

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION, LAW ENFORCEMENT
EMOLOYEE RELATIONS DIVISION**

and

TOWN OF THREE LAKES

Case 5
No. 63069
MA-12492

(Holiday Compensation Grievance)

Appearances:

Robert West, Consultant, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, 340 Coyier Lane, Madison, Wisconsin, appearing on behalf of the Town of Three Lakes Police Officers Association.

Jeffrey Jones, Ruder Ware, Attorneys at Law, 500 Third Street, Suite 700, Wausau, Wisconsin, appearing on behalf of the Town of Three Lakes.

ARBITRATION AWARD

Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, hereinafter "Association" or "WPPA/LEER" requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Town of Three Lakes, hereinafter "Town," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on March 12, 2004, in Three Lakes, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, reply briefs and a stipulation of facts, the last of which was received on August 8, 2004, at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

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ISSUES

The parties agreed at hearing that there were no procedural issues in dispute and framed the issues as follows:

Whether the Town of Three Lakes violated the terms of the collective bargaining agreement in the manner it scheduled Police Officers to work on holidays? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article I – MANAGEMENT RIGHTS

Section 1.01 – Rights: The Association recognizes the prerogatives of the Town Board to operate and manage the affairs of the Town in all respects in accordance with its responsibility, powers and statutory authority which the Town had not specifically abridged, delegated, or modified by this Agreement and such powers or authority are retained by the Board. Subject to these conditions, the Board possesses the sole right to operate the Town and its police department and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct and maintain the efficiency of all operations of the Town and the police department;

. . .

C. To determine the methods, means and personnel by which operations are to be conducted;

. . .

E. To establish reasonable work rules and schedules of work;

. . .

H. To hire, promote, transfer, lay-off, schedule and assign officers in positions;

. . .

Section 1.02 – Exercise: The exercise of the above rights shall be in compliance with and subject to the provisions of this Agreement. The exercise of the above rights shall also be subject to the grievance procedure.

...

ARTICLE VII – HOURS OF WORK WEEK, HOURS AND OVERTIME

Section 7.01 – Work Week: The normal work schedule shall be five (5) days on duty, followed by two (2) days off duty. The normal work week for officers shall be eight (8) hours per day, forty (40) hours per week. The Chief shall determine shift assignments after considering an officer’s seniority and shift preference. There shall be a minimum of eight (8) hours between scheduled work shifts for any one officer unless emergency circumstances require otherwise as determined by the Chief. The work schedule shall be posted thirty (30) days in advance. The on-duty work day shall include a one-half (1/2) hour paid lunch period during which time the employee shall be on call. The employee shall be allowed two (2) fifteen-minute paid breaks per shift. The Chief shall determine the normal times for lunch and breaks to be taken. The normal annual hours of work shall be 2080.

...

ARTICLE XVI – HOLIDAYS

Section 16.01 – Full time employees in the bargaining unit shall receive nine (9) paid holidays as follows:

New Years Day	Fourth of July
Memorial Day	Thanksgiving Day
Labor Day	Christmas Day
New Year’s Eve	Christmas Eve
One (1) Floating Holiday (to be taken as a day off as approved and only when shifts are double covered.)	

Section 16.02 – For those holidays listed above on which an employee does not work, he/she will receive eight (8) hours holiday pay. If he/she works, he/she will receive the eight (8) hours of holiday pay and scheduled work will be paid at the rate of time and-one-half (1½).

...

BACKGROUND AND FACTS

The Town Police Department employs four (4) bargaining unit law enforcement officers, Warner Stebbeds, Jr., Kim Moe, Scott Lea and Daniel Harlow, 1/ and the Chief of Police, William Slizewski. The Department employees have worked a 5 day on – 2 day off (hereinafter “5-2”) schedule for approximately 20 years. The schedule was created for the Town by an employee of the Oneida County Sheriff’s Department. The schedule includes three 8 hour shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. Implementation of the 5- 2 schedule results in all officers working on Thursdays.

1/ Officer Daniel Harlow resigned subsequent to the filing of the grievance

On November 20, 2003 Town Chairman Tom Truog directed Chief of Police William Slizewski to schedule two (2) officers on all holidays. Slizewski complied with Truog’s directive and on November 21 reissued the November and December 2003 schedules.

The original schedule for Thanksgiving, November 27, 2003, which was a Thursday, provided that Stebbeds and Slizewski were to work the 7 a.m. to 3 p.m. shift; Harlow and Lea were to work the 3 p.m. to 11 p.m. shift and Moe was to work the 11 p.m. to 7 a.m. shift. Due to the directive, Harlow worked 10 a.m. to 6 p.m., Lea worked 6 p.m. to 2 a.m. shift and there was no officer assigned to duty between 2 a.m. and 10 a.m. 2/ Officers Stebbeds and Moe did not work 40 hours during that work week.

2/ Officer Warner Stebbeds, Jr. has greater seniority than Officer Scott Lea, but Stebbeds volunteered to take November 27, 2003, as a day off.

On Wednesday, Christmas Eve, December 24, 2003, the original schedule provided that Slizewski was off, Stebbeds was to work the 7 a.m. – 3 p.m. shift, Harlow and Lea were to work the 7 a.m. – 3 p.m. shift, and Moe was to work the 3 p.m. – 11 p.m. shift. As a result of the directive, Stebbeds worked the 10 a.m. to 6 p.m. shift and Lea worked the 6 p.m. to 2 a.m. shift.

On Thursday, Christmas Day, December 25, 2003, the original schedule provided that Stebbeds and Slizewski were to work the 7 a.m. to 3 p.m. shift, Harlow and Lea were to work

the 3 p.m. to 11 p.m. shift and Moe was to work the 11 p.m. to 7 a.m. shift. As a result of the directive, Harlow worked the 10 a.m. to 6 p.m. shift and Lea worked the 6 p.m. to 2 a.m. shift.

On Wednesday, New Year's Eve, December 31, 2003, the original schedule provided that Harlow was to work the 7 a.m. to 3 p.m. shift, Stebbeds and Lea were to work the 3 p.m. to 11 p.m. shift and Moe was to work the 11 p.m. to 7 a.m. shift. As a result of the directive, Harlow worked the 10 a.m. to 6 p.m. shift and Lea worked the 6 p.m. to 2 a.m. shift.

In advance of January 1, 2004, Officer Harlow resigned thus causing Slizewski to no longer have enough staff available to continue to schedule three shifts per day.

On New Years Eve, January 1, 2004, Harlow worked the 10 a.m. to 6 p.m. shift and Lea worked the 6 p.m. to 2 a.m. shift.

All Town law enforcement officers, including Chief Slizewski, worked their regular shifts on Memorial Day, May 31, 2004. All officers, including the Chief, worked on Independence Day, July 4, 2004.

A review of overtime records prepared by the Town indicates that from mid-2000 through 2003, there were five holidays staffed by two officers. Of the remaining 23 holidays; 12 were staffed by three officers; 6 were staffed by four officers; and the remaining three, which were July 4th holidays, were staffed by five officers.

It is not uncommon for the Town to have only two officers working on a day due to vacation leave, sick leave and employee resignations. This occurred on three occasions during the month of September 2003, on four occasions in October 2003, and on two occasions prior to Thanksgiving in November 2003. When this occurs, one officer works from 10 a.m. to 6 p.m. and the other officer works from 6 p.m. to 2 a.m. The Association has not grieved instances when only two officers are working due to these circumstances.

The Association timely filed grievance 03-536 which was ultimately denied by the Town Board on December 5, 2003, thus placing the case properly before the Arbitrator.

POSITIONS OF THE PARTIES

Association

The Association asserts that the Village unilaterally implemented a change in the police officer schedule in contravention to the clear language of the collective bargaining agreement. Consistent with the simplest principle of contract interpretation, the arbitrator's responsibility

is to “determine the intent of the parties from various sources including the express language of the agreement, statements made at precontract negotiations, bargaining history and past practice.” Initial brief at 3. The evidence establishes that the language of the contract, bargaining history and past practice support the Association’s position.

The language is clear and unambiguous on its face. There was no discussion during bargaining of any different meaning, thus the express language which guarantees a 5-2 schedule must be upheld.

There is an ironclad past practice. The Town and the Association have consistently implemented the schedule and holiday language such that when an employee’s shift rotation requires they work on a holiday, then the employee receives holiday pay plus time and one-half for working on the holiday.

Finally, there has been no showing by the Town of an emergency or unique circumstance justifying a change from the normal shift rotation. The Town’s desire to save money is not a good enough reason to unilaterally alter the parties agreement.

Town Initial Brief

The management rights clause provides the Town with broad authority. This includes the right to limit the number of officers assigned to work on holidays, work hours, and work schedules. The Town is vested with the authority to make determinations relating to “safety, health and property protection measures” and thus, in conjunction with the Town’s right to change the methods of operation, the Town actions were consistent with its contractual management authority.

The parties inclusion of the word “normal” in Section 7.01 demonstrates that they contemplated that officers, on occasion, would work another schedule. Although the customary work schedule is a 5-2, it can be altered by the Town. Had the parties intended to “guarantee” a work schedule, they would have stated it as such and would have had no reason to include “normal” as the qualifier.

The *contra proferentem* principle is applicable. The Association proposed this language and at no time did the Town seek or make modifications to the language. At no time during the discussion of Section 7.01 did the Association ever advise the Town that the 5-2 could not be changed.

Arbitral law supports the Town's reading of Section 7.01. Numerous arbitrators have addressed the inclusion of modifiers preceding employee work hours concluding that when terms such as "normal," "standard" or "regular" are used, then a certain number of work hours is not guaranteed.

Association Reply

The Association challenges the Town's assertion that the shift language in the collective bargaining agreement is ambiguous. The scheduling language establishes a 5-2 shift. Not only has this been in effect since long before the collective bargaining agreement was implemented, but it has been in effect since the parties entered into the agreement. There is no question that the schedule has not been changed or adjusted by the Town at any time in the past to accommodate holidays.

The Holiday Pay language is also clear; when an employee works on a holiday, they receive holiday pay plus time and one-half pay.

As to what is the "normal" schedule, the Association recommends that the Arbitrator look to the practices of the parties and not adopt the Town's absurd proposition. The Town's position would allow it to deviate at any time and for any reason from the language contained in the labor agreement. Given that the Town has not identified any emergency or unique circumstances that justify its actions, a violation of the contract has occurred and must be rectified.

For the above reasons, the Association requests that the Arbitrator uphold the grievance.

Town Reply Brief

The Association has misread the terms of the labor agreement. The language of Section 7.01 merely states that the "normal" work schedule is 5-2; it does not guarantee such a schedule. Moreover, the management rights clause grants the Town the right to establish schedules of work and thus the Town was within its rights when it changed the schedule for holidays.

The Town disagrees with the Association's assertion that the parties have an established binding past practice guaranteeing a 5-2 work schedule and guaranteeing all employees work on holidays. Not only is the asserted past practice not supported factually, past practice assertion irrelevant to this dispute since Section 20.01 of the parties labor agreement extinguishes any and all past practices each time it signs a new contract.

For all of the above reasons, the Town respectfully requests the Arbitrator to dismiss the Grievance in its entirety.

DISCUSSION

The issue in this case is whether the Town can change the work schedule for holidays, thus denying certain employees work hours and accompanying holiday overtime compensation.

Section 1.01 provides the Town the right to “direct and maintain the efficiency of all operations of the Town and police department” and “to establish reasonable . . . schedules of work.” These are general rights and the parties have bargained more specific language as it relates to the work schedule in Section 7.01. Given that specific terms are given greater weight than general language, it is the language of Section 7.01 that controls.

The language of Section 7.01 provides that the “normal work schedule shall be five (5) days on duty, followed by two (2) days off duty.” The parties do not agree as to the meaning of “normal”; the Union asserts it “guarantees” officers the 5-2 schedule while the Town believes that the inclusion of “normal” signifies that the parties understood that there would be occasions in which the officers worked a different schedule. Section 7.01 utilizes the word “normal” as a modifier to the phrase “work schedule.” “Normal” is used three additional times in Section 7.01; once to modify “work week,” once to modify “time for lunch and breaks to be taken” and once to modify “annual hours. The dictionary defines “normal” as “conforming with, adhering to, or constituting a norm, standard, pattern, level, or type; typical.” *The American Heritage® Dictionary of the English Language, Fourth Edition Copyright @ 2000 by Houghton Mifflin Company.* Nowhere in this definition is there a reference to guarantee. Normal in this context is not definitive; rather, “normal” provides an assurance of stability for employees as it relates to work week, annual hours and work schedule while also providing flexibility to the employer. The language is unambiguous and does not create a guaranteed 5-2 schedule for police officers as the Association suggests.

Having found that the language is unambiguous and that the Town has the management right to change the schedule consistent with Section 1.01 of the management rights clause, it is necessary to determine whether the Town’s exercise of its management right was compliant with the remainder of the agreement and not arbitrary, capricious or discriminatory.

The Town in its reply brief appears to limit the Union’s grievance to only the holidays of Thanksgiving, Christmas Eve, Christmas Day, New Year’s Eve, and New Year’s Day and continues stating that “it is hardly likely that the Town Board would direct that only two Police Officers work on such busy holidays such as Memorial Day and July 4, when multiple events are taking place and additional law enforcement is needed.” (Town Reply Brief p. 2) The Town’s assertion that only specific holidays are covered by the Town Board directive is inconsistent with the evidence. (See Exhibit 2, page 2.) The Town’s reading of the grievance is also erroneous. The grievance does not limit the grievance to solely five holidays.

Moreover, the Town argues in its brief that it did not intend to limit staffing on the Memorial Day and Independence Day holidays to the two police officers as the Town Board directed in November, 2004, and they did not do so for Memorial Day and Independence Day.

The evidence establishes that the Town issued a directive, implemented the directive in violation of the labor agreement for Thanksgiving 2004, implemented the directive so as to deny overtime for Christmas Eve, Christmas Day, New Year's Eve and New Year's Day and violated the directive for Memorial Day and Independence Day. At best this is an arbitrarily implemented directive and at worst is a directive that was designed to deny regular and holiday compensation to employees for the historically less busy holidays while maintaining full staffing for the historically busy holidays. The Town is not at liberty to pick and choose when it follows a directive, established for all holidays, especially when the directive deviates from the bargained for "normal" schedule. As such, the Town's action was an arbitrary exercise of its management rights.

In conclusion, the express language of the Agreement was not violated by the Town Board's decision to limit the number of law enforcement officers assigned to work on for all holidays. The Town implemented the directive first, in violation of Article 7.01 posting requirement for the Thanksgiving 2003 holiday, and second, in an arbitrary and capricious manner which denied police officers their bargained-for holiday benefit.

AWARD

1. Yes, the Town of Three Lakes violated the terms of the collective bargaining agreement in the manner it scheduled Police Officers to work on all holidays identified in Article XVI.

2. To remedy the violation found in item #1 above, the Town shall compensate all employees holiday pay and time and one-half for hours worked consistent with Section 16.02 who were scheduled or would have been scheduled to work for all holidays identified in the parties' labor agreement from Thanksgiving 2003 to the date of this Award.

3. I will retain jurisdiction for at least sixty (60) days to resolve any questions involving application of this Award.

Dated at Rhinelander, Wisconsin, this 30th day of December, 2004.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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