BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

APPLETON PROFESSIONAL POLICE ASSOCIATION

and

CITY OF APPLETON (POLICE DEPARTMENT)

Case 407
No. 60703
MA-11690

(Michael Parker Grievance)

Appearances:

Mr. Fred Perillo, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Association.

Ms. Ellen Totzke, Deputy City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Association and the City, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on April 10, 2002 in Appleton, Wisconsin. On May 30, 2002, the parties filed briefs, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association frames the issue as follows:

> Did the City violate the collective bargaining agreement when it refused to allow a shift change to permit an officer to pay back a traded day because the officer would work 16 consecutive hours?

The City frames the issue as follows:

> Does Article 3, Section D of the Labor Agreement stating that each officer shall be allowed to work up to 16½ hours scheduled in a 24-hour period supersede the language of Article 3, Section B of the Labor Agreement regarding work schedule, specifically the language that states "Officers may mutually exchange work schedules with prior approval of the supervisor."

Having reviewed the record and arguments in this case, the undersigned finds that the Association's wording of the issue is appropriate for purposes of deciding this grievance. Accordingly, the undersigned adopts the Association's wording of the issue.

PERTINENT CONTRACT PROVISIONS

The parties' 2000-2001 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 3 – HOURS

. . .

B. Work Schedule: . . .Officers may mutually exchange work schedules with prior approval of the supervisor.

. . .

D. Each Officer shall be allowed to work up to 16½ scheduled hours in a 24 hour period.

. . .

ARTICLE 28 – FUNCTION OF MANAGEMENT

Except as otherwise provided, the management of the Department and the direction of the working forces, including the right to hire, promote, demote, lay-off, suspend without pay, discharge for proper cause, transfer, determine the

number of employees to be assigned to any job classification or to determine the job classification needed to operate the Employer's jurisdiction is vested exclusively with the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of management include, but are not limited to those outlined in this Agreement. In addition to any functions specified herein, the employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing, or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules, and of applying appropriate means of administration and control. Provided however, that the exercise of the foregoing rights by the City will not be used for the purpose of discrimination against any member of the Association or be contrary to any other specific provision of this Agreement, and provided that nothing herein shall be construed to abrogate the provisions of the grievance procedure.

BACKGROUND

The City operates a police department in Appleton, Wisconsin. The Association is the exclusive collective bargaining representative for the Department's employees with the power of arrest. The grievant in this case, Michael Parker, is a member of that bargaining unit.

This case involves a shift trade that was denied.

Employees in the department routinely trade shifts with their co-workers. The employee involved in the trade at issue here has participated in hundreds of them over the years. When a trade occurs, the employees work out the specifics among themselves (namely, who is substituting for whom on what date and for how many hours) and then they submit the appropriate paperwork to management for approval. The trade is usually approved unless management determines that a problem exists with the proposed trade. When a trade occurs, the employee who is scheduled to work receives his or her regular pay even though they did not work and the employee who actually works the shift receives no pay. Trades do not have to be mirror images of each other; multi-part trades have been approved so long as the hours were equal. A mutual trade between employees contemplates that the employee benefiting will pay back the other employee by working for him or her on a different occasion. This latter trade, which is known as a payback, makes the two employees even. Management does not inject itself into ensuring that paybacks occur. The employees who testified thought that paybacks had to occur within the same calendar year as the initial half of the trade occurred. Management witnesses who testified thought that pay backs did not have to occur within the same calendar year as the initial half of the trade occurred.

. . .

The following bargaining history is noted because the parties addressed it at the hearing and in their briefs. Until 1999, there was no provision in the labor agreement that specified how many consecutive hours an employee could work in a day. This changed in 1999 as a result of an interest-arbitration decision. That year, both sides made bargaining proposals concerning same (i.e. the number of consecutive hours that an employee could be scheduled to work). Both the City and the Union proposed that this new contract language be added to Article 3, which is entitled "Hours". The City's bargaining proposal was as follows:

> Employees shall not normally be scheduled or permitted to work more than 12 consecutive hours. A rest break of at least 6 consecutive hours or a total of 8 hours is required in the 12 hours preceding the start of their next scheduled shift. These provisions may be waived at the discretion of the Chief or his designee.

The Association's bargaining proposal, which was entitled "Maximum Hours of Work", was as follows:

> Each officer shall be allowed to work up to 16½ scheduled hours in a 24 hour period.

The parties did not voluntarily settle their contract, so they proceeded to interest-arbitration pursuant to Wisconsin's interest-arbitration law. In their brief to the interest-arbitrator, the City argued that its proposal was necessary to ensure public safety, citing contract provisions in other communities permitting officers to work in excess of 12 consecutive hours only in emergencies. On page 2 of their brief to the interest-arbitrator, the Association summarized their proposal thus:

> Importantly, the Association's proposal does not interfere with the City's inherent authority to schedule the members hours of work. This proposal merely addresses a members ability to request or sign up for overtime should the officer elect to do so. This proposal does not impact the City's ability to call in or hold over members as needed on an emergency or as needed basis.

When the interest-arbitrator issued his award, he did not pick one side's final offer in its entirety. Instead, contrary to Wisconsin's interest-arbitration law, he ruled on an issue-by-issue basis. The portion of his award pertinent here is the part dealing with Article 3 (Hours). He put his discussion of same in Section IX under the heading "Hours – Maximum Scheduled Overtime." This heading was apparently an error, because in his actual discussion of the proposals, he did not mention overtime at all, and consistently referred to the proposals as an "hours-worked on duty limitation." In that section, he addressed various arguments, including

the City's comparability argument and safety argument. With regard to the City's comparability argument, he found that the other communities' contract provisions were not comparable because they did not contain a rest period requirement in addition to a consecutive hours limitation. With regard to the City's safety argument, he rejected the City's evidence concerning safety on the grounds that it was not empirically valid. After considering all the foregoing points, the interest-arbitrator found that the City's offer on this particular issue:

> . . . cannot be adopted on statutory grounds, and furthermore, is of such magnitude in its scope for changing the terms and conditions of bargaining unit members that it requires mutual assent, rather than imposition by an arbitrator.

He therefore found for the Association on this particular issue.

Following the issuance of the interest-arbitrator's award, the parties decided to not challenge the award in court, but rather to incorporate his findings into their successor collective bargaining agreement. They did this as follows: if the arbitrator found for the City on say, disputed item #1, then the City's proposal on item #1 was incorporated into the labor agreement. Consistent with this approach, the parties incorporated the Association's proposal on Article 3 into the labor agreement. It became Article 3, D.

In the current contract negotiations between the parties, the City again proposed to limit officer hours. Specifically, it proposed new language for Article 3, D. The City's proposal was as follows:

> The Department will not schedule an Officer for more than 12 consecutive hours. Anytime an Officer works 12 or more consecutive hours, the Officer must have a minimum 6 consecutive hours as a rest period unless directed by a supervisor or subpoenaed.

The City interpreted the phrase "directed by a supervisor" in its proposal to mean emergency situations. This language was substantially identical to the change the City proposed in 1999 for the purpose of restricting officers to 12 hours per day. The only significant difference between the City's 1999 proposal and this one is that in the current proposal exceptions are limited to emergencies.

. . .

The record indicates that following the insertion of Article 3, D into the labor agreement, some department employees have worked over 12 consecutive hours in a single day. For example, Association Exhibits 2, 4 and 5 show that the officers identified therein worked, respectively, 15½ hours, 13¾ hours, and 15¼ hours in a single day. Additionally,

officers have been held-over for minimum staffing to work 16¼ hours in a single day, and in other instances, 14¼ hours and 13¼ hours in a day. Additionally, when the City denied Officer Gross overtime on the grounds that he would have worked 16½ hours in a day, it settled the grievance and admitted it had violated the contract. The record also indicates that the City approved a cross-district trade between Officers Olson and Pynenberg which resulted in a 14¼ hour day for one of them.

FACTS

On January 27, 2001, Officers Burbach and Parker traded shifts. Parker, who was scheduled to be off work, worked a four (4) hour shift for Burbach. The same thing occurred on October 27, 2001. On that date, Parker, who was scheduled to be off work, once again worked a four (4) hour shift for Burbach. Both these trades were approved by management. As a result of these trades, Burbach was obliged to work eight (8) hours for Parker to pay back these two trades.

In early November, Parker and Burbach mutually agreed that as a payback for the two four (4) hour shifts that Parker worked for Burbach on January 27 and October 27, Burbach would work Parker's eight (8) hour shift on December 29, 2001. When they made these arrangements, both knew that Burbach was already scheduled to work the eight (8) hour shift immediately prior to Parker's scheduled eight (8) hour shift. Since Burbach was already scheduled to work an 8¼ hour shift that day, the proposed trade would result in her working 16¼ consecutive hours that day.

Parker then submitted the appropriate paperwork seeking management approval of this trade. In that paperwork, he indicated that he wanted to have Burbach work his eight (8) hour shift on December 29, 2001 as payback for the two (2), four (4) hour shifts that he had worked for Parker on January 27 and October 27.

On November 7, 2001, Lieutenant Nickels denied the requested trade. When he denied it, he gave no reason for doing so except that Deputy Chief Peterson had directed him to deny the trade. The Association grieved this action. When the grievance was appealed to Deputy Chief Peterson, his response stated in pertinent part: "I don't believe that Article 3, paragraph D of the Labor Agreement was ever intended to usurp the scheduling authority of the City, and I am not prepared to abdicate that authority." When the grievance was appealed to Chief Myers, his response stated in pertinent part: "the City here is simply exercising its right in denying the request to work back two distinct shift trade events in a single 'payback' event."

After the City denied the shift trade referenced above, Burbach orchestrated a complex five-person trade as payback to Parker so that he would be off work on December 29. This five-person trade was approved by management. That trade is not at issue here.

POSITIONS OF THE PARTIES

Association

The Association contends that the City violated the collective bargaining agreement when it refused to permit Officer Burbach to trade a shift with Officer Parker on December 29, 2001. The Union acknowledges that if the trade had been approved, Officer Burbach would have worked 16¼ consecutive hours on that date. Be that as it may, the contract specifically says that officers "shall" be allowed to work 16½ hours in a 24-hour period. The Association avers that since the contract specifically allows officers to work 16½ hours in a 24-hour period, the trade should not have been denied. It elaborates on this contention as follows.

First, the Association argues that when the City refused to approve the requested trade, it violated two contract provisions: Article 3, B and 3, D. It notes that the former section specifies that shift trades be "mutually exchanged", and the latter section specifies that officers "shall" be allowed to work 16½ hour days. Reading the two provisions together, the Association avers that management cannot deny a trade except when there is an operational reason for doing so. The Association points out that when the City denied this particular trade, it did not provide any reason for doing so. Instead, it simply denied it without an explanation. According to the Association, if ever anything was arbitrary, this was it. The Association cites several arbitration awards for the proposition that an employer cannot deny a shift trade arbitrarily.

While the City later supplied two reasons for its denial of the trade, the Association believes that neither holds water. The first reason was that the trade was defective on the grounds that Parker was trying to recoup two, four hour shifts in a single eight-hour shift. The Association believes the City abandoned that argument during the hearing, and, in any event, it has no merit. The Association asserts that there was nothing defective or improper about the proposed trade. The second reason which the City later supplied was "safety". According to the Association, the City never substantiated that claim; instead, all it did was make the bald assertion that a scheduled 16¼ hour shift would be unsafe. The Association characterizes the City's safety concern as "sheer hypocrisy", since the City frequently schedules employees for 14 to 16 hour days for its own convenience. The Association argues that when the City raised its alleged concern over safety, it did so simply as an excuse to deny the trade – not because of genuine concern that long hours are justified only in extreme exigencies. Aside from that, the Association maintains that the City offered no evidence that 16½ hour shifts cause fatigue or a decline in officer performance.

The Association avers that the real reason management denied the requested trade is because it simply does not like to approve trades which result in a 16¼ hour shift. According to the Association, the problem with the City's view is that it conflicts with Article 3, D. As

previously noted, that provision says that employees can work 16½ hour days. Thus, officers are contractually entitled to work 16½ hour days if they want. The Association argues that notwithstanding "vague notions of safety", the City cannot abrogate this plain and unambiguous language because, as they put it in their brief, "the limit which the City seeks to impose by management fiat directly violates an explicit contractual command."

Next, the Association responds to the City's argument that officers should try to use other methods or trades to avoid working a 16¼ hour day. It notes at the outset that this argument assumes that contract rights are something to be avoided, rather than used. The Association disagrees with that premise. In its view, contract rights are entitlements, not last resorts. As the Association sees it, the right to work 16½ hour days is an important contract right. To support that premise, it notes that both parties risked an averse award by including it in their 1999 final offers. The Association argues that if management can unilaterally decide that the Article 3, D right to work 16½ hour days is never to be used if it can be avoided, then in effect that contract clause is being rewritten to provide thus: officers no longer "shall" be allowed to work 16½ hour days, but are only allowed to do so if there are no other conceivable alternatives. The Association asks that such a last resort limitation not be grafted onto Article 3, D at this late date.

Next, the Association responds to the City's argument that Article 3, D concerns only overtime, and thus does not apply herein (because overtime was not involved). Simply put, it disputes that assertion. In its view, neither the contract language itself nor the parties' past practice support the view that 16½ hour days are permitted for overtime purposes only. As for the City's reliance on the party's bargaining history, the Association responds thus. First, the Association acknowledges that when the interest-arbitrator wrote his discussion on the language that was ultimately incorporated into the contract as Article 3, D, he referenced it as "maximum scheduled overtime." The Association characterizes this as an apparent typographical error because in every other place in the award, he referred to it as "maximum scheduled hours." Second, the Association notes that when both sides wrote their respective proposals, they both put them in the article dealing with hours (Article 3) – not the article dealing with overtime (Article 4). Third, it points out that when the interest-arbitrator wrote his discussion, he made no mention of overtime whatsoever. Fourth, the Association argues that there is no need for the arbitrator to resort to using parol evidence to interpret Article 3, D because that provision is plain and unambiguous. As the Association puts it in their brief, "the only way to create the ambiguity is to resort to extrinsic or parol evidence such as the brief itself." It asserts that arbitrators traditionally do not permit parol evidence to be used this way. Finally, the Association calls the arbitrator's attention to the fact that the City lost the 1999 interest-arbitration award on this subject. In its view, what the City is attempting to do here is re-fight that lost battle in an effort to get a different result. The Association asks that the arbitrator not change the contract language which it won in interest-arbitration. The Association also notes that the City has tried to achieve the same change in contract negotiations since then, but has not been successful in doing so.

In sum, the Association believes that Parker's original shift trade with Burbach should have been approved even though it would have resulted in Burbach working a 16¼ hour day. In support thereof, the Association relies on Article 3, D which it believes gives officers the right to do just that (i.e. work a 16½ hour day). It therefore asks that the grievance be sustained. With regard to a remedy, the Association notes that it is not requesting a monetary award. Rather, it seeks a declaration from the arbitrator that the City violated the collective bargaining agreement when it denied the trade involved herein. Additionally, it seeks an order that henceforth, "the City is to approve trades up to 16½ hours in duration absent an operational reason (excluding safety or fatigue) for doing so."

City

The City contends it did not violate the collective bargaining agreement when it denied Parker's first trade request. According to the City, it had the management right to do that (i.e. deny the trade). It makes the following arguments to support that contention.

The City believes that three contract provisions are applicable to this contract dispute: They are Article 28, Article 3, B and Article 3, D. It addresses them in the order just listed.

First, the City relies on the Management Rights clause. The City reads that clause to give it the right to regulate the department's workforce in general, and specifically the number of people scheduled to work. The City contends that the rights just referenced specifically allow it to manage the scheduling of personnel. The City avers that scheduling the department's 24-hour a day operation is already a difficult task, but will be made even more difficult if the grievance is sustained.

Next, the City calls attention to the shift trade language contained in Article 3, B. Before it addresses that language though, it notes for background purposes that it approves most shift trades. In its view, department management goes out of its way to assist officers in getting time off, and accommodating them on shift schedule changes and shift trades. That said, the focus turns to the trade language itself. It calls attention to the fact that trades have to be approved by a supervisor. The City cites a dictionary definition of "approve" as giving formal sanction to, or confirming. It notes that here, though, management did neither (i.e. sanction or confirm the proposed trade). As the City sees it, that was management's call to make (i.e. to approve or deny). The City asserts that the reason the shift trade in question was denied was because of concerns for the officer's safety. It notes in this regard that if the trade had been approved, the officer would have worked a 16½ hour day. The City acknowledges that there are certainly occasions that arise in the department which require employees to work long hours. In its view, though, the situations where an employee is scheduled for more than 12 consecutive hours should be emergency situations only, and should not be something that is scheduled in advance (which would have been the situation here if the trade had been

approved). In this instance, management simply did not want to schedule the employee to work for 16¼ consecutive hours in a day. The City essentially asserts that this management decision deserves deference and should not be overturned by the arbitrator.

The City argues that if the arbitrator finds in the Association's favor in this case, the effect will be that henceforth when an officer notifies management that they want to trade a shift, then management will have to approve the request unless it supplies a reason that is acceptable to the officer. According to the City, that is not what "approval" means. In the City's view, Article 3, B does not require supervisors to abdicate their management authority to approve trades.

Finally, the City addresses the language found in Article 3, D. It maintains at the outset that the arbitrator's interpretive task herein is not to give that clause, as they put it in their brief, "the meaning that can possibly be read into the language." Instead, the City asserts that the arbitrator's interpretive task is to discern what the parties intended it to mean. According to the City, arbitrators traditionally look to the parties' bargaining history and past practice to help them interpret the language and ascertain the parties' intent. Consequently, it makes those traditional arguments here. It contends that after the arbitrator reviews that evidence (i.e. the bargaining history and the past practice), he will conclude that Article 3, D does not have the meaning ascribed to it by the Association. In other words, he should find that the clause does not apply to shift trades; instead, it only applies to overtime situations. According to the City, that clause does not require the City to, as the City puts it in their brief, "allow an officer to work 16½ hours whenever he or she wants to."

With regard to the parties' bargaining history, the City notes the following. First, it calls attention to the fact that the 16½ hour language which was ultimately incorporated into Article 3, D was the Association's proposal; not the City's. Second, it notes that when the Association wrote their brief to the interest-arbitrator, it specifically stated what the Association intended the language to mean. The City specifically relies on the following line from that brief: the proposal "merely addresses a members ability to request or sign up for overtime should the officer elect to do so." The City cites Elkouri for the proposition that the Association should be held to the interpretation just noted (i.e. that the Association intended the proposal to cover only overtime situations). Third, the City notes that when the interest-arbitrator issued his decision, he captioned the discussion of same as "Hours-Maximum Scheduled Overtime." As the City sees it, the reference to "overtime" in this caption was no accident. The City avers that when all this bargaining history is considered, it establishes that the parties intended the Article 3, D 16½ hour day provision to only apply to overtime situations, and not to apply to shift trades.

With regard to the parties' past practice, the City acknowledges that employees have worked more than 12 hours a day since Article 3, D was placed into the labor agreement. However, the City avers that in those situations, no shift trade was involved. Instead, in those situations, officers had requested the opportunity to work overtime for special events, or were held over to accomplish minimum staffing levels or process a late arrest. According to the City, the situation with Sergeant Gross supports its position here that Article 3, D only applies to overtime situations. In support of that premise, it notes that in that case, Gross was denied the opportunity to work 8 hours of overtime. If he had worked that overtime, he would have worked a 16¼ hour shift. It further notes that after he grieved the denial of the overtime, the City admitted that it was in error, and that he should have been allowed to work the overtime in question. In the Employer's view, this proves that Article 3, D applies to just overtime situations.

Based on the above, the City requests that the grievance be denied.

DISCUSSION

This case involves a shift trade which management denied. The question to be answered is whether this denial violated the collective bargaining agreement. The Association contends that it did while the City disputes that contention. I answer that question in the affirmative, meaning that the City violated the collective bargaining agreement when it denied the requested trade. My rationale follows.

I begin with an overview of how this discussion is structured. Attention will be focused initially on the contract language cited by the parties. They relied on three contract provisions: Article 28; 3, B; and 3, D. Those provisions will be addressed in the order just listed. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves the parties' bargaining history and an alleged past practice.

The first contract provision relied on by the City is the Management Rights clause which is found in Article 28. That clause provides, in pertinent part, that the City has the right to direct the work force and establish the work schedule. Neither of those points is really at issue, though. As noted above, what is at issue here is a disputed shift trade. The Management Rights clause makes no explicit reference to shift trades, while another contract provision, which has yet to be reviewed, does. Inasmuch as this is a shift trade dispute, it stands to reason that the contract language which would be most applicable to such a dispute is not the Management Rights clause, but rather the shift trade language. That being so, the focus turns to an examination of that language (i.e., the shift trade language).

The shift trade provision is found in Article 3, B. The last sentence in that provision reads as follows: "Officers may mutually exchange work schedules with prior approval of the supervisor." This clause allows officers to trade shifts with their co-workers. The reference to "mutually exchange" means that the employees work out the specifics among themselves (i.e. who is substituting for whom on what date and for how many hours) and then they submit the appropriate paperwork to management. After the paperwork is submitted to management, the ball is in their court, so to speak. What happens next is that management decides whether to approve the requested trade. Under this clause, management approval is not automatic or guaranteed. Had the parties intended that all trades would automatically be approved, they would have said so. They did not. In point of fact, the clause does not say that management will simply be notified of a trade by the affected officers. Instead, the language specifies that "prior approval of the supervisor" is needed. When management has the right to approve something, it obviously has the right to withhold its approval (i.e. to deny). This particular clause does not say though how that determination is made by management (i.e. how approval is granted or denied). Thus, it is silent concerning same.

The final point made in the preceding paragraph (i.e. how management approval is granted or denied) deserves further comment. It is a well-established contractual principle that when a contract gives management the right to approve something (in the context of this case, the right to approve a requested trade), the employer's determination cannot be arbitrary or unreasonable. In other words, a reasonableness standard is inferred. Arbitrators routinely find that if the employer acts arbitrarily in making its decision, its actions constitute a contract violation. Conversely, arbitrators routinely find that if the employer did not act arbitrarily in making its decision, its actions do not constitute a contract violation.

The focus now shifts to an analysis of the City's reasons for denying the shift trade to determine if they (i.e. the reasons) pass muster. When the trade was denied, no reason was given at the time. Later, though, three reasons were supplied which, in the City's view, justify the denial of the shift trade. Two of the reasons were given during the processing of the grievance and the third was given at the arbitration hearing. All three reasons will be addressed in the discussion which follows.

The first reason which the City cited to justify the denial of the shift trade was its inherent management right to schedule. This contention has already been addressed in my previous discussion concerning the applicability of the Management Rights clause to this dispute. Given that discussion, nothing more need be said here.

The second reason which the City cited to justify the denial of the shift trade was that the trade was defective or improper because the officer was trying to recoup two, four-hour shifts in a single eight-hour shift. It appears that the City abandoned this argument because it was not referenced in their brief. However, if it did not, I find there is no merit to same. The

reason is this: the record indicates that the City has previously approved trades where several small exchanges were traded back for a single, larger time period. In other words, the City has previously permitted multi-part trades so long as the hours were equal. That being so, there is no operational reason identified in the record why in this instance two, four-hour shifts could not be traded back for an eight-hour shift.

The third reason which the City cited to justify the denial of the shift trade was concern for the officer's safety in working a 16¼ hour day. It would be one thing if the City had presented evidence which substantiated that assertion. If it had presented such evidence showing that the requested trade compromised the safety of the officer, the undersigned would have hung his proverbial hat on it and used it as a basis for reaching a decision herein. However, there is no record evidence which substantiates the City's claim that 16¼ hour days are unsafe. Specifically, there is no record evidence that working a 16¼ hour day causes fatigue, results in a hazardous situation, or causes a threat to public safety. Aside from that, the record indicates that the City sometimes schedules employees for 14 to 16 hour days for the City's convenience (such as a holdover for minimum staffing). Obviously, this fact undercuts the City's safety argument.

Having found none of the aforementioned reasons sufficient to justify the denial of the shift trade, the focus now shifts back to the contract language. The final contract provision applicable to this dispute is Article 3, D.

My first interpretive task involving this provision is to determine whether its meaning is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts. Attention is now turned to making that call.

I begin my discussion of this language by noting what it explicitly says. On its face, it says this: "Each Officer shall be allowed to work up to 16½ scheduled hours in a 24 hour period." This sentence says in very plain terms that officers can work 16½ hour days. There is nothing unclear or ambiguous about it. This language gives employees the right to work 16½ hour days if they want. There are no ifs, ands or buts about it.

Having just found that employees have a contract right to work 16½ hour days if they want, the focus turns to the City's tacit contention that officers should try to use other methods or trades to avoid working a 16½ hour day. The premise to this contention assumes that some

contract rights (in this particular case, the employees' right to work a 16½ hour day) should not be used, but rather should be avoided. That premise cannot be sustained. Contract rights are not mere last resorts, meaning that they are only to be used if there are no other alternatives. Instead, they are entitlements. What this means is that bargaining unit employees are entitled to use their contractual rights whether or not they are the least restrictive means possible. Said another way, bargaining unit employees can use their contract rights over the objection of management. If management has the power to decide that this particular right (i.e. the right to work 16½ hours in a day) should not be used if it can be avoided, then in effect, this is re-writing the contract to provide that officers no longer shall be allowed to work 16½ hour days if there are other conceivable alternatives available. The contract does not say that; in fact, it contemplates just the opposite, namely that officers "shall" be allowed to work 16½ hours in a row.

Having so found, attention is now turned to the City's argument that Article 3, D only applies to overtime situations and does not apply to shift trades. I find that the City's contention lacks a contractual basis. Nothing in the language of Article 3, D says that 16½ hour days are permitted only for overtime situations.

Recognizing this, the City does not rely on what the language explicitly says. Instead, it relies on evidence external to the collective bargaining agreement. Specifically, it relies on the parties' bargaining history and an alleged past practice. Bargaining history and past practice are forms of evidence which are commonly used and applied in contract interpretation cases. The rationale underlying their use is that they can yield reliable evidence of what a particular provision means. Thus, arbitrators traditionally look at bargaining history and past practice when the contract language is ambiguous to help them interpret it. The key word in the previous sentence is "ambiguous". The reason that word is key is because that is not the case here. After reviewing Article 3, D, the undersigned found its meaning to be plain, clear and unambiguous. That being so, there is no need in this instance to resort to using bargaining history and past practice to interpret the meaning of that language. What the City is essentially trying to do here is use statements from the Association's brief to the interest-arbitrator and his award to create an ambiguity in Article 3, D. However, as previously noted, there is no ambiguity whatsoever in Article 3, D. None. The only way to create an ambiguity in it is to resort to parsing certain statements which are contained in those documents. I decline to do that. The language of Article 3, D speaks for itself and presumably incorporates the parties' mutual intent concerning its meaning. Given this finding, the undersigned will not review the parties' bargaining history or the alleged past practice further, or use either as a basis to ascertain the parties' intent concerning the meaning of Article 3, D.

Finally, it is apparent from the record that what the City is attempting to achieve through this arbitration is a change in the meaning of Article 3, D that it has thus far failed to achieve through negotiations. If the City wants the 16½ hour days referenced in Article 3, D to be limited to just overtime situations, it will have to get that limitation through negotiations or from an interest-arbitrator.

It is therefore concluded that the City violated Article 3, B and 3, D of the collective bargaining agreement when it denied the shift trade involved herein. While this trade would have resulted in the affected officer working for 16¼ consecutive hours that day, Article 3, D specifically allows officers to do that. Since officers have a contract right to work 16½ hours in a day, the requested trade should have been approved.

Having found a contract violation, the focus turns to the remedy. The remedy which I find appropriate is this: henceforth, when an officer seeks to have a shift trade which is up to 16½ hours in duration approved, management is to approve the trade unless it offers a valid operational reason why it cannot, in that instance, be approved.

In light of the above, it is my

AWARD

That the City violated the collective bargaining agreement when it refused to allow a shift change to permit an officer to pay back a traded day because the officer would work 16¼ consecutive hours. The remedy for this contract violation is as follows: henceforth, when an officer seeks to have a shift trade which is up to 16½ hours in duration approved, management is to approve the trade unless it offers a valid operational reason why it cannot, in that instance, be approved.

Dated at Madison, Wisconsin, this 7th day of August, 2002.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

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