

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**KEWASKUM POLICE ASSOCIATION, LOCAL 314
OF THE LABOR ASSOCIATION OF WISCONSIN**

and

VILLAGE OF KEWASKUM

Case 9	Case 10
No. 66834	No. 66855
MA-13649	MA-13661

Appearances:

Benjamin M. Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, WI 53022, appearing on behalf of Kewaskum Police Association, Local 314 of the Labor Association of Wisconsin, Inc.

Nancy L. Pirkey, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI, 53202-6613, appearing on behalf of the Village of Kewaskum.

ARBITRATION AWARD

The Village of Kewaskum, hereinafter Village or Employer, and Kewaskum Police Association, Local 314, Labor Association of Wisconsin, Inc., hereinafter LAW or Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five WERC Commissioners or staff members from which they could jointly select an arbitrator to hear and resolve disputes between them regarding the instant grievances. Commissioner Susan J.M. Bauman was so selected. A hearing was held on September 26, 2007 in Kewaskum, Wisconsin. The hearing was not transcribed. The record was closed on December 26, 2007, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties stipulated that the substantive issues to be decided are the following, and the Village has also raised a timeliness question as to one of the grievances. Both the procedural and substantive issues will be addressed herein as follows:

Grievance No. 2007-05: Did the employer violate the collective bargaining agreement when it refused to allow the Grievant to take compensatory time for short shift hours on January 3 and 4, 2007?

If yes, what is the appropriate remedy?

Grievance No. 2007-09: Was the grievance timely filed?

If the grievance is timely, did the employer violate the collective bargaining agreement when it failed to pay additional compensation to the Grievant for all hours the Grievant worked on January 3 and 4, 2007?

If yes, what is the appropriate remedy?

BACKGROUND and FACTS

The Village of Kewaskum provides a wide range of municipal services, including public safety provided by the Kewaskum Police Department, hereinafter Department. The Department employs six (6) full-time police officers, a part-time police officer and a Chief, Richard L. Knoebel. Among the full-time officers is Officer Troy Ellis, the Grievant herein, who also serves as the President of the Kewaskum Police Association.

Officer Ellis has served as a police officer for the Village since 1989, initially as a part-time officer and then as a full-time officer for numerous years thereafter. At the time of the incident giving rise to the two (2) grievances herein, Officer Ellis' normal shift was 3 p.m. to 11 p.m. He was scheduled to work those hours on January 3, 2007, but due to the illness of the 3rd shift officer, Officer Ellis was called around noon that day by the Chief's assistant, Patty Blackstone, and advised that he should come in at 8:00 p.m. and that he would be working from 8 p.m. to 7 a.m. Officer Ellis reported to work and, indeed, worked from 8 p.m. to 7 a.m. The same officer was ill on January 4 and Officer Ellis again worked from 8 p.m. to 7 a.m.

On January 12, 2007, Officer Ellis received a report of his direct deposit pay for the pay period that included January 3 and 4. Upon review of the report, he determined that he had not been paid correctly for having had his shift changed without three (3) days notice. He spoke with the Chief and with Village Administrator Jay Shambeau about his concerns. He received a response from Chief Knoebel by memo dated January 15, 2007 which read as follows:

In regards to the ½ time that was paid on this pay check. It was my mistake and the difference will be applied to the 01/26/07 paycheck.

As to the request for compensatory time for the short shift change hours, we have always paid that out as cash as this is not considered overtime according to several sections in the current contract; [sic] In that this was not excess time worked but a premium payment for having the officers schedule changed on short notice. The basis for this is found in several sections of the current contract. Section 14.01 says: *Full-time officers shall be paid in cash at the rate of 1 ½ time [sic] the regular pay for all time worked in excess of a normal work week or normal work shift.* We do not dispute this language. Also Article 14.05 says: *In lieu of payment for overtime, an officer may elect to receive compensatory time off on the basis set out above in this Article.* We do not dispute this language. However based on Section 14.04 says: *Any full time Officer with less than three (3) calendar day notice who is involuntarily moved from the employees regularly scheduled hours of work shall be compensated one-half (1/2) hour pay for each hour worked outside of the regularly scheduled shift hours.* We will pay you the ½ time premium pay, but not allow you to convert this into compensatory time.

A grievance was filed immediately by Officer Ellis which stated that Article II – Management Rights, Article VI – Hours Per Week, Article XIV – Overtime, as well as any other Article, Section, Work Rule or Past Practice that may be applicable, had been violated. The grievance, No. 2007-05, further expounded on the grievance as follows:

Issue: Did the Employer violate the expressed or implied terms of the collective bargaining agreement when it did not allow the grievant to bank the overtime he received for working outside of his regular shift on January 3, 2007 and January 4, 2007?

If so, what is the appropriate remedy?

Facts:

1. That the Village of Kewaskum and the Kewaskum Police Association, Local 314 of the Labor Association of Wisconsin, Inc. have a collective bargaining agreement in full force and effect during all times pertinent to this grievance.
2. That the grievant, Troy Ellis, is a member of the Association and is covered by the collective bargaining agreement referenced in paragraph one.
3. That on January 3, 2007, the grievant was scheduled to work the hours of 3:00PM to 11:00PM.
4. That on January 3, 2007, the grievant was informed by Chief Knoebel that his hours of work for January 3, 2007 were being switched to 11:00PM to 7:00AM.
5. That on January 4, 2007, the grievant was scheduled to work the hours of 3:00PM to 11:00PM.
6. That on January 4, 2007, the grievant was informed by Chief Knoebel that his hours of work for January 4, 2007 were being switched to 11:00PM to 7:00AM.
7. That *Article XIV- Overtime, Section 14.04*, reads as follows:
“Any full-time Officer with less than a three (3) calendar day notice who is involuntarily moved from the employees regularly scheduled hours of work shall be compensated an additional one-half (1/2) hour of pay for each hour worked outside of the regularly scheduled shift hours.”
8. That the grievant requested the overtime he earned on January 3, 2007 and January 4, 2007 be placed into his compensatory time off bank pursuant to *Section 14.05*.
9. That *Article XIV-Overtime, Section 14.05*, reads in pertinent part as follows:
“In lieu of payment for overtime, *an Officer may elect to receive compensatory time off* on the basis set out above in this Article...” (Emphasis added)

10. That by not allowing the grievant to place the overtime he earned on January 3, 2007 and January 4, 2007 into his compensatory time off bank, the employer has exercised its' management rights in an unreasonable manner.

Remedy: The grievant respectfully requests that the Village cease and desist from violating the terms of the collective bargaining agreement. Further, the grievant is requesting that the overtime he earned on January 3, 2007 and January 4, 2007 be placed into his compensatory time off bank to be used according to *Section 14.05*.

Officer Ellis received pay for the following pay period on January 26, 2007. He reviewed his direct deposit pay stub which indicated a year-to-date amount of \$123.75 for miscellaneous pay. According to his calculations, this amount should have been \$198.00, an amount that he wrote on the pay stub. On February 1, 2007, he filed another grievance, Grievance 2007-09. While citing the same contractual provisions as having been violated in Grievance 2007-05, this grievance stated the issue as follows:

Did the Employer violate the express or implied terms of the collective bargaining agreement when it did¹ compensate the grievant an additional one-half (1/2) hour for all hours worked outside his regularly scheduled shift hours on January 3, 2007 and January 4, 2007?

If so, what is the appropriate remedy?

Facts 1 through 7 of this grievance are identical to those of the prior grievance. The remaining facts listed are:

8. That the grievant was compensated one-half (1/2) time for five (5) hours on January 3, 2007 and five (5) hours on January 4, 2007.
9. That the grievant worked a full eight (8) hour shift on January 3, 2007 and January 4, 2007 outside of his regularly scheduled shift hours.

¹ Although the statement of the issue is as quoted above, I suspect that the word "not" was omitted.

10. That by not compensating the grievant an additional one-half (1/2) hour for all hours worked outside his regularly scheduled shift hours on January 3, 2007 and January 4, 2007, the employer has exercised its' management rights in an unreasonable manner.

The **Remedy** sought is described as follows:

The grievant respectfully requests that the Village cease and desist from violating the terms of the collective bargaining agreement. Further, the grievant is requesting that he be compensated an additional one-half (1/2) hour for the remaining six (6) hours he worked on January 3, 2007 and January 4, 2007 outside of his regularly scheduled shift hours.

Chief Knoebel responded to the first grievance regarding compensatory time on February 2, 2007:

In regards to your Grievance in reference to compensatory time for short shift change: You make two points in your grievance that are inaccurate. Your shift was not changed from 3:00 pm to 11:00 pm to 11:00 pm to 7:00 am January 3 and 4, 2007 as you stated, it was changed to 8:00 pm to 4:00 am on both days. The time from 4:00 am to 7:00 am was considered time worked in excess of your normal work day or shift and was paid as compensatory time off as required in Article XIV – Section 14.05. However, as stated in the memo of January 15, 2006² (copy attached) the time in question was not time worked in excess of your normal 8-hour workday but a premium pay for the hours that were changed without 3 days notice, those being 11:00 pm to 4:00 am on both days, therefore your grievance is denied.

The Chief responded to the second grievance on February 5, 2007:

In regards to your Grievance 2007-09 in reference to compensation for short shift change: You make two points in your grievance that are inaccurate. You state in points 4 and 6 that you were told you were working from 11:00 pm to 7:00 am on January 3 and 4, this is inaccurate; You were told that you would be working 8:00 pm to

² This should have read 2007.

7:00 am on both days. Therefore the hours that you worked from 8:00 pm to 11:00 pm were in your originally scheduled shifts for January 3 and 4. The hours worked from 4:00 am to 7:00 am on both days were paid to you in compensatory time at the rate of 1-1/2 times, per Article XIV – Section 14.05 of the current collective bargaining agreement; therefore your grievance is denied.

Both grievances were properly processed through the grievance procedure and the arbitration hearing was held on September 26, 2007. At the hearing, Officer Ellis testified that he was specifically told that he would be working the third shift on January 3 and January 4, whereas both Chief Knoebel and his assistant, Patty Blackstone, testified that Officer Ellis was told that he would be working 8 p.m. to 7 a.m. Ms. Blackstone's phone log whereby she recorded the time to be covered also indicates "8 pm – 7A".

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section 2.01: The Village retains and reserves the sole right to manage its affairs in accordance with all applicable laws and regulations and ordinances. Included in the responsibility, but not limited thereto, is the right to determine the number, structure and location of the departments and divisions; the right to direct the work force; the right, subject to the terms of this Agreement related thereto, to determine the specific hours of employment, the length of the work week and the details of employment of various employees; the right to suspend, discharge, demote or take other disciplinary action, the right to release employees from the duties because of lack of work and for other legitimate reasons; the right to contract out for goods or services; the right to maintain efficiency and effectiveness of operations by determining the methods, the means and the personnel by which such operations are conducted; and to take whatever actions necessary to carry out the duties of the various departments and divisions in emergency situations.

Section 2.02: In addition to the foregoing, the Village reserves the right to make, adopt, enforce, and amend from time to time, reasonable rules and regulations relating to personnel policy, procedures and practices and matter relating to working conditions, giving due regard to the obligations imposed by the Agreement and the provisions of Wisconsin Statute, Section 111.70. However, the Village reserves the total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, assignment of personnel, or the technology of performing work. These rights are unqualified and shall not be abridged, delegated or modified, except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of the Agreement. These rights shall not be used for the purpose of discrediting or weakening the Association.

ARTICLE III – GRIEVANCE PROCEDURE

Section 3.01: Any grievance which may arise out of the interpretation of the provisions of this Agreement between the Village and an Officer, or the Village and the Association, shall be handled as follows:

Step One: The aggrieved Officer, and/or the Association representative, shall present the grievance in writing to the Chief, who shall present an answer, in writing, within ten (10) calendar days.

Step Two: If a satisfactory settlement is not reached as outlined in Step One, the Officer and/or the Association representative shall have the right to request a meeting with the Village Administrator. Such request must be in writing and filed within ten (10) calendar days after receiving the Chief's answer set forth in Step One. The Village Administrator shall present an answer, in writing, within ten (10) calendar days of the meeting.

Step Three: If the aggrieved Officer is not satisfied as outlined in Step Two, the Association may within ten (10) calendar days after receiving the Village Administrator's answer set forth in Step Two, inform the Village Administrator in writing that it is submitting the grievance to arbitration as hereinafter provided.

. . .

Section 3.04: The arbitrator shall have the authority to interpret this Agreement in arriving at a determination of any issue presented which is proper for final and binding arbitration, but the arbitrator shall have no authority to add to, subtract from or modify any of the provisions of this Agreement. The arbitrator shall not have authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself or herself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issues not so submitted to the arbitrator nor shall the arbitrator submit observations or declarations of opinion which are not essential in reaching the determination.

...

Section 3.06: All grievances must be submitted in writing at Step One within ten (10) calendar days of their occurrence or within ten (10) calendar days of the time they are known or would have been known with the reasonable diligence on the part of the parties involved, whichever is later, but in no event later than thirty (30) calendar days from the date of occurrence.

...

ARTICLE VI – HOURS PER WEEK

Section 6.01: Effective April 1, 1989, all full-time employees shall work the following schedule: five (5) working days followed by two (2) off days, four (4) working days followed by two (2) off days. Each work day shall include a one-half (1/2) hour lunch period. The Police Chief shall establish the work schedule for part-time employees.

...

ARTICLE XIV – OVERTIME

Section 14.01: Full-time Officers shall be paid in cash at the rate of one and one-half (1-1/2) times the regular rate of pay for all hours worked in excess of a normal work shift or normal work week. Time worked in excess of normal work shift or work week which results from approved exchange of shifts between Officers, is not overtime. This provision will be construed as follows for full-time employees.

- a) Time and one-half (1-1/2) will be paid for all overtime, including mandatory training programs, mandatory shooting range training and mandatory departmental meetings, but it is understood that there is no minimum overtime payment for any type of overtime, except as provided in *Section 14.03*.

- b) The Village has the right to make shift changes to accommodate mandatory training programs, mandatory shooting range training or mandatory departmental meetings without incurring any overtime obligation, provided the Village gives the affected employee at least thirty (30) calendar days prior notice. The affected employee can waive the above thirty (30) day prior notice by signing a waiver as per the attached Appendix "A".

- c) The Village has the right to change an employee's regular off days to accommodate mandatory training programs, mandatory shooting range training or mandatory departmental meetings without incurring any overtime obligations or contravening *Section 6.01*, provided the Village gives the affected employee at least thirty (30) calendar days prior notice. The affected employee can waive the above thirty (30) days prior notice by signing a waiver form as per the attached Appendix "A". The Village agrees that no employee will have more than four (4) regular off days per calendar year changed for such training programs, range training or meetings unless the employee agrees to additional off day changes by signing a waiver form as per the attached Appendix "A".

Section 14.02: Part-time Officers shall be paid in cash at the rate of one and one-half (1-1/2) times their regular rate of pay for all hours worked in excess of eight (8) consecutive hours in a work day.

Section 14.03: Any full-time employee who is called into work outside of his/her normal work shift shall be entitled to a minimum of two (2) hours pays at time and one-half (1-1/2) or time and one-half (1- 1/2) for all time worked, whichever is greater. The two (2) hours minimum shall not apply to time worked immediately prior or consecutive to the employee's normal work shift.

Section 14.04: Any full-time Officer with less than a three (3) calendar day notice who is involuntarily moved from the employees [sic] regularly scheduled hours of work shall be compensated an additional one-half (1/2) hour of pay for each hour worked outside of the regularly scheduled shift hours.

Section 14.05: In lieu of payment for overtime, an Officer may elect to receive compensatory time off on the basis set out above in this Article. In the event an Officer requests compensatory time off, the Officer shall so indicate that on the overtime card submitted. The maximum number of compensatory time off hours which any Officer may accumulate at any one time shall not exceed twenty-four (24) hours. All compensatory time off must be scheduled with the prior approval of the Chief of Police, and al [sic] compensatory time off must be taken off by November 30 of each year, or it shall be paid on the second paycheck in the following December at the rate in effect on such November 30.

POSITIONS OF THE PARTIES

Contrary to the assertion of the Village, the Association contends that Grievance 2007-09 is timely and properly before the Arbitrator. The grievance was filed on February 1, 2007, well within ten (10) calendar days of Officer Ellis' noticing that the discrepancy between his additional pay for January 3 and January 4, 2007 had not been corrected in the manner that he believed was appropriate. After Officer Ellis had received his paycheck on January 12, he discussed his concerns with Chief Knoebel. On January 15, Ellis received a memo from the Chief indicating that the discrepancy was his (the Chief's) mistake and that it would be corrected on the next paycheck. When the correction did not meet Officer Ellis' expectation, he timely filed the grievance.

On the merits of the two grievances, the Association contends that the contractual language is clear and unambiguous, and its clear meaning must be given full effect. Section 14.04 mandates that officers receive an additional one-half (1/2) hour of pay for all hours worked outside an employee's regularly scheduled work shift when reassigned with less than three (3) working days notice. Because Officer Ellis worked the hours of 11:00 p.m. to 7:00 a.m. each of the two days in question, he should be paid the extra one-half hour for all eight hours of each day, as all were outside of his regular work schedule of 3:00 p.m. to 11:00 p.m. In addition, Section 14.05 of the collective bargaining agreement provides that at the Officer's option, "in lieu of overtime, an Officer may elect to receive compensatory time off on the basis set out above in this Article." The fact that Section 14.04 is part of Article XIV - Overtime, implies that Section 14.05 applies to hours earned under Section 14.04. Had the parties intended for the additional compensation an officer receives for working outside of his regularly scheduled shift without three day notice to be ineligible for conversion to compensatory time, there would have been clear language in Section 14.05 to exclude the additional compensation an officer receives under Section 14.04.

The Association also contends that there is no bona fide past practice to support the Village's interpretation of these contractual provisions. To be binding, a past practice must be unequivocal, clearly enunciated and acted upon, regularly ascertainable over a reasonable period of time, and accepted by both parties. Here, a mutual understanding and mutual agreement are missing. Had there been a mutual understanding that additional compensation earned under Section 14.04 was not eligible to be placed in an officer's compensatory time off bank, the grievance would not have been filed. In addition, the Chief testified that in some cases, employees have been able to place the additional compensation in their compensatory time off bank.

With respect to the previous grievance filed in 2003, this was withdrawn without prejudice at the request of the grievant, thus putting the Village on notice that the Association did not agree with the Village's interpretation of the contract language.

Accordingly, the Association asks that the Grievant be compensated an additional six (6) hours at the rate of one-half time for working outside his regularly scheduled work shift on January 3 and January 4, 2007, and that he be permitted, at his option, to have such additional compensation be placed in his compensatory time off bank.

The Village contends that both grievances suffer from serious faults such that they must be dismissed. With respect to the first grievance, the contention that Officer Ellis is entitled to take compensatory time in lieu of short shift pay is directly contrary to the language of the collective bargaining agreement. The contract language provides for compensatory time in lieu of overtime. Additional pay for shift changes without three (3) days notice, "short shift pay", is not overtime but, rather, premium pay which is fundamentally different than overtime pay.

With respect to the second grievance, the Employer argues that this grievance was not filed on a timely basis such that the merits are not properly before the arbitrator. This grievance was not filed within ten (10) calendar days of when the grievant knew of the events giving rise to the grievance. Upon receipt of his pay on January 12, 2007, Officer Ellis became aware that there was a discrepancy between what he thought he was owed and what he was paid. He spoke with the Chief, who responded in writing by memo dated January 15, 2007. This memo advised Officer Ellis that he would not be paid the monies he sought and, therefore, a grievance had to be filed within ten (10) days of receipt of that memo. Officer Ellis acknowledges that he received the memo on January 15, making the filing of a grievance for additional short shift pay on February 1 untimely.

Even if the grievance had been filed on time, the Village contends that it is without merit. The Village has an established past practice of not paying short shift pay concurrently with other premium pay or overtime. Additionally, the Association has waived the right to make a claim for such double payment by unilaterally abandoning a prior grievance on the same issue. The Employer contends that the Association could not simply drop a grievance “without prejudice” and then claim years later that it has not accepted the Village’s interpretation of the contract language. The Association’s choices in 2003 were to arbitrate the grievance to invalidate any dispute as to the contract interpretation or drop the grievance and notify the Village that it was terminating the past practice at contract expiration and attempt to bargain new contract language that invalidates the past practice.

In response to the Association’s allegation that the Village has not been consistent in its application of the contract language with regard to short shift pay, the Village acknowledges one instance in which an officer received compensatory time off in lieu of cash for the premium pay for a short shift change, and that this was done in error. A singular incident neither creates a past practice, nor does it abrogate an existing past practice where the Village has cited multiple occasions where the past practice was consistently applied.

The Village also raises concerns with respect to the remedy sought by the Association, contending that a new remedy was raised for the first time at hearing, and argues that such a request cannot be considered as it was not raised prior to hearing.³

For all these reasons, the Village requests that both grievances be denied and dismissed in their entirety.

DISCUSSION

These grievances involve the interplay of two distinct sections of Article XIV of the collective bargaining agreement between the Village of Kewaskum and the Kewaskum Police Association, Section 14.04 and Section 14.05. The parties have, ostensibly, not agreed upon the manner in which these two contract provisions should be applied for a period of time, although there is some question in the eye of the Village as to whether or not the Association has acquiesced in the Village’s interpretation.

³ I have not addressed this issue as to whatever the Association may have appeared to argue at hearing inasmuch as the written request for an additional six (6) hours at one-half time is consistent with the remedy sought in the initial grievance.

Section 14.04 addresses short shift pay and Section 14.05 addresses accumulation of compensatory time. The two grievances at issue herein arise from events that occurred on January 3 and January 4, 2007. There is no question that the first grievance, 2007-05 regarding compensatory time, was filed on a timely basis. The Village contends that the second grievance, 2007-09 regarding short shift pay, is not properly before the arbitrator because it was not filed within ten (10) working days of the events giving rise to the grievance, or when the grievant knew or should have known that an alleged contractual violation had occurred.

Timeliness of Grievance 2007-09

After Officer Troy Ellis, the Grievant, received his first paycheck after having worked from 8:00 p.m. to 7:00 a.m. each of the nights in question rather than his assigned shift, 3:00 p.m. to 11:00 p.m., he noticed a discrepancy between the amounts paid and/or accrued into his compensatory time off bank and that which he had anticipated. He immediately brought his concerns to the attention of the Chief of Police who reviewed the matter and responded via memo dated January 15, 2007. The memo acknowledged that an error had been made with respect to the one-half (½) time owed for the change in shift, short shift pay, and advised that compensatory time was not available to Officer Ellis for those hours for which short shift pay was received as that was considered premium pay, not overtime, and compensatory time is available only for overtime earned. Officer Ellis immediately filed a grievance, 2007-05, contending that he was entitled to receive compensatory time for the short shift hours in accordance with Section 14.05 of the collective bargaining agreement. He did not immediately grieve what he believed to have been a misapplication of Section 14.04, short shift pay, because he wanted to see if the amount he believed to be correct would be included in the January 26, 2007 paycheck, based on the Chief's January 15 memo.

Upon receipt of the next paycheck, and seeing that he had not been paid the amount that he anticipated pursuant to Section 14.04, Officer Ellis filed another grievance, 2007-09, on February 1, 2007. It is this grievance that the Village believes was untimely in that it contends the January 15, 2007 memo put Officer Ellis on notice that he would not be receiving the amounts he thought he was owed pursuant to Section 14.04 and, therefore, any grievance would have to be filed within ten (10) days of January 15.

A review of the Chief's January 15 memo reveals that it states "In regards to the ½ time that was paid on this pay check. It was my mistake and the difference will be applied to the 01/26/07 paycheck." The memo does not state the additional amount that would be added on the next paycheck, so the undersigned is of the opinion that Officer

Ellis' action in waiting to receive that paycheck was appropriate. Thus, the date on which the Grievant knew of the alleged contract violation was January 26. The grievance was filed on February 1, well within the ten (10) day contractual requirement. Accordingly, both grievances are properly before the arbitrator.

Grievance 2007-05

Grievance 2007-05 raises the question of whether an employee who earns short shift pay pursuant to Section 14.04 is entitled to bank that pay in his or her compensatory time off bank. Section 14.05 provides that "in lieu of payment for overtime, an Officer may elect to receive compensatory time off. . ." Article XIV is entitled "Overtime." Section 14.01 defines the circumstances under which full-time officers shall be paid in cash at the rate of one and one-half (1-1/2) times the regular rate of pay for time worked in excess of a normal work shift or normal work week. The subsections of Section 14.01 use the word overtime, but do not define it other than as to the fact that an employee will receive one and one-half (1-1/2) pay for overtime. Section 14.02 pertains to part-time officers and is not relevant to the issues herein, but it also provides payment at the rate of one and one-half times the regular rate of pay for all hours in excess of eight (8) consecutive hours in a work day.

Section 14.03, also not in play in these grievances, provides that any full-time employee who is called into work outside of his/her normal work shift shall be entitled to a minimum of two (2) hours pay at time and one-half (1-1/2) or time and one-half (1-1/2) for all time worked, whichever is greater. Section 14.04, the subject of both of the grievances, provides that a full-time Officer who is moved from his or her regularly scheduled hours of work without three (3) calendar days notice shall be compensated an additional one-half (1/2) hour of pay for each hour worked outside of the regularly scheduled shift hours. The word overtime does not appear in Section 14.04. This provision provides, according to the Employer, premium pay to the employee. Another way to view this provision is that the Employer pays a penalty in the event of changing an employee's shift without three (3) days notice.

In Section 14.05, the collective bargaining agreement provides that "in lieu of payment for overtime, and Officer may elect to receive compensatory time off on the basis set out above in this Article." In reality, nothing above in Article XIV describes how compensatory time can be received. Rather, it is Section 14.05 which provides that an Officer may request compensatory time off by so indicating on the overtime card submitted.

The Village relies on Arbitrator Millot's decision in CITY OF WAUSAU, MA-13601 (9/07) for distinguishing premium pay for short shifts and overtime pay that, pursuant to Section 14.05, may be converted to compensatory time. In that case, the collective bargaining agreement contained a provision for call-in pay, pre-scheduled overtime and rescheduling shifts, Article 29, that was distinct from the overtime provision, Article 33. In finding that employees who were already present at the work place and asked to commence working 15 or 20 minutes prior to their scheduled work time due to a snow storm were not entitled to receive call-in pay, but who did receive overtime for the period of time in question, Arbitrator Millot was called upon to determine the meaning of the parties' intent in creating the call-in provision. The arbitrator rejected the Union's argument that call-in pay was a specific type of overtime benefit.

Although in Kewaskum the Association and the Village have placed the short shift pay provision in the Article entitled "Overtime", they also placed premium pay for call-in in this section. The provision, Section 14.03, provides that an employee called into work outside of his/her schedule is entitled to a minimum of two (2) hours pay at time and one-half or time and one-half for all hours worked, whichever is greater. This section, like Section 14.04, provides a premium to the employee, or a penalty to the Village, for a schedule change. Like short shift pay, call-in pay is not overtime.

The Village also points to past practice to support its argument that officers working short shifts are not entitled to comp time. It points to Employer Exhibit 9 which, it contends, demonstrates that between 2002 and 2007 there were 31 instances of officers having their shift changed without three (3) calendar days notice. In all but one instance, involving the Grievant herein, the officers were paid the short shift premium pay. The one time in 2005 that Officer Ellis was permitted to bank compensatory time rather than be paid, according to the Village, the Chief erred. Employer Exhibit 9 does, indeed, demonstrate that employees received compensation, rather than accrual to their overtime banks, for short shift hours. However, the record does not indicate whether the employees requested that the time be allocated to their comp times banks, rather than be paid. However, even the fact that a number of the instances represented in Employer's Exhibit 9 include comp time for other hours earned during the same pay periods, I do view Exhibit 9 as persuasive evidence that the Village has not permitted employees to accrue short shift pay as compensatory time.

The Association points to only one instance, that of Troy Ellis, where short shift pay was allocated to his comp time bank. The Chief testified that this was done in error. Deviation, by error, from a practice one time in a five year period does not unravel the ongoing practice of the Village and its consistent, appropriate interpretation of the collective bargaining agreement. Officer Ellis is not entitled to place short shift hours earned on January 3 and January 4, 2007 into his compensatory time off bank.

Grievance 2007-09

Simply stated, the issue in Grievance 2007-09 is whether Officer Ellis is entitled to receive both short shift pay and overtime pay for hours worked on January 3 and January 4 which were both outside of his regularly scheduled shift and which were in excess of his regular shift of eight hours. In other words, does Officer Ellis have the right to pyramid short shift pay and overtime pay?

The Association argues that Section 14.04 requires that Officer Ellis receive one-half (1/2) hour additional pay for each hour he worked outside of his regularly scheduled shift hours. Officer Ellis normally works from 3:00 p.m. to 11:00 p.m. He actually worked from 8:00 p.m. to 7:00 a.m. on each day, January 3 and January 4. The eight hours that he worked from 11:00 p.m. to 7:00 a.m. were all outside of his regularly scheduled shift hours. Accordingly, he should be paid for 8 hours each day for a total of 16 hours, at one-half his hourly rate of pay. In fact, he was paid five (5) hours short shift pay each night, for a total of ten (10) hours. He is therefore, entitled to six (6) additional hours of short shift pay at one-half of his hourly rate, in addition to the overtime at time and one-half that he received for the three hours of overtime that he worked each of January 3 and January 4.

The Village argues that short shift pay and overtime pay should not be pyramided under the terms of the collective bargaining agreement and that Officer Ellis was paid correctly:

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| 8:00 p.m. to 11:00 p.m. | Straight time because these hours were within his regular shift. |
| 11:00 p.m. to 4:00 a.m. | Premium pay of an additional one-half of regular hourly rate for 5 hours. |
| 4:00 a.m. to 7:00 a.m. | Overtime paid at one and one-half time. |

In support of its position that Officer Ellis was paid correctly, the Village contends that additional payment would be contrary to the clear terms of the contract and the established past practice of the parties. Further, the Employer argues that the Association waived its right to make such a claim by unilaterally abandoning a prior grievance on the same issues.

The Village relies on a number of prior arbitral decisions to support its contention that a past practice to not pyramid short shift and overtime payments exists. Initially, the Employer cites CITY OF WAUSAU, WERC MA-6530 (Engmann, 1991) for

the proposition that, in the absence of a written agreement, past practice, if clearly enunciated, unequivocal, acted upon, and readily ascertainable over a reasonable period of time, and accepted by both parties should be utilized to interpret the collective bargaining agreement. The Village then cites Arbitrator Hempe's decision in PRICE COUNTY, WERC MA-1114 (Hempe, 2002) wherein the arbitrator found that the overtime and holiday pay provisions of a collective bargaining agreement were mutually exclusive of one another and relied on the past practice of the parties to deny payment of both to deputies that worked in excess of eight (8) hours on holidays.

While there is no question that past practice of the parties should be used to fill in the gaps in a collective bargaining agreement, as a true past practice reflects mutuality between the parties as to the meaning of the collective bargaining agreement, I do not find reliance on past practice to be needed here. The instant situation is distinguishable from the PRICE COUNTY circumstances in that the contract language itself in those circumstances had been modified by the practice of the parties, and holiday pay was provided in a manner that was not consistent with the contract language. The long-standing practice there is very different from the situation before me.

Although the Village contends that there is a long standing practice of reading Section 14.04 and other premium pay and/or overtime provisions of the collective bargaining agreement separately, other than the Chief's testimony to this effect and an attachment to a letter from the Village's attorney to the Association's representative that purports to be examples of the manner in which the Village has interpreted these provisions, the record does not demonstrate that this is a mutually agreed upon interpretation of the collective bargaining agreement. In fact, the Association filed a grievance in 2003 in which it sought short shift pay for four hours for which the grievant had been paid overtime. The Association subsequently withdrew that grievance without prejudice when the grievant decided he did not wish to pursue the matter.

Although the Village argues that the withdrawal of the grievance in 2003 prohibits the Association from now grieving the Village's interpretation of Sections 14.04 and 14.05, it is clear that the grievance was withdrawn without prejudice. While it would have been better practice for the Association to take some affirmative action with regard to this controversy at the expiration of the collective bargaining agreement as the Employer has suggested, the fact that the grievance was withdrawn without prejudice put the Village on notice that the Association reserved its right to contest the application of the Employer's interpretation at a future date. The record is devoid of examples of this situation arising again since the withdrawal of the grievance, sometime after September 15, 2003 and the January 2007 events. There is no evidence that the

Village has been adversely affected by the failure to process the 2003 grievance, nor that the Association has sat on its hands regarding this matter since that time.⁴ Accordingly, I cannot find that consideration of this grievance is barred by the withdrawal without prejudice of the 2003 grievance.

The Employer contends that it has a well established past practice of not paying both short shift pay and overtime for the same hours. Employer's Exhibit 11 purports to list examples of that occurring during the course of the contract period in effect as of the date of the Employer's letter, September 2003. A review of the circumstances listed there reveals that of the eleven instances cited, only five involved a circumstance similar to the one at bar where an employee was called in early, rather being asked to stay over. In the five cases, the employee, apparently, only claimed overtime in four instances. The other matter, which occurred after three of the possible short shift/overtime situations, was the subject of the above referenced grievance. The fifth instance occurred during the pendency of the grievance and cannot be construed as agreement with the Employer's interpretation of the contract language.

Employer Exhibit 9 appears to be time reports of circumstances in which employees received short shift payments during the period April 25, 2002 through January 6, 2007, including the pay period at issue herein. Unfortunately, it is not possible to determine, from these records, whether employees who were called in to work hours different from their normal shift also worked more than eight (8) hours during those shifts. It is clear, however, that employees rarely receive short shift pay, and the circumstances under which they might claim both short shift pay and overtime appear to be even less.

The Chief's testimony notwithstanding, I cannot find that there is a clear past practice of not paying overtime pay for the same hours that an employee receives short shift pay. Furthermore, it is necessary to look at past practice only when the language of the collective bargaining agreement is ambiguous. The collective bargaining agreement between the parties provides for payment of overtime when a full-time employee works more than a normal work shift or normal work week. The agreement also provides for payment of an additional one-half hour for each hour worked outside of an employee's regular shift when such a change is made with less than three (3) calendar days notice. There is nothing in the collective bargaining agreement that states that these are two distinct, mutually exclusive benefits. There is nothing in the collective bargaining agreement that prohibits the pyramiding of overtime. Being fully cognizant of the authority and the limitation thereon bestowed on the arbitrator under

⁴The situation is very different than that in CITY OF TWO RIVERS, WERC MA-12119 (Gallagher, 2004) or MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, WERC MA-7115 (Gallagher, 1992).

Section 3.04 of the Agreement, “. . . no authority to add to, subtract from or modify any of the provisions of this Agreement”, I decline to add a provision that prohibits the pyramiding of overtime and short shift pay. The parties have a mature collective bargaining relationship and are quite capable of negotiating such language, should that be mutually desirable.

Accordingly, I find that the Grievant is entitled to receive short shift pay for the hours he worked between 4:00 a.m. and 7:00 a.m. on both January 3 and January 4, 2007.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

Grievance No. 2007-05: No, the Employer did not violate the collective bargaining agreement when it refused to allow the Grievant to take compensatory time for short shift hours on January 3 and January 4, 2007. This grievance is denied and dismissed.

Grievance No. 2007-09: Yes, the grievance was timely filed.

Yes, the Employer violated the collective bargaining agreement when it failed to pay additional compensation to the Grievant for all hours the Grievant worked on January 3 and 4, 2007. This grievance is sustained.

As a remedy for this violation, the Employer shall pay the Grievant an additional six (6) hours short shift pay at one-half (1/2) time.

Dated at Madison, Wisconsin, this 24th day of January 2008.

Susan J.M. Bauman, Arbitrator