BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUPACA CITY LAW ENFORCEMENT ASSOCIATION, WPPA/LEER DIVISION**

and

**CITY OF WAUPACA**

Case 25
No. 63497
MA-12607

*(Work Shift – Association Grievance)*

**Appearances:**

**Jeffrey D. Berlin**, Attorney at Law, on behalf of the Wisconsin Professional Police Association and Waupaca City Law Enforcement Association.

DiRenzo & Bomier, LLC, Attorneys at Law, by **Howard T. Healy**, on behalf of the City of Waupaca.

## ARBITRATION AWARD

The Wisconsin Professional Police Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the Association and the City of Waupaca, hereinafter the City, could select an arbitrator to hear and decide the instant dispute in accord with the grievance and arbitration procedures contained in the parties' collective bargaining agreement. 1/ Thereafter, the parties selected the undersigned, David E. Shaw, to arbitrate in the dispute. A hearing was held before the undersigned on September 30, 2004, in Waupaca, Wisconsin. There was no stenographic transcript made of the hearing. The parties submitted post-hearing briefs by December 14, 2004.

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



1 The parties agreed to waive the time limit for the issuance of the Award.

## ISSUES

There were no procedural issues raised. The parties could not agree to a statement of the substantive issues, but agreed the Arbitrator will frame the issues to be decided.

The Association would state the issues as follows:

> Did the employer violate the terms and conditions of the collective bargaining agreement when it adjusted Officer Kontos' regular work shift of 3PM to 2AM on January 12-15 and January 20-23, 2004 to 7AM to 6PM? If so, what is the appropriate remedy?

The City would state the issues as being:

> Did the City violate the Collective Bargaining Agreement when it changed the shift of Officer Kontos to work the 7:00 a.m. to 6:00 p.m. shift on January 12, 13, 14 and 15 and January 20, 21, 22 and 23, 2004; if so what is the appropriate remedy?

The Arbitrator finds no substantive difference between the parties' respective statements of the issues.

## CONTRACT PROVISIONS

The following provisions of the parties' 2003-2004 Agreement are cited, in relevant part:

### ARTICLE 2 – MANAGEMENT RIGHTS

> The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights, which are normally exercised by the City or the department head include, but are not limited to, the following:
>
> A. To direct all operations of the City Police Department.
>
> B. To hire, promote, transfer, assign, lay off, or retain employees in positions with the City, and to suspend, demote, discharge, and take other disciplinary action against employees under Sec. 62.13 of Wis. Stats.
>
> C. To maintain efficiency of city government operations entrusted to it.

D. To introduce new or improved methods or facilities.

E. To change existing methods or facilities.

F. To contract out for goods or services except that the City, prior to implementing such action, agrees to negotiate with the Association if such action had an impact on the wages, hours, or other terms and conditions of employment on the employees in the existing bargaining unit.

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

H. To take whatever action may be necessary to carry out the functions of the City in situations of emergency.

I. To take whatever action is necessary to comply with State or Federal law.

J. In the event of an arbitration proceeding concerning the scope or interpretation of this Article, said Article is to be liberally construed.

. . .

**ARTICLE 9 – WAGES AND HOURS OF WORK**

. . .

B. Work Period For Patrol Officers: Employees shall be required to work a recurring schedule of four (4) days "on duty" followed by four (4) days "off duty." The work shift shall consist of eleven (11) consecutive hours each. Additional hours may be assigned by the Chief of Police or the Personnel Committee, as required.

The hours of work shall be as follows:

7AM – 6PM
11AM – 10PM
3PM – 2AM
8PM – 7AM

C. Work Period For Police School Liaison Officers: To ensure that the PSLO are working an equivalent number of hours as the patrol officers are working, the following schedule will be applied:

. . .

The summer schedule for the PSLO's will be four (4) days "on duty" followed by four days "off duty." The work shift shall consist of eleven (11) consecutive hours each. This schedule will be for a ten (10) week period during the summer, which equates to four hundred forty (440) hours of work.

. . .

**ARTICLE 17 – VACATIONS**

. . .

B. Vacations for an employee shall not be cumulative from year to year. The Chief of Police shall determine vacation schedules provided, however, that in setting vacations he will consider requests from employees which are received at least three (3) weeks prior to the beginning of the requested vacation. Should two or more employees with the same job classification request the same vacation period within the time set by the preceding sentence, the senior employee will be given first consideration. No more than two (2) consecutive weeks of vacation may be taken at a time unless with prior approval of the Personnel Committee.

. . .

**ARTICLE 21 – EMERGENCY PROCEDURES**

The City retains the right in the event of emergencies beyond its control to alter the regularly assigned work hours and assignments.

## BACKGROUND

The Grievant, Officer Aimee Kontos, was employed by the City's Police Department as a Patrol Officer in January of 2004. Her regularly-scheduled hours of work were from 3:00 p.m. through 2:00 a.m. on a recurring schedule of four days on, followed by four days off. The Grievant was scheduled to work her regular shift on January 12 through January 15, 2004 and again on January 20 through January 23, 2004. However, the Grievant was ordered to work the 7:00 a.m. to 6:00 p.m. shift on those dates instead of her regular shift. This was done to accommodate a vacation request of Officer Hansen, and Sergeant Kirk, who is not in the bargaining unit, was assigned to work the Grievant's regular shift.

It has been the practice in the bargaining unit that patrol officers select their shifts at the beginning of the year based on seniority. Patrol Sergeants are not in the bargaining unit and are considered part of management. Chief Timothy Goke began with the Department in March of 2003 as a Lieutenant. He became Chief in September of 2004. Chief Goke testified that his duties included scheduling during the time he was Lieutenant and that he was responsible for the change in the Grievant's shifts on the days in question. He further testified that he had notified the Grievant of those changes in her schedule on November 18, 2003. Sergeant Johnson testified that he became a sergeant in 2001 and was assigned to do the scheduling from 2001 until March of 2003. Both Chief Goke and Sergeant Johnson testified that during the times that they were responsible for scheduling, officers had had their schedules changed to accommodate officers being off for training, on suspensions, on military leave, and due to an unexpected resignation or being off on sick leave, and provided documentation in these regards. Sergeant Johnson also testified that officers, including himself, had in the past had their schedules changed to accommodate vacation requests, but could provide no specific instances or any documentation in that regard. His only records were his personal notes, which indicated his schedule had been changed, but not the reasons for the changes.

The Grievant testified that in 2003 her schedule had been changed due to an officer being off on military leave and that she did not object or grieve that change in her schedule. She acknowledged that officers are required to give thirty days prior notice of being off on military leave and that she did not consider that to be a "emergency". The Grievant could not recall having her hours changed in the past to accommodate a vacation request, but could not recall what the reasons had been for the changes prior to these. Officer Lewinski testified he could not recall if his schedule had been changed in the past beyond the instances in 2003 where his schedule was changed three times to cover for an officer being at training.

Chief Goke conceded that he did not consider vacation to be a "emergency" and testified that the five instances that he cited of schedule changes were all that he could find documentation of occurring between June 2003 and the change in the Grievant's schedule. Both Chief Goke and Sergeant Johnson testified that prior to utilizing the computer for keeping track of schedules, the Department had kept paper records, but that those records are no longer available to verify what had occurred prior to June of 2003.

A grievance was filed regarding the change in the Grievant's regular work schedule in January of 2004. That grievance stated, in relevant part:

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION**

**LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

**GRIEVANCE FORM**

. . .

**BASIS FOR GRIEVANCE:** Violation of a long standing "past practice", Article 2 – Management Rights, and any other Article and/or Sections of the Agreement that may apply.

. . .

**DESCRIBE THE GRIEVANCE:**

**ISSUE:** Did the Employer violate the terms and conditions of the Agreement when it informed adjusted Officer Kontos regular shift assignment to work the 7:00 a.m. to 6:00 p.m. shift on January 12-15 and January 20-23, 2004? If so, what is the appropriate remedy?

**FACTS:** On January 12-15 and January 20-23, 2004, the Employer adjusted the grievant's regular shift assignment to work the 7:00 a.m. to 6:00 p.m. shift. Additionally, the Employer has adjusted a non-bargaining unit member (Sgt. Kirk) to work the grievant's regular shift assignment of 3:00 p.m. to 2:00 a.m. shift.

The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

## POSITIONS OF THE PARTIES

### Association

The Association asserts that the Agreement sets forth specific conditions under which management retains the right to alter regularly-assigned work hours and assignments. Article 9, B of the Agreement outlines the work schedule and patrol times for patrol officers. Article 21 of the Agreement provides that an officer's regularly-assigned work hours can be altered by management in the event of emergencies beyond management's control. There is no other provision in the Agreement that addresses management's right to alter regularly-assigned work hours. Here, the Grievant's hours were changed for two stated reasons. The first to cover another officer's vacation, and the second was to avoid payment of overtime. Neither of these reasons constitutes an emergency beyond management's control. There is an arbitral principle that when contracts specify certain exceptions, they imply that there are no other exceptions. This rule of *expression unis est exclusion alterius*, applied to this case, results in the conclusion that management may only alter regularly-assigned work hours in the event of emergencies beyond management's control and that there is no other basis upon which they may do so.

The Association also disputes that the City has been able to establish that there was a binding past practice of altering patrol officer's regularly-assigned work hours. The party asserting the existence of a binding past practice has the burden of establishing that the practice was unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice which was mutually accepted by both parties. A practice that is at best "checkered" does not meet these conditions.

Of those instances cited by the City in support of their assertion of a past practice, the evidence shows that they are not relevant to this dispute. Evidence as to the sergeants is irrelevant because they are not in the bargaining unit, and the other instances cited are distinguishable. In 2000, then-Officer Johnson altered his schedule to cover for an officer who had unexpectedly resigned, a situation falling squarely within an emergency beyond management's control. Officer Johnson did not indicate that he had objected to the change in the schedule and there is a significant difference between an unexpected resignation and a vacation request. The next instance involving Officer Graceffa in August of 2003 does not indicate the reason for the change or whether the officer objected to the change. The instance of Officer Helgeson in August of 2003 working a different shift from his regular shift to cover for a patrol officer who called in sick, i.e., an unanticipated illness, involves a situation that again falls squarely under the emergency beyond management's control. There is also no evidence presented that the officer objected to the change and there is a significant difference between an unexpected illness and a vacation request. The instances involving Officer Lewinski in August of 2003 to cover for an officer who was in training is also not evidence of a binding past practice. As the School Liaison Officer, Officer Lewinski's work period was governed by Article 9, C of the Agreement rather than 9, B, as is the case for the Grievant. There is also a significant difference between attending training and a vacation request. The instance of Officer Zelenski working other than his regular shift in September of 2003 again involves covering for an officer who was in training. There is no evidence that Officer Zelenski objected to the change, and again there is a difference between training and a vacation request. The last instance cited of the Grievant working other than her regular shift in December of 2003 to cover for an officer who was serving in the military also is not evidence of a past practice in this regard. The Grievant testified that she understood the obligation of serving in the military and did not object to having her schedule changed in those circumstances. Again, there is a significant difference between serving in the military and a vacation request. These instances cited by management involve circumstances that are materially different than those involved in the instant grievance. Thus, the City did not meet its burden of establishing that there was a binding past practice.

As there was no emergency involved in this case and the City failed to prove that there was an established binding past practice that would permit them to alter the Grievant's regularly-assigned hours to cover for a vacation, it must be concluded that the City violated the Agreement when it altered the Grievant's regular work hours in order to accommodate a vacation request and avoid the payment of overtime. The Association requests as a remedy that the Grievant be awarded eight hours of pay at overtime rates for the hours of 6:00 p.m. to 2:00 a.m. for the eight days her regularly assigned hours of work were altered.

**City**

The City first asserts that it is important to identify what has not been grieved in this case. The Agreement contains specific provisions concerning hours of work and Article 9. However, the Agreement does not contain, nor does the grievance refer to, any provision that specifically regulates the work schedule. While the Grievant refers to Article 2, Management Rights, and identifies past practice, it does not refer to a specific subsection in Article 2.

Article 2 is what can be described as a standard Management Rights clause that allows the City to do such things as maintain efficiency of City government, direct operations, introduce new or improved methods or facilities, change existing methods or facilities, and specifically, under Section 2, G, "to determine the methods, means and personnel by which such operations are to be conducted."

The City notes that the Grievant's regular hours of work were altered for January 12, 13, 14, 15, 20, 21, 22 and 23 of 2004. Further, she was given approximately two months notice of the schedule change. The City asserts that it has a past practice of changing shifts for a number of situations when an officer scheduled to work a particular shift is unavailable. According to the Chief, the reason for the shift changes was to provide adequate coverage and adequate supervision. The exhibits establish that the Grievant's hours were switched in December of 2003 to cover for an officer absent due to military duty. Another exhibit establishes that Sergeant Kirk was switched to cover a suspension, vacation and training. Exhibit 6 provided instances where officers had been moved to cover absence due to illness and training.

Article 17 of the Agreement regarding vacation and scheduling of vacations anticipates that there will be work schedule changes. The schedule would need to be changed to schedule vacations because the contract allows officers to make vacation requests three weeks prior to the beginning of the requested vacation. While not specifically stated in the Agreement, it is understood that police officers by the nature of their work are required to attend training which also creates absences from work requiring adjustments to the schedule. The Chief testified that the records of the Department reflect that changes have been made for a number of years to accommodate a number of schedule changes when these absences arose due to training. These were absences in which officers had been moved from the regular shift to fill a need, based on the Chief's determination as to how personnel should be used to conduct the operations of the Department.

A grievance had never been filed prior to this instant case. According to the Chief, the Union had not objected in the past, and Sergeant Johnson testified that adjusting an officer's shift to fill a vacancy created by vacation was a long-standing practice. He produced records from his personal log proving that when he was a patrol officer, his shift had been changed to accommodate the vacation requests of other bargaining unit members. Consistent with the Chief's testimony, Sergeant Johnson confirmed that he was not aware of any grievances having been filed or any objections made by the Union prior to this case. He indicated that everyone

understood that the flexible vacation request language in the Agreement required periodic adjustments to the schedule as long as officers received reasonable notice of the change. Here, the Grievant admitted she had been given too much notice. She could not recall if her schedule had been changed for vacations in the past and she conceded that there were situations in which there had been schedule changes necessary to accommodate coverage such as training, military duty, illness and discipline. The other witness who testified, Officer Lewinski, is the Union President and he indicated that his summer schedule had been changed. However, his recollection was inconclusive and he could not recall whether those changes had been made to cover vacation.

The City concludes that the grievance should be denied as the evidence indicates that under the Agreement the Chief has the discretion to adjust personnel to accommodate operations, and there are no provisions limiting the Chief in that regard. Therefore, the test of "reasonableness" applies. In this case, the Chief's actions are "reasonable" and consistent with past practice. In the latter regard, the Association conceded that schedule changes were made without objection to accommodate military duty such as weekend Guard or Reserve duty, training and an officer's suspension. Despite its claim that schedule changes were not used to fill vacation requests, the Association submitted no evidence to rebut the testimony of Sergeant Johnson. His testimony was supported by his personal logs and recollection. There is no reason to suggest either his recollection or his records are not credible. Thus, the evidence supports the City's position that it followed a consistent past practice to which the Union had never objected. Further, the adjustments to the schedule were made with reasonable notice. Thus, the practice itself is reasonable. In all the instances presented, the changes were infrequent and of short duration and occurred as a result of schedule changes to accommodate the request of another officer. The practice had been long-standing and the Association conceded that it had agreed to the changes in schedules as a result of the suspensions, military training, and regular training and offered no explanation or justification as to why vacation should be treated differently. Thus, the City concludes the grievance should be denied.

## DISCUSSION

There is no dispute that the Grievant's regular shift hours were from 3:00 p.m. to 2:00 a.m., one of the shifts set forth in Article 9, B of the Agreement. While the City would only have the Arbitrator consider the provisions cited in the grievance, i.e., Article 2, Management Rights and past practice, the grievance also refers to "any other Article and/or Sections of the Agreement that may apply." The Association cites Article 21, as well as Article 9, B, of the Agreement. The former states that an officer's regularly assigned work hours may be changed in cases of emergency beyond the City's control and the latter sets forth the work shifts of patrol officers. Given the manner in which the parties presented their cases, they were each given adequate notice of what the other was relying on to support its respective position in this dispute. Therefore, the Arbitrator will consider all provisions which have been cited by the parties in support of their positions.

While the Association cites Article 21 dealing with emergencies, and asserts that vacation requests do not constitute an "emergency", it does not dispute that officers' schedules or shifts have been altered to accommodate training, unexpected resignations, illness, or military duty. However, it asserts that an unexpected resignation or an unexpected illness would constitute a "emergency". While the Association concedes that training is a necessary requirement of being a police officer, it does not otherwise indicate how training, which is scheduled by the Department, can be distinguished from a vacation request. The Grievant acknowledged that officers are required to give thirty days' prior notice of military duty that is scheduled, and it appears from the record that the military duty of the officer for whom her schedule was changed to cover his absence in December of 2003, was weekend Guard or Reserve duty. Thus, there is an acknowledged practice of permitting management to alter an officer's regular shift hours in order to cover for another officer who is absent for reasons other than "an emergency".

The only record evidence with regard to altering an officer's regularly-scheduled hours to accommodate a vacation request of another officer, is the anecdotal testimony of Sergeant Johnson as to what occurred when he was a patrol officer and after he was assigned scheduling responsibilities until March of 2003. As the Association points out, the instances of the hours of the sergeants being changed to accommodate a vacation request cannot establish a practice on behalf of the bargaining unit, as sergeants are not covered by the terms and conditions of the parties' Agreement. However, the Association's witnesses were unable to recall if their schedules had been changed in the past, or for what reasons if they had been.

While the lack of documented instances regarding changes in officers' schedules to accommodate vacation requests is troubling, nevertheless, the Association has not distinguished vacation requests from scheduled training, or scheduled military duty. Thus, the Arbitrator is faced with a practice of altering officers' regularly-scheduled shifts to cover for officers who are off for reasons other than an emergency, and provisions of the Agreement which establish the regular work shifts for officers and the provision that permits management to alter an officers' regular hours in cases of emergencies beyond the City's control, a situation not involved in this case, since the Chief has the discretion to determine vacation schedules under Article 17, B, of the Agreement. Absent other consideration, it would ordinarily be inferred from Article 21 that the City, having retained its right to alter regularly-assigned work hours in event of an emergency, impliedly did not have the right to alter those hours outside of such emergencies. However, given the parties' accepted practice of altering officers' schedule to cover for absences not due to emergencies, the Arbitrator does not find the wording of Article 21 sufficiently clear to supersede the parties' practice in this regard. Given that practice, and the lack of any significant difference between scheduling vacation and scheduling training, and to a lesser extent, covering for an officer who has given prior notice of being off on military duty, the Arbitrator is compelled to conclude that the practice is sufficiently broad so as to include altering officers' hours for purposes of covering for another officer being on vacation. Therefore, no violation of the Agreement has been found.

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

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 6th day of June, 2005.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
6833