BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OCONOMOWOC PROFESSIONAL POLICE ASSOCIATION, WPPA/LEER

and

CITY OF OCONOMOWOC

Case 76
No. 63583
MA-12637

Appearances:

Mr. Robert West, Labor Consultant, Wisconsin Professional Police Association, 2001 Gilbert Road, Madison Wisconsin 53711, on behalf of the Union.

Stadler & Centofanti, S.C., by **Attorney Ronald S. Stadler**, 1025 Glen Oaks Lane, Suite 108, Mequon, Wisconsin 53092, on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the Oconomowoc Professional Police Association (herein the Union) and the City of Oconomowoc (herein the City) were parties to a collective bargaining agreement dated February 25, 2004, and covering the period January 1, 2004, to December 31, 2005, which provided for binding arbitration of certain disputes between the parties. On April 16, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding a change by the City in the practice regarding offering of overtime. The parties selected the Undersigned to arbitrate the issue from a panel of members of the Commission's staff. A hearing was conducted on October 26, 2004. The proceedings were transcribed and the transcript was filed on November 5, 2004. The Union filed its brief on November 29, 2004, and the City filed its brief on December 9, 2004. The Union filed a reply brief on January 5, 2005, and the City filed a reply brief on January 7, 2005, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to a framing of the issues. The Union would frame the issues as follows:

> Did the City violate the collective bargaining agreement by changing the manner in which officers were offered overtime?
>
> If so, what is the appropriate remedy?

The City would frame the issues as follows:

> Did the City violate Article 19 by changing the past practice of offering overtime first to full-time officers and then to part-time officers?
>
> If so, what is the appropriate remedy?

Having considered the submissions of the parties, the Arbitrator frames the issues as follows:

> 1. Was the grievance timely?
>
> 2. If so, did the City violate the contract or past practice in issuing a shift manpower shortage policy memorandum on March 27, 2003?
>
> If so, what is the appropriate remedy?
>
> 3. Irrespective of the answer to question #2, did the City violate Article XX of the contract by failing to provide advance notice to the Union of the March 27, 2003 memorandum?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE I – RECOGNITION

> The City recognizes the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association, hereinafter referred to as "Union," as the exclusive bargaining representative of all regular full-time law

enforcement employees with the power of arrest employed in the Police Department of the City of Oconomowoc, but excluding the Chief, the Captain, supervisory, managerial and confidential employees, and all other employees, for the purpose of negotiations in relation to wages, hours and conditions of employment.

ARTICLE III – GRIEVANCE PROCEDURE

Section 1. Should any problems, differences or disputes arise with relation to classification, hours of work or conditions of employment, an earnest effort shall be made to settle such differences in the steps hereinafter provided. Suspensions, demotions and discharges covered by Section 62.13(5), Wis. Stats., shall not be processed under this Article but shall be handled exclusively under such Section 62.13(5). A written grievance shall contain the name and position of the grievant, a clear statement of the grievance, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, if any, and the signature of the grievant and date. Both the Union and the City recognize that grievances and complaints should be settled promptly and at the earliest possible stage, initiated within ten (10) working days of the incident. Any grievances not reported or filed within ten (10) working days of the incident shall be invalid. The procedure for adjustment of grievance is as follows:

Step 1. The matter shall be presented in writing to the Captain who shall, within ten (10) working days thereafter, furnish the aggrieved employee and the Union with the written answer to the grievance. If no satisfactory solution is reached at this level, the matter shall proceed to Step 2.

Step 2. The aggrieved employee and/or the Union shall present the matter in writing to the Chief of Police within ten (10) working days of receipt of the Step 1 answer or last date due. The Chief of Police shall, within ten (10) working days, hold an informal meeting with the aggrieved employee, the Captain, and the representative of the Union, and any other superior involved. The Chief shall give a written response to the aggrieved employee and the Union within ten (10) working days of the meeting. If no satisfactory solution is reached, the matter shall proceed to Step 3.

Step 3. The matter will be presented in writing to the City Administrator within ten (10) working days of receipt of the Step 2 answer or last date due. The City Administrator shall give a written response to the aggrieved employee and the Union within ten (10) working days after receipt of the grievance. If no satisfactory solution is reached and the matter involves a grievance over the interpretation or application of a specific provision of this Agreement, the matter shall proceed to Step 4.

Step 4. The Union shall appeal the grievance to arbitration within ten (10) working days of receipt of the Step 3 answer or last date due, but written notice thereof to the City Administrator. The City Administrator and the representative of the Union shall meet and attempt to agree upon a neutral arbitrator. If, within five (5) working days, a neutral arbitrator is not agreed upon, either party may request the Wisconsin Employment Relations Commission to either:

1. appoint an arbitrator, or
2. submit a panel of arbitrators form which the parties may alternatively strike names until one (1) arbitrator remains.

The arbitrator so selected shall hear the dispute and render a written decision which shall be final and binding upon the parties involved in the dispute. The arbitrator shall not have the authority to change or amend the terms of this Agreement but only to interpret the same.

. . .

ARTICLE XIX – MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

Section 2. Fire and Police Commission or departmental rules and regulations which bear upon wages, hours or working conditions of employees covered by this Agreement or which bear upon their off-duty lives shall be subject to the grievance machinery established under this contract.

ARTICLE XX – RULES AND REGULATIONS

Section 1. The Employer has the right to make and revise rules and regulations relating to wages, hours and conditions of employment. The Employer will give the Union ten (10) days advance notice prior to the effective date of any new or revised rule or regulation, except in emergency situations. The reasonableness of any new or revised rule or regulation may be raised in the grievance procedure, provided that the rules and regulations in effect as of December 1, 1986, are deemed to be reasonable.

BACKGROUND

The City and the Union have a collective bargaining relationship going back many years. In approximately 1980, the City began hiring part-time officers, who were not members of the bargaining unit. The Union agreed to the hiring of part-time officers as long as overtime hours were initially offered to full-time officers.

On March 17, 1992, Chief Hugh Martin issued a memorandum regarding shift manpower shortages, as follows:

. . .

> When an injury or sickness to a Police Officer, or a school or a function authorized by the Chief of Police, causes the shift to fall below minimum manpower, the Shift Commander will follow the procedures listed below:
>
> 1. The Shift Commander will check the other shifts to see if a Police Officer can be moved. If a Police Officer can be moved, this will be done. If possible, the permission of such Officer's Shift Commander should be obtained.
>
> 2. The Shift Commander will contact Part Time Police Officers and request that they cover the manpower shortage.
>
> 3. If the Shift Commander is unable to get a Part Time Police Officer to work, then a Full Time Police Officer will be contacted to work to cover the manpower shortage. Full Time Police Officers can be ordered to work to cover the shortage.
>
> 4. If the Shift Commander cannot get any Police Officer to work, the Shift Commander can order any Police Officer into work who is on a extra off day, one day vacation, holiday off day or on a regular off day.
>
> 5. At the direction of the Chief of Police, or his/her designee, Police Officers can be assigned to work in excess of their normal scheduled shift.
>
> 6. This policy shall supercede [sic] all prior dated policies concerning this type of manpower shortage.

. . .

The effect of the memorandum was to alter the overtime policy by offering available hours to part-time officers before full-time officers.

In 1997, an issue arose concerning filling vacant shifts during vacations, resulting in a memorandum to third shift officers from Sergeant Ron Buerger essentially reiterating to policy declared in the 1992 memo that overtime hours would first be offered to part-time officers. The Union filed a grievance on August 18, 1997, on the basis that Sergeant Buerger's memo violated the maintenance of standards clause by changing a long-standing practice of offering overtime hours first to full-time officers. As a result of an exchange of correspondence between the Union Representative, Chief Martin and Lieutenant Schmidt, wherein the Union representative was satisfied that the practice of offering overtime first to full-time officers had not changed, the grievance was withdrawn.

On March 27, 2003, Chief Martin issued a new memorandum regarding shift manpower shortages, as follows:

. . .

> When a manpower shortage exists on a shift, the shift supervisor shall adhere to the following procedures to fill in the vacancy:
>
> 1. Check with another shift to see if an officer can switch shifts without affecting that shift's minimum manpower. If there is a possibility of having an officer switch shifts, this shall be done on a voluntary basis. The voluntary basis only applies to a single day switch.
>
> 2. Check on the availability of a part-time officer to work either all or part of the shift. If a part-time officer can only cover part of the shift, the balance can be covered with overtime.
>
> 3. Cover the manpower shortage with overtime by utilizing a full-time officer, from either the patrol or detective division. The shift can be covered either as a full shift or two officers splitting a shift. The shift supervisor can order officers to work in excess of their assigned shift to cover shortages.
>
> 4. If the shift supervisor is unable to cover the manpower shortage, the shift supervisor may order an officer into work. This would include canceling extra off days, one day vacations, holiday off days and regular off days. Consideration shall be given to extra off days and one day vacation scheduled in conjunction with regular off days.
>
> The expectation of the department is that anticipated overtime shall be fairly distributed amongst all of the officers including detectives. While officers from a shift with anticipated shortages may have the first opportunity to cover those hours, it doesn't preclude officers from other shifts the opportunity to work the

> overtime. Officers who are willing to work anticipated overtime on other shifts, should make certain that information is known.
> If an officer believed that overtime is not being fairly distributed, they should first bring it to their Sergeant's attention. If the issue can not be resolved, a memo outlining the issue should be forwarded to the Operations Lieutenant by the concerned officer.
> This policy shall supersede all prior dated policies concerning manpower shortages.
>
> . . .

The memorandum was placed in the Department policy manual and the field training manual used in orienting new officers with Department policies and procedures. No copy was specifically sent to the Union Representative or the local Union officers. The Union Representative became aware of the memorandum in November, 2003, during bargaining over a successor collective bargaining agreement. On December 19, 2003, the Union filed a grievance alleging that the City had violated the maintenance of standards clause and had also failed to give the Union proper notice of the policy change as required by the collective bargaining agreement. The City denied the grievance and the matter proceeded through the steps set forth in the contract without resolution, culminating in this arbitration. At the hearing, the City raised the issue of arbitrability, based on an allegation that the grievance was not timely filed. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the grievance is not untimely. The City changed its policy regarding overtime, but in so doing, did not give proper notice to the Union under Article XX of the contract. The notice to the Union triggers the timeline for filing a grievance. By failing to provide notice, the City is foreclosed from arguing that the grievance is untimely. The City argues that the contract language is superseded by a practice of not providing notice, but this violates basic rules of contract interpretation which favor the plain language of the agreement.

In this case, the City has attempted to change the existing practice through subterfuge. After problems developed with the overtime procedure in 1997, the City produced a memo affirming the practice of offering overtime first to full-time officers. Lt. Buerger took the position that the City could assign overtime as it wishes under its management rights, but no mention is made of the applicability of the maintenance of standards clause. The Association's position that overtime was to be offered to full-time officers first was supported by both Association and City witnesses. Sgt. Cavaiani testified that he calls full-timers first because

part-timers are generally not available on his shift. The City did not call the other two sergeants who are responsible for assigning overtime and, since they were presumably available, an adverse inference should be drawn from the City's failure to do so. The testimony of Chief Martin and Lt. Buerger regarding offering hours to part-timers first should be discounted because they are not directly involved in assigning overtime.

The maintenance of standards clause in the contract prohibits the City from reducing employee benefits during the term of the agreement. Thus, the Arbitrator must base his decision on what the practice was at the time the agreement was signed, not what it was in 1992 or 1997. It is clear that the March 27, 2003 memo was intended to alter the policy with regard to overtime and that the City did not give the Union proper notice. The grievance should be sustained and the new policy rejected.

The City

The City asserts that the grievance is untimely and not arbitrable. Where a contract requires filing of grievances within a set time, if a party fails to do so, the grievance is not arbitrable. NORTHERN PINES UNIFIED SERVICES, CASE 16, NO. 50550, MA-8923 (KNUDSON, 10/18/94). Here, the contract requires grievances to be filed within 10 working days of the precipitating incident. The employees were informed in February, 2003, that the 1992 policy was being reaffirmed. On March 27, 2003, the memo announcing the new policy was released. The Union did not file a grievance until December 19, 2003. Thus, the grievance is not arbitrable.

The Union has also failed to prove the existence of a binding past practice of offering overtime first to full-time officers. A binding past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice; and (4) accepted by both parties. LINCOLN COUNTY COURTHOUSE, CASE 193, NO. 58373, MA-10932 (MEIER, 8/22/00). Here, the practice is not clear and unequivocal. The Union cannot even agree among its membership what the practice is because there was a difference of opinion among its witnesses whether overtime was to be offered by seniority. It is also clear that the actual practice has not been as the Union asserts because Lt. Buerger testified to the viability of the 1992 policy and the fact that he has followed it in assigning overtime. It is significant that the Union did not call the sergeants, other than Sgt. Cavaiani, to refute Lt. Buerger's testimony. The sergeants are bargaining unit members and the Arbitrator should draw an adverse inference from the Union's failure to call them to support its case. In contrast, Officers Callaghan and Pfister merely offered conclusory testimony about the existence of a practice without reference to probative details. The clear testimony of Lt. Buerger and Sgt. Cavaiani, however, undercuts any suggestion that there was a clear practice of calling full-timers first.

The Manpower Policy also does not lower any conditions of employment. In fact, the policy improves conditions because it allows officers the ability to refuse a shift change to cover manpower shortages. Thus, there was not violation of the maintenance of standards clause.

The City also complied with the notice requirement of Article XX by providing notice of the policy change to the local Union leadership. There has never been a requirement that notice must be given to the Union Representative or mailed to the Union headquarters. The Chief also testified to the fact that he has not sent notice of policy changes directly to the Union for years. The parties have always treated the local and the state union organizations as being synonymous. At the time the Policy memo was issued, Officer Lesniewski, a member of the Union's grievance committee, was aware of it. Thus, it cannot be said that the Union did not have notice of the change. The City argues that the point is moot, however, because if the policy is rescinded, the parties would return to the only written policy in place, that of 1992, which would have the same effect.

The Union in Reply

The Union reasserts that the appropriate date for determining when the grievance should have been filed is the date notice was given to the Union, not the date the policy was issued. Further, even if notice to the local was sufficient, this did not occur either. If notice to individual officers was sufficient, the contract language would be meaningless. The Wisconsin Professional Police Association (WPPA) Business Agent, who represents the local, only has a timely opportunity to address such issues if they are directed personally to him.

The Arbitrator must reject the argument that the March, 2003 memorandum does not represent a change in existing policy, or that it reaffirms an existing practice. The Association believes there was a clear practice of providing overtime first to full-time officers, as evidenced by the 1997 grievances and their resolution.

The City in Reply

The Union concedes that its grievance was untimely, but apparently, and wrongly, asserts that the continuing violation rule applies. This was a one time event, the issuance of the March, 2003 memo, which was alleged to have violated the Maintenance of Standards clause. It does not become a continuing violation merely because it has continuing effects. Likewise, the alleged violation of the notice provision was a one time event. The Union was aware of the circumstances at least by November 17, 2003, but didn't file a grievance until December 19, which was still a violation of the grievance procedure, making the grievance unarbitrable.

The grievance must fail on its merits because the Union has failed to show the existence of a binding past practice. Historically, there is no clear and unequivocal practice with regard to assignment of overtime. Lt. Buerger and Sgt. Cavaiani both testified that they understood the 1992 policy regarding assigning overtime was valid until replaced by the 2003 policy. Sgt. Cavaiani called part-timers first unless he knew that they were unavailable. Although the Union witnesses contradicted the City's witnesses, their testimony is of dubious value because they were not in as good a position to be aware of the policy. The City also maintains that, if anything, the fact that the other sergeants did not testify should lead to an inference against the Union, not the City, since the sergeants are bargaining unit members and could be expected to have testified favorably to the Union's position if they were able.

It is also immaterial if the City did not always adhere to the 1992 policy. Manpower shortages have never been addressed in bargaining, but remain a management prerogative. Management's use of its discretion in exercising its rights cannot lead to the establishment of a binding practice. (Citations omitted) The Union's reliance on Jt. Ex. 6 to support its practice argument is misplaced. The exchange of correspondence, at best, shows a misunderstanding between Lt. Schmidt and Union Representative Sharp. It does not show an acknowledgement of a full-time first practice.

The City also did not violate the notice requirement in Article XX. The contract is ambiguous as to whether notice must be given to the WPPA or the Oconomowoc Professional Police Association (OPPA). Notice was given to the OPPA in the same manner the City has followed for that past several years. Because the contract is ambiguous and the parties have had a practice for at least 12 years that notice is given to the OPPA, the City did not violate the contract in so doing here.

Finally, even were the Union to prevail, it is unclear what would change. If a cease and desist order were issued, the City would not be able to enforce the new policy and would, therefore, revert to the former policy, adopted in 1992. In that event, the policy of offering overtime first to part-time officers would remain unchanged. The Union wants the City to pay overtime to full-time officers for hours already worked by part-time officers. This would be an inequitable result and the only reasonable remedy would be a cease and desist order, which would have the effect outlined above.

DISCUSSION

Arbitrability

The City makes the argument that the grievance herein was not timely filed under the grievance procedure and should, therefore, be dismissed. The Union counters that the contractual timelines for filing grievances were suspended by the City's failure to comply with

the notice requirements of Article XX. The City contends that the requirements of Article XX were met by the forwarding of the March 27, 2003 memorandum to the local Union officers.

Article III, Section 1, of the contract states, in pertinent part: "Both the Union and the City recognize that grievances and complaints should be settled promptly and at the earliest possible stage, initiated within ten (10) working days of the incident. Any grievances not reported or filed within ten (10) days working days of the incident shall be invalid." Here, there is no dispute that WPPA was not provided with notice of the memorandum at the time it was issued. Chief Martin specifically testified that he did not do so. Further, the City asserts, in support of its argument that notice was properly given under Article XX, that the contract is ambiguous as to whether is to be given to WPPA or OPPA. Having so stated, it follows that the ambiguity runs both ways and the Union is likewise entitled to a contrary construction of the language in asserting that the grievance timelines are triggered by notice to the WPPA. Inasmuch as there is a heavy presumption against forfeiture in arbitration, I find, therefore, that for purposes of timeliness the Union reasonably concluded that actual notice to the WPPA of the policy change was the triggering event for the grievance deadline.[1]

The record reflects that WPPA learned of the memorandum in contract negotiations late in 2003. The specific testimony offered by City Administrator Diane Gard was as follows:

> Q: (By Attorney Stadler) Do you recall the dates of the bargaining sessions that were held?
>
> A: Yes. One was held in November and a second one was held in December.
>
> Q: Do you remember the particular dates? Let me show you a document and ask if you can identify it for us.
>
> A: Yes. The dates were 11/17 and 12/12, and these are our notes from the sessions.
>
> Q: Okay. That document refreshes your recollection to the dates of those sessions?
>
> A: That's correct.
>
> Q: Was Mr. Dillon present at the bargaining sessions?
>
> A: Yes, he was.

[1] I note, as well, that the record contains no indication that the issue of timeliness was ever raised by the City prior to the hearing and the argument being presented in the City's brief. Many arbitrators hold that where a grievance is processed to arbitration without raising a timeliness defense, the objection is waived.

Q: And there were probably bargaining union members present as well?

A: That's correct.

Q: At either of those sessions was there a discussion about the March 2003 memo that Lieutenant Buerger had issued?

A: Yes.

Q: Was there a discussion about whether the bargaining unit members were happy about that memo?

A: Yes. There was a provision. One of the proposals was that we changed the scheduling of overtime so it goes to full time by seniority first and then part time.

Q: Was Mr. Dillon present during those discussions?

A: Yes.

Q: If the first discussion was on November 17, can you tell me, did you within ten days of that date receive a grievance from the union over the issue of the existence of the March 2003 memo?

A: No, we didn't.

Tr., pp. 67-69

Ms. Gard's bargaining notes were not offered into evidence. Her testimony indicates that the March, 2003 memo was discussed at one or both of those meetings, but doesn't specify which. Mr. Stadler's question assumes that the topic was first discussed on November 17, but Ms. Gard did not so state. Since ambiguities in the evidence must be resolved against the party seeking the forfeiture, I find that the Union is entitled to a presumption that the topic was first discussed at the December 12, 2003 meeting. The grievance was filed on December 19, 2003, within the ten-day window set forth in the contract. I find, therefore, that the grievance was timely.

The Merits

This case presents two substantive questions. First, did the City violate the Maintenance of Standards clause in Article XIX of the contract by issuing the March 27, 2003 memorandum regarding shift manpower shortages. Second, did the City violate the notice requirements of Article XX in failing to provide notice to the Union ten days before issuing the memorandum.

As to the first question, the contract language specifically requires ". . . that all conditions of employment relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement . . . " With respect to the overtime policy, this language requires that, while the contract is in force, the City will not alter the policy in such a way as to reduce the benefit to the employees below the level in effect at the time the contract was adopted. The grievance specifically alleges that the March 27, 2003 memorandum alters a binding practice in effect at the time the contract was adopted, which required that overtime hours be offered to full-time officers before part-time officers.

As the City noted in its brief, to have binding effect a past practice must have certain characteristics that make it possible to define with specificity and provide sufficient assurance that the practice is one that has been recognized and accepted by both parties. Thus, it must be possible to clearly identify what the practice is and there must be indicia that it has been understood, acknowledged and consistently applied over time by the parties. Thus, if the Union is to prevail here, it must establish that there was a clear and accepted practice of offering overtime to full-time officers before part-time officers at the time the contract was adopted.

The evidence shows that in 1992, the Chief of Police issued a memorandum regarding shift manpower shortages. This memo provided that manpower shortages were to be handled, if possible, by moving officers from other shifts. If this was not possible, the Shift Commanders were to use part-time officers to cover the shortages. If part-time officers were not available, the hours were to be offered to, or if need be assigned to, full-time officers. (Jt. Ex. 4) The import of this memo was clearly that available overtime hours were to be offered to part-time officers before full-time officers. This policy was added to the Department's Field Training Manual and all officers were made aware of it at the time of training. (City Ex. 1) Apparently, however, this policy was more effective in theory than in practice, as the testimony indicates that over the years those in charge of assigning overtime hours, whether sergeants or officers in charge, did not consistently follow the policy, but would occasionally or regularly call full-time officers first for overtime. (Tr. 12-13, 55-56). That there was confusion and lack of consistency is shown by the fact that then Sgt. Buerger issued a memo to the third shift officers on August 6, 1997, which attempted to reiterate the policy of overtime hours being offered first to part-time officers. This led to a response, and eventually a grievance, from the Union on the basis that the memo changed a past practice of offering overtime first to full-time officers. Subsequently, a letter was sent to the Union Representative from Lt. Jeffrey Schmidt on August 21, 1997, indicating that ". . . the agency has always agreed that there could be flexibility on coverage of overtime if a shift was short due to lengthy illness, injury, or lengthy shortages . . ." He also indicated that there was no change in Department policy regarding overtime, but did not specify what the policy was. This apparently satisfied the Union because the grievance was withdrawn on September 16. (Jt. Ex. 6) This is how the situation remained until the issuance of the March 27, 2003 memorandum.

The picture that develops is one of two parties with disparate views of what the existing "policy" or "practice," as the case may be, was with respect to overtime. The City appears to have been of the mind that the 1992 "shift manpower shortages" memo remained in effect, giving primacy in the offering of overtime to part-time officers, but that shift commanders and officers in charge had discretion to deviate from the policy, as needed, to fill open shifts. Because part-time officers were frequently known to be unavailable, this resulted in overtime being frequently offered to full-time officers first. The Union, on the other hand, seems to have believed that the resolution of the 1997 grievance reiterated its understanding that the practice was to offer overtime first to full-time officers. The exchange of correspondence is not clear on this point and could be read to support either position, but the Union's perception was probably reinforced by the *de facto* practice of regularly offering overtime to full-time officers indicated above.

As set forth above, the appears to have been no clear meeting of the minds between the City and the Union as to what the practice was with respect to overtime. This undercuts one of the primary criteria for a binding practice – that it be clearly understood by the parties. I cannot say on this record, therefore, that a binding past practice existed that overtime was to be offered to full-time officers before part-time officers. That being the case, the issuance of the March 27, 2003 memorandum did not constitute a violation of the maintenance of standards language contained in Article XIX. If anything, it reiterated the *status quo* because it reaffirmed the progression of offering overtime set forth in the 1992 memo, but left open the possibility that in practical effect the situation may not change appreciably, depending on the availability of part-time officers.

The second question, that of notice, is based on the language of Article XX, which requires the City to ". . . give the Union 10 days' advance notice prior to the effective date of any new or revised rule or regulation, except in emergency situations." Article I also identifies the Union as ". . . the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association." I note that the March 27, 2003 memorandum does not specify an effective date, but is written in such a way as to imply that it is to take immediate effect. I further note that it specifically states that it supersedes all previous policies regarding shift manpower shortages, which would include the 1992 and 1997 memoranda. Also, the memorandum does, in some respects, modify the previous policy by addressing issues such as fair distribution of overtime, use of detectives to fill open shifts and shift splitting, where appropriate. Indeed, Lt. Buerger, in a February 9, 2003 letter to Attorney Stadler, indicated that a policy revision was necessary to clear up misconceptions created by a recent reaffirmation of the 1992 memo and a previous 1997 memo by Lt. Schmidt, which was not made part of the record, but which had also apparently added to the ambiguity surrounding the policy of overtime preferences. (City Ex. 4) It is clear to me, therefore, that the memorandum is, at least, a policy revision as that term is used in Article XX.

As to notice, the City acknowledges that no copy of the memorandum was provided to WPPA at the time of issuance. It maintains, however, that it fulfilled the requirement of the contract by providing notice to the local Union, which has been its practice with respect to

notification in the past and which the Union does not dispute. The Union counters that the contract language is clear and that advance notice to the WPPA/LEER Division is essential to the Union's ability to adequately represent its members with respect to proposed policy changes. The Union's point is well taken, because the purpose of advance notice is to forestall conflict and grievances by giving the parties an opportunity to work out potential problems before the policies take effect. On the other hand, if the Union has acquiesced to local notice for an extended period of time, one cannot blame the City for proceeding on the assumption that it was acceptable. Irrespective of the parties' positions, however, there is no indication in the record that advance notice of the policy revision was provided to anyone, whether WPPA or OPPA, prior to the issuance of the March 27 memo. There is also no indication of the existence of an emergency that would permit an exception to the requirements of the contract. Thus, it appears to me that the City did violate the provisions of Article XX by its failure to provide advance notice of the shift manpower shortage memorandum.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

1. The grievance was timely.

2. The City did not violate the contract or past practice with respect to offering overtime in issuing the shift manpower shortage policy memorandum on March 27, 2003, and the grievance is, accordingly dismissed as to that issue.

3. The City did violate Article XX of the contract by failing to provide advance notice to the Union of the March 27, 2003 memorandum. Accordingly, the City shall cease and desist from this practice and shall in the future provide at least 10 days' advance written notice to the WPPA/LEER Division of all proposed additions to or changes of Departmental rules or regulations.

Dated at Fond du Lac, Wisconsin, this 5th day of April, 2005.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/anl
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