

BEFORE THE ARBITRATOR

PRICE COUNTY

and

LABOR ASSOCIATION OF WISCONSIN, INC.

for and on behalf of

PRICE COUNTY PROFESSIONAL DEPUTIES' ASSOCIATION, LOCAL 116

Case 97

No. 67244

MA-13814

(Lillie Overtime Grievance)

Appearances:

Lori Blair-Hill, Human Resources Coordinator, Price County Courthouse, 126 Cherry Street, Phillips, WI 54555, appeared on behalf of Price County.

Thomas A. Bauer, Labor Consultant, 206 South Arlington Street, Appleton, WI 54915, appeared on behalf of the Labor Association of Wisconsin, Inc., Price County Professional Deputies' Association, Local 116, and Grievant Joseph Lillie.

ARBITRATION AWARD

Price County and the Labor Association of Wisconsin, Inc., for and on behalf of the Price County Professional Deputies' Association, Local 116, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by Local 116 concerning one of its members, Joseph Lillie, herein Lillie or the Grievant, as to an overtime claim for being ordered to training on his regularly scheduled day off. The Commission designated Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on October 18, 2007 in Phillips, Wisconsin. No transcript was prepared. A briefing schedule was set, extended by the parties, and briefs were filed on February 4, 2008 when the record was closed.

ISSUES

At the hearing the parties stipulated to a statement of the issues as:

Did the Employer violate the expressed or implied terms of the collective bargaining agreement when it ordered the Grievant to attend training on his regularly scheduled off-days without compensating him the appropriate overtime rate?

If so, what is the appropriate remedy?

However, in its written brief the County stated the issue as:

Did Management overreach their rights when changing the Jail Staff's regular schedule to accommodate the training schedule and, if so, violate the contract by denying the Grievant overtime for the hours worked on his "Off" day.

The issues stipulated to at the hearing are adopted as those the parties agreed to at the hearing and based their respective cases on in presenting the evidence and developing the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights that repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but not limited to, the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, demote, discharge and take other disciplinary action for just cause against employees;
- E. To relieve employees from their duties because of lack of work or any other legitimate reasons;
- F. To maintain efficiency of County government operations;
- G. To take whatever action is necessary to comply with State or Federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To determine the kinds and amounts of services to be performed as pertains to County Governmental operation; and the number and kinds of classifications to perform such services;

- K. To contract out for goods or services;
- L. To determine the methods, means and personnel by which the County operations are to be conducted;
- M. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

The Association and the employees agree that they will not attempt to abridge these management rights, and the County agrees it will not use these management rights to interfere with rights established under this Agreement. Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy.

ARTICLE 6 – SENIORITY RIGHTS FOR SHIFT ASSIGNMENTS, LAYOFFS AND RECALLS

. . .

- G. Shift Selection by Seniority:** The County as part of its management rights shall determine the number of positions and the work schedule for each position in each of the three (3) categories. The positions and work schedules presently established by the County are as follows:

The County as part of its management rights has the unlimited right to make changes in the categories and in the number of positions and work hours of the positions in any category.

Shift Assignments for Jail Officers:

Effective Monday, January 6, 2003, Jail Officers will work 12-hour shifts. The shifts are to run from 6:00 a.m. to 6:00 p.m. For the purposes of shift selection, Jail Officers are to be divided between females and males due to various regulations. The male officers will sign for the male Jail Officer positions and the female Jail Officers will sign for the female Jail Officer positions. The County shall then assign positions within each category by seniority. Selections by seniority are to be completed by October 15 for the following calendar year. Any employee who has not selected a shift by October 15 can be assigned to any open shift at the County's discretion. The County is to post the actual shift assignments on or before November 1 for the upcoming calendar year. The shifts posted will be as follows:

. . .

The County is to post the categories and positions under each category by October 1 of each year at the same time the Seniority List For Shift Selection is posted. The Law Enforcement Officers designated as dispatchers shall select the Dispatcher positions, the Law Enforcement Officers designated as road deputies shall select the road Deputy positions and the Jail Officers shall select the Jail Officer positions. The County shall then assign positions within each category by seniority. Selections by seniority are to be completed by October 15 for the following calendar year. Any employee who has not selected a shift by October 15 can be assigned to any open shift at the County's discretion. The County is to post the actual shift assignments on or before November 1 for the upcoming year.

The County as part of its management rights has the unlimited right to make changes in the type, number and work hours of any of the positions and to make changes in the designation of particular Law Enforcement Officers as to being Road Deputy or Dispatcher during the course of the calendar year. Any time the County makes a change, that change is to be posted. Seniority is to again prevail in the selection of shifts for any options affected by any change within fifteen (15) days of when the change is posted. Changing and employee from one shift to another shift can increase or decrease the hours that the employee would normally work. The Employer has the right to make changes in employees work schedules during the pay period in which the shift change occurs to keep the employees hours of work approximately equal to what the employee would have worked without the change.

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ARTICLE 7 – GRIEVANCE PROCEDURE

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B. Steps of Grievance Procedure:

Step 1 An employee or an association representative may file a grievance within ten (10) working days after the employee knew or should have known of the cause of such grievance. The grievance shall be reduced to writing on forms provided by the County and presented to the Sheriff. The Sheriff shall confer with the grievant in relation to the grievance within ten (10) working days of receiving the grievance and the Association representative shall be afforded an opportunity to be present at the conference. Following said conference, the Sheriff shall respond within ten (10) working days in writing.

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ARTICLE 10 – HOURS OF WORK

- A. **Work Year for Jail Officers:** For Jail Officers, the normal work year shall consist of the hours worked following the schedule as set forth in Article 6 under the heading “Shift Assignments for Jail Officers.”
- B. **Work Day:** The normal work day for all employees shall be eight hours. However, effective January 6, 2003, the normal work day for Jail Officers shall be twelve hours.
- C. **Work Schedule for Investigators:** The Investigator will work a schedule of forty (40) hours per week with the normal days of work being Monday through Friday.

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ARTICLE 13 – OVERTIME

- A. Investigators, Law Enforcement Officers and Jail Officers who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half (1-1/2) or compensatory time off at time and one-half (1-1/2) at the employee’s discretion. Overtime must be approved by the Sheriff or Chief Deputy in advance except in an emergency. Time and one-half (1-1/2) payment, if the employee selects pay instead of compensatory time, shall be rendered to the employee no later than the last pay period of the following month.
- B. **Scheduling:** Whenever the employer is aware of overtime with at least forty eight (48) business hours notice, excluding Saturdays, Sundays and holiday, the overtime shall be filled as follows. The overtime will be offered to part-time employees. If there are no part time employees who are available, it will be offered to the full-time employees on a seniority basis within their respective classifications. If none of the employees volunteer for the overtime, the least senior employee in the classification in which the overtime is occurring shall be ordered to fill the overtime slot.

...

BACKGROUND AND FACTS

Grievant is a ten year veteran of the Price County Sheriff’s Department and is an Association Officer. At all material times herein he was working as a Jail Officer. His regular schedule is to work a 12-hour work day, 6:00 a.m. to 6:00 p.m., with a regular work cycle of two days on-duty; three days off-duty; two days on-duty; two days off-duty; three days on-duty; two days off-duty; then repeating the cycle. This schedule had been determined by the provisions of Article 6 and Article 10 of the parties’ collective bargaining agreement which ultimately provides for a normal work year for Jail Officers. Under that schedule, Grievant would normally have been off-duty on April 11 and April 12, 2007.

On January 5, 2007, the Sheriff's Department posted a memorandum which scheduled Grievant, and others, to attend a three day Jail Officer training session in Rice Lake, Barron County, Wisconsin, on April 10-12, 2007. This type of training is required for all Price County Jail Officers to maintain their certifications as Jail Officers. In addition to scheduling the training sessions, the Department changed Grievant's schedule for that pay period to on-duty for the training days and assigned him two new off-duty days. The Department made these scheduling changes to avoid paying Grievant overtime for the two days of attending the training which would otherwise fall on his days off. The Department changed the schedules of all Jail Officers for attending training sessions at various times similarly to the manner in which it changed Grievant's schedule, and overtime considerations were part of the reasons for the change of schedules for the training. These Officers were not paid overtime for attending training on days previously scheduled as off-days prior to the respective schedule changes. The Department did not consult with the individual Officers or the Association before making the scheduling changes. The Association did send a letter to the Sheriff dated January 18, 2007, stating its objection to the changes in schedules and contending that such changes would require appropriate overtime compensation. The letter requested that the schedules be changed back so that they conform to Article 6(G). It alluded to future filings of grievances for employees not being compensated the appropriate overtime rate of pay for working in excess of their regular work week.

Grievant attended the training sessions for all three days. The sessions lasted approximately nine hours each day. The first day he traveled from home to Rice Lake before the start of training. The second day, after training, he also traveled to Chippewa Falls and back to pick up a squad car for Department purposes. After training on the third day he traveled home. He did not work the two days which the Department had re-designated his off-days. He later submitted a time card which requested overtime payments for working April 11th and April 12th, as those had been his previously scheduled off-days. He was paid at his straight time rate for 12-hour shifts for the days at training but, the request for overtime pay was denied by the Department on April 24, 2007. The difference in pay for the regular and overtime rates for the two days is \$110.16.

For various times from January 2004 through March, 2007 both Grievant and Deputy Seth Dabler have received overtime pay for training that they were required to attend on their off duty time. In one instance Grievant attended a training session after his regularly scheduled work day and was paid overtime for the time at the training session. In instances occurring both before and in 2003, 2004, and 2005, Grievant was paid overtime for attending training on a scheduled day off. The shifts had not been changed or adjusted in these instances. Some of this training occurred inside Price County and some occurred outside of the County. A Patrol Officer, David Wesenick, also was paid overtime for attending training.¹

¹ The underlying circumstances were not developed of record at the hearing.

Grievant was also required to attend a training session on March 30, 2006, which was a normally schedule day off for him. The Department changed his schedule to make March 30th a work day and substituted a different day as Grievant's off-day, similar to the arrangement set out above. Grievant did not file a grievance over the March 30, 2006 matter because he believed it was an oversight by the Department. However, the Association did send a letter to the Sheriff to the effect that the Association did not agree with those changes. In January, 2007 a former County Deputy, Tammy Poetzl, had had her schedule changed by the Department to accommodate scheduled training. A grievance was filed over that matter alleging essentially the same claims and issues as in the instant case. That grievance was denied by the County. Poetzl resigned from the Department during the processing of the grievance and it was not pursued further. Another grievance concerned Poetzl not being paid for unscheduled time worked when the Officer was not aware of a schedule change which had otherwise been posted as changed. That grievance was settled by the parties. As part of the settlement, which included payment for the hours, the Department sent a memorandum to all Department personnel on December 15, 2006 regarding Work Schedule, which stated in pertinent part:

All employees are required to check their work schedule on each tour of duty due to frequent scheduling changes within the department.

Any employee reporting to work on a scheduled OFF day who claims pay without the authorization of a supervisor will face disciplinary action, up to and including termination.

The Department changes Jail Officer's schedules frequently because of various trainings, transportation of prisoner needs, trades, days off, and other reasons. Changes are posted ahead of time.

On May 4, 2007 the instant grievance was filed alleging the County violated Articles 2, 6, 10, 13, and any other Article of the collective bargaining agreement, work rule or past practice that may be applicable. The grievance sought overtime payment for April 11th and April 12th, and that the County cease and desist from violating the terms of the collective bargaining agreement. The grievance was denied by the County, leading to this arbitration. Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

The Association

In summary, the Association argues that the collective bargaining agreement provides that employees must be compensated at their overtime rate of pay for time spent in training that is scheduled on their days off. Article 6, Section G, provides that the work schedule is selected on a seniority basis, subject only to the male officer/female officer ratio regulations.

Article 10 provides that the Jail Officers' work schedule is set on an annual basis by seniority. Grievant selected a work selection rotation of 2 days on/3 days off; 2 days on² days off; 3 days on/2 days off, and repeat the cycle. No other contractual provisions permit the Employer to change the work schedule unless there is an emergency. Article 13 provides that Jail Officers who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half or compensatory time off at time and one-half at the employee's discretion. The department scheduled Grievant for training on April 10, 11, and 12. April 10 was a regularly scheduled work day; the other two days were regularly scheduled off days. The Department reassigned Grievant's regular work days of April 9 and 13 as off days, and reassigned April 11 and 12 as work days to attend training and avoid paying overtime. This caused Grievant to work in excess of his regularly scheduled work days and for April 11 and 12 he should have been compensated at the overtime rate of pay. Mandatory training is clearly considered work time. The employer cannot manipulate an employee's work schedule to avoid the payment of overtime to the employee. Management has exercised their management right in an unreasonable manner when they changed Grievant's off days to work days to avoid the payment of overtime for attending mandatory training.

The Association also argues that the past practice of the employer confirms that employees have been paid overtime for training that occurs both within and outside of Price County. Article 13 does not exempt overtime compensation for training that occurs outside the County. Grievant received overtime for suicide training in the Department basement which was held following his regularly scheduled shift hours. Deputy Dabler received overtime for training that occurred on his off duty time on numerous occasions between January 8, 2004 and November 30, 2006. This is illustrated in a chart. This past practice shows that overtime has been consistently paid to employees' scheduled training on their off days, whether in county or out. For the two scenarios where grievances were not filed for overtime denied for training on an employee's off days, in one, Grievant did not file a grievance because he believed it may have been an oversight by the Employer. In the other, the Deputy resigned during the processing of the grievance which voided the grievance. The past practice clearly shows that overtime has been paid out for training occurring on the employees off duty time. The collective bargaining agreement does not exempt the Employer from compensating employees for work performed on their off duty time. With the exception of an emergency, the Employer can not adjust the employees scheduled rotation to avoid paying overtime. The Employer violated the express and implied provisions of Articles 2, 6, 10 and 13 when they changed Grievant's off days to work days to avoid the payment of overtime for attending mandatory training.

The Association asks that the Employer be ordered to compensate Grievant for all hours worked on April 11th (9 hours) and April 12th (9 hours) at his overtime rate of pay (\$24.57) per hour.

The County

In summary, the County argues that Grievant failed to file his complaint in a timely manner and did not meet the requirements of Article 7 of the contract, which requires filing within ten days after the employee knew or should have known of the cause of such grievance. The incident grieved occurred March 28-30, 2006 as this was the first time that management changed the work schedules to accommodate overnight training. Grievant would have needed to file after this first incident in order to fulfill the required time line for filing a grievance. Also, the Association Representative was aware of Management's actions during the hearing for grievance 2006-31 before the Personnel Committee in July, 2006. The Association did not grieve then the change of schedule issue, only a non-payment issue. That grievance was settled, which included payment and a letter to that grievant and a memo to the Members to be aware of work schedules, as they frequently change. Grievant was also aware of Management's position as to changing schedules and payment of overtime when he was the Union Steward during grievance 2007-10 of January 24, 2007, where the same circumstances and facts were grieved by a fellow Officer. The grievance was not carried forward after it was denied. If the Union believed that Management was in violation then the Union had a responsibility to carry it to arbitration. The grievance procedures allow the Union to file on behalf of another.

The County also argues that Management was within its rights to change the Employees' work schedules as outlined in Article 2, noting sections: A. To Direct all operations of the County; B. To establish reasonable work rules and schedules of work; E. To maintain efficiency of County government operations. And the Article also reads: Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy. In addition, the County notes that Article 6 Section G outlines Management's rights to make changes to the set schedule. Once the schedule has been changed and reposted, it becomes the regular schedule for the employee and overtime rules as outlined in Article 13 would apply to any hours worked outside the newly posted schedule. Management made sure to keep the employees whole by paying them for their regular 12 hour shift even though the training days were in fact eight hour days. This was payment at the overtime rate.

The County responds to the Association position that Management did not have the right to change Greivant's work schedule and therefore violated the contract by not paying him overtime. The County argues that the Association points out that the annual work schedule is listed in Article 6, but completely ignores all other language in the Article giving Management the right to make changes to that annual schedule. The language of Article 13 states that work in excess of the scheduled work day or work week shall receive pay at time and one-half. It does not say all hours worked in excess of the annual set schedule shall receive pay at time and one-half. Article 2 and Article 6 give Management the right to change schedules as needed for efficient operations of the Department. Per the contract, Management posted and notified the employees of the change in schedule. In posting the changes to the schedule and paying Grievant time and one-half for the hours worked beyond the reposted schedule, Management fulfilled its contractual obligations to the Grievant.

The County also responds to the Association's position that Management did not treat the Grievant fairly due to not changing other employees' schedules and therefore allowing them to earn overtime. Deputy Dabler has done trainings and did not have his schedule changed. These were one day on site trainings, not multiple days away from the jobsite that involved overnight travel. The Deputy Wesenick example only involved one employee and did not involve multiple days away from the job site and overnight travel. The County responds that every situation is different and the schedule is always changing for one reason or another. Only Management holds all the knowledge necessary to determine the best manner to staff the Department on any given day. It is Management's responsibility and the contract intention to ensure that the community receives effective law enforcement, a high level of protection, and preservation of law and order. Management achieved this by staffing in the most efficient and effective manner as possible. And, grievant is a Jail Officer, while the other examples involved Sheriff's Deputies. They have different duties, responsibilities and schedules and are not true comparisons to the current situation. All Jail Officers were scheduled for off site training and had their annual set schedules changed to accommodate this training. Grievant was treated the same as the rest of his unit and did not receive unfair treatment.

DISCUSSION

The merits of the issue involve an overtime claim by Grievant after his schedule was changed. Besides denying the grievance as to its merits, at each step in these proceedings the County has raised a timeliness objection and defense to the grievance. That will now be considered.

The County's timeliness objection is based on Article 7 of the collective bargaining agreement, which provides in pertinent part:

Step 1 An employee or an association representative may file a grievance within ten (10) working days after the employee knew or should have known of the cause of such grievance. The grievance shall be reduced to writing on forms provided by the County and presented to the Sheriff. The Sheriff shall confer with the grievant in relation to the grievance within ten (10) working days of receiving the grievance and the Association representative shall be afforded an opportunity to be present at the conference. Following said conference, the Sheriff shall respond within ten (10) working days in writing.

The County contends that the Grievance, dated May 3, 2007 and file stamped May 4, 2007, which alleges a violation on April 24, 2007 is untimely because Grievant either knew or should have known the cause of such grievance on March 28 to March 30, 2006. This is because those were the dates the first time Management changed work schedules to accommodate sending employees to overnight training. The County argues that Grievant would have had to file after this first incident in order to fulfill the required time lines for filing a grievance.

Secondly, the County argues that the Association, through its Representative, was aware of Management changing schedules as part of the hearing in grievance 2006-31 on July 7, 2006 – the grievance filed by a Jail Officer to protest not being paid for unscheduled work time due to the fact that she was not aware her schedule had been changed for the day in question. Thirdly, the County argues that Grievant was fully aware of Management's position as to changing of schedules and payment of overtime when he participated in grievance 2007-10 dated January 24, 2007, where very similar circumstances and facts were grieved by a fellow Jail Officer.

The nature of the instant grievance is a claim for overtime for work performed on a changed schedule. Grievant says he was required to go to the training on two off-days. The fact is, his normal schedule was changed for the three day out of County training, and he did not work on the substituted off-days. Although there is a similarity in the change of schedules that is involved in this grievance and the three other instances cited by the County, here it is the grievance of an overtime claim which was made within the ten days of the denial of that overtime claim. The denial of the overtime did not occur until April 24, 2007. The grievance was filed after that within the contractual time limit. In the March 28-30, 2006 schedule change there is nothing of record to show there was an overtime claim associated with that. Grievant did not know and should not have known that his overtime claim was denied as of March 30, 2006.

In the July 7, 2006 incident where a Jail Officer had not been paid for actually working on a scheduled day off, the grievance concerned not having been paid at all, as opposed to not being paid overtime for working on a changed scheduled work day. Grievant did not know and could not have known from that incident that his overtime claim for working on a changed scheduled work day would not be paid.

The Grievance signed February 3, 2007 by Poetzl, concerning similar circumstances to those here, alleged a grievance occurring on January 24 and 25, 2007, which were the changed schedule dates that the grievant therein worked. That grievance was ultimately not pursued to arbitration by that grievant or the Association because the grievant therein left County employment. This left unresolved the merits of that grievance. Here, Grievant received notice of the change in his schedule by memo of January 5, 2007. At that point he did not know and could not have known that he would not be paid overtime for attending training on the changed scheduled work day, nor what the result would be of a grievance filed January 24, 2007. While the January 18, 2007 letter from the Association to the County mentioned overtime, the request in that letter was specifically to have all work schedules changed back so that they conform to Article 6(G). It indicated that grievances would be filed if members were not paid overtime. But again, at that point Grievant had not made his overtime request for his April 11th and April 12th training. On January 18th he did not know and could not have known that such overtime request would be denied by the County. The alleged adverse impact of not

paying overtime to Grievant did not occur until sometime after the notice of schedule change. This is a distinction recognized by arbitrators. As stated in *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 6TH ED., p.224:

A party sometimes announces its intention to perform a given act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect upon another does not result until a later date. In such situations arbitrators have held that the “occurrence” for purposes of applying time limits is at the later date. For example, where a company changed a seniority date on its records as a correction, a grievance protesting the change was held timely though not filed until 9 months later; the arbitrator stated that the basis of the grievance would be the employee’s frustrated attempt to exercise seniority rights based upon the old date, rather than the mere change in the company’s records.

(citations omitted)

The same reasoning applies here where the change in schedule notice to Grievant was not the actual adverse effect, but rather not paying the claimed overtime after the schedule was changed and worked, was the culminating act that allegedly adversely affected Grievant in frustration of his rights under the collective bargaining agreement.

Nor does the decision of the Association not to pursue the Poetzl grievance to arbitration, and the existence of that grievance in and of itself, provide notice to Grievant of the denial of his overtime claim on April 24, 2007. Parties make decisions about not pursuing grievances or arbitrations for many different reasons. Even though the Association might have been able to pursue arbitration of the Poetzl grievance regardless of Poetzl’s wishes, the collective bargaining agreement does not require it to do so. The record established that that grievance simply was not pursued to arbitration, rather than it being settled in some fashion so as to become binding.² Here, Grievant filed his grievance within the contractual time lime once his request for overtime pay was denied, making the grievance timely.

The case now turns to the merits of the grievance. That has to do with whether the County violated the collective bargaining agreement when it ordered Grievant to attend training on his regularly scheduled off-days without compensating him the appropriate overtime rate.

² See, e.g. *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 6TH ED., p.271:

Somewhat different considerations are involved, however, where a grievance has not been mutually settled, but simply has been denied by management at some prearbitral step of the grievance procedure and, for various possible reasons such as lack of funding or available witnesses, has not been appealed further. If management’s denial of a grievance is “accepted” by the union in order to provide the elements of a “settlement” an arbitrator might consider it a binding precedent. But numerous arbitrators have held that the mere failure to appeal a grievance is not per se acquiescence of the disposition of the issue on the basis of management’s final answer that would bar the issue from arbitration in a subsequent case. . . .

Grievant claims he is entitled to overtime. Overtime is addressed in Article 13, which provides:

A. Investigators, Law Enforcement Officers and Jail Officers who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half (1-1/2) or compensatory time off at time and one-half (1-1/2) at the employee's discretion. Overtime must be approved by the Sheriff or Chief Deputy in advance except in an emergency. Time and one-half (1-1/2) payment, if the employee selects pay instead of compensatory time, shall be rendered to the employee no later than the last pay period of the following month.

Here, Grievant worked April 11th and April 12th because the Department changed his normal schedule. He did not work in excess of that scheduled work day. The training was about 9 hours each day. His work day is a 12 hour shift. He had some travel on all three days, either to go to or return from Rice Lake, or to go to Chippewa Falls and back to pick up a squad car. His Officers' Daily Activity Reports shows that including these various travel times he did not exceed 11 hours in any of the three days. Thus, for each day he was scheduled for training, he did not work in excess of the scheduled work day. The work he performed on any of these three days did not entitle him to overtime because it did not exceed the scheduled work day. Grievant's time cards also show that he did not work on the two substituted off-days when his schedule was changed. He did not work any more scheduled work days or work hours in the work week while at training than he would have if his schedule had not been changed. Because his schedule has been changed, Grievant did not work in excess of the scheduled work day or work week so as to be entitled to overtime under the terms of Article 13 A. But this does not end the inquiry.

Although Grievant's claim is an overtime claim, it is based on the fact that his schedule was changed so that his schedule for training had him working on what would otherwise have been two off-days. This gets to the heart of the parties' arguments as to the ability of the Department to change the work schedule. The collective bargaining agreement in Article 6 sets out how the Jail Officers' schedules of shifts are selected for the upcoming year. Article 10 A provides that for Jail Officers, the normal work year shall consist of the hours worked following the schedule as set forth in Article 6 under the headings "Shift Assignments for Jail Officers". Under these two provisions, Grievant's normal shifts and work year for 2007 would have off-days for him on April 11 and April 12, 2007. Thus, in Grievant's view, being required to work on those two off-days would be working in excess of his scheduled work day or work week. This is so even though Grievant has not accounted for the two substituted off-days which he did not work due to the change in schedule. Grievant argues that other than Articles 6(G) and Article 10 A, there is no other contractual provision that permits the Employer to change the employee's work schedule unless there is an emergency.

However, as the County points out, there are other provisions in the collective bargaining agreement which do provide the Department with some ability to change schedules. It is first important to note that what Article 6 (G) and Article 10 A together provide is a normal work year on the shift assignments. Because this is a normal work year, it does not mean that in appropriate circumstances it cannot be changed for certain necessary reasons. The normal work year is the shifts, hours and days which a Jail Officer will normally work. As discussed again below, it does not mean that there cannot be any variance from this norm, so long as the normal shift is not permanently changed itself. A temporary change from this normal schedule, regularly scheduled off-days as phrased in the grievance and issue, is not a change to the normal schedule itself. If it were, Grievant's schedule would not have returned to its norm, which it did. A certain amount of flexibility in scheduling is recognized where a collective bargaining agreement uses the word "normal" in defining a work week As stated in *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 6TH ED., p.726:

Under agreements that expressly define a "normal" or "regular" workweek, management often has been permitted considerable leeway in making adjustments in the workweek as needed for efficient operations. For example, although an agreement specified a normal workweek Monday through Friday, special production needs justified the scheduling of one employee to a Tuesday through Saturday workweek. By the same token, under another agreement that provided for a regular workweek of 5 days, management could schedule a 4-day workweek during a period of reduced production. The arbitrator in that case stated that the provision for a regular workweek was designed to regularize employment and furnish norms from which overtime premiums could be calculated, and not to guarantee employment for all or any group of employees for any specific number of hours per day or days per week. However, one arbitrator found such a restriction in a contractual reference to a "regularly scheduled" workweek. The contract there recited that the workweek would be "five consecutive or regularly scheduled days of eight hours each." The arbitrator interpreted this language as prohibiting management from establishing a variable daily starting time because such a schedule was not "regular" within the meaning of the contract.

(citations omitted)

Similarly, arbitrators have recognized, in the context of scheduling overtime, the word "normal" implies occasional resort to "abnormal". ID. p. 739. The topic is also dealt with in Timothy Heinsz & Terry Bethel, "Wages and Hours" in COMMON LAW OF THE WORKPLACE, 1st ed., Theodore St. Antoine ed. (1998), Chapter 7:

§ 7.16 The Right to Establish and
 Change Schedules

Except as specifically limited by contract, most arbitrators hold that management has the right to establish work schedules, including days of work, hours of work, and the number of shifts. Arbitrators

management to alter existing schedules if the change is supported by a business reason. A contractual provision that recognizes a “normal” or “standard” work schedule will not necessarily limit this right.

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Arbitrators typically require that the employers have a business-related, nonarbitrary reason for changing a work schedule during the contract term. The desire to limit overtime payments often satisfies this test, even in the face of past practice or employee expectations.

The above considerations of the nature of a normal work year, work week and shift assignments are reflected in the specific language of other provisions in the instant collective bargaining agreement. As the County points out, the Management rights clause does give the County the right to establish reasonable work rules and schedules of work, and to hire, promote transfer schedule and assign employees to positions within the County. It is axiomatic that these management rights are subject to the other express provisions of the collective bargaining agreement. But as so far has been seen, Articles 6(G) and 10A provide for a normal work year. Other express provisions grant additional scheduling leeway to the County. Such language is in the beginning of Article 6 (G) which states:

Shift Selection by Seniority: The County as part of its management rights shall determine the number of positions and the work schedule for each position in each of the three (3) categories. The positions and work schedules presently established by the County are as follows:

The County as part of its management rights has the unlimited right to make changes in the categories and in the number of positions and work hours of the positions in any category.

This language would give the county the right to change the work hours of the shifts that are then set out and which formed the basis for the Officer’s shift selections. This is further substantiated in the last paragraph of Article 6(G), which states:

The County as part of its management rights has the unlimited right to make changes in the type, number and work hours of any of the positions and to make changes in the designation of particular Law Enforcement Officers as to being Road Deputy or Dispatcher during the course of the calendar year. Any time the County makes a change, that change is to be posted. Seniority is to again prevail in the selection of shifts for any options affected by any change within fifteen (15) days of when the change is posted. Changing an employee from one shift to another shift can increase or decrease the hours that the employee would normally work. The Employer has the right to make changes in employees work schedules during the pay period in which the shift change occurs to keep the employees hours of work approximately equal to what the employee would have worked without the change.

These various contractual provisions, read as a whole and giving meaning to all of them, show a clear intent of the parties that at least some changes in scheduling is to be afforded to the Department, provided a normal schedule is normally adhered to. The County is also correct to point out that the overtime language in Article 13 refers to a scheduled work day or work week, as opposed to the normal work year or normal work day of Article 10. This distinction between the Articles must be recognized. It is a scheduled work day or work week which is considered in relation to overtime. It does not limit how or if that schedule can be changed, but only that work in excess of the scheduled day or week shall generate overtime. Because of the change in schedule for training, Grievant was scheduled to work April 11th and April 12th and he did not work in excess of his work days, or the work week, even though the actual hours as well as days were changed.

The Association argues that the change of schedule to avoid paying overtime was the exercise of management rights in an unreasonable manner. The management rights clause does provide that the County agrees it will not use these management rights to interfere with rights established under the Agreement. The County admits it started changing schedules for training in 2006 in part to avoid overtime. However, the undersigned is not persuaded that the County has unreasonably exercised its management right in this case where it changed the schedule, temporarily, to accommodate out of county training that took place over three days, and then resumed Grievant's normal schedule. Jail Officers must receive training to stay certified to perform their job and retain employment with the County. It is not unusual or impractical to send employees out of the county for training, and all Jail Officers were scheduled to attend training over various sessions. This presents a need to adjust schedules and is not arbitrary or capricious. The County also has fiscal responsibilities and practical financial limitations which are legitimate concerns that are directly impacted in how it does its scheduling. There is nothing in the collective bargaining agreement which either requires the County to schedule overtime or which prevents the County from avoiding overtime in scheduling.³ The above reference to THE COMMON LAW OF THE WORKPLACE recognizes general arbitral acceptance of avoiding overtime as a legitimate use of the management and contract right to schedule. Since it started making schedule changes in 2006 for training, there is no evidence that Grievant has been treated differently than any other Jail Officer in scheduling or the payment of overtime while at training. There is no evidence that he has been singled out for any different type of treatment. All Jail Officers had out of county training and had their normal schedules changed temporarily to accommodate that training without incurring overtime.

The parties do recognize that sometimes there are scheduling changes, as evidenced by the provision in the settlement of the grievance which involved the memorandum to the Officers reminding them to check the posted schedule as it does change frequently. This may not address overtime itself, but it does show that there are changes to the normal schedule.

³ While there are some instance where management may be denied the right to make temporary changes in the work schedule where the purpose of doing so is to avoid overtime payments, particularly on short notice, in the absence of limiting contract language other arbitrators had permitted management to change work schedules to avoid the payment of overtime, holding that the company is not obligated to provide overtime work. See, e.g. *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 6TH ED. pp.728 ,729.

Certainly the Association, on behalf of its members, has an interest in having a stable or normal work schedule so that the lives and personal schedules of the Jail Officers are given due consideration in a predictable schedule. That is why it is important to recognize the normal work year must remain the norm, even if it can be temporarily changed in a reasonable manner for a legitimate reason. Here Grievant was given notice of the change on January 5, 2007 for work days to occur well into April. Certainly the parties cannot expect that an exception to the normal work year and work day will become the norm, or that any claim of efficiency could justify wholesale changes of normal schedules. However, such scenarios are not presented in this case.

There is also the Association argument that the past practice of the Employer confirms that employees have been paid overtime for training that occurs both within and outside of Price County. As the Association asserts, there is no question that mandatory training is work time. As a matter of historical fact the record demonstrates that, indeed the County has paid overtime to employees for training that occurred within and outside the County. The record is also clear that in all such instances the overtime was for hours worked in addition to or in excess of the otherwise scheduled hours of the employees. This includes training that occurred on days that were normally scheduled off-days. In those particular instances the employees' normal schedule was not changed, but the training hours were worked in addition to the normal schedule. That is different than the instant grievance. The collective bargaining agreement is silent on the concept of outside or within the County when work is scheduled. It makes no difference whether training is inside or outside the County. Grievant may be correct that there might be a past practice of paying overtime to employees for scheduled training that occurs on their off-days, whether in County or out. The language in the collective bargaining agreement appears to require such payment even in the absence of any past practice. Under the circumstances of those trainings, it occurred in excess of the normally scheduled work week. What is important is whether there was overtime involved, not where the training took place.

Past practices can be helpful in interpreting agreements that have ambiguous language as a way of determining what the intent of the parties was in drafting and applying the language. There is no ambiguity here. As noted above, the language in the agreement gives the County the right to make a scheduling change, at least temporarily. Neither is there an application of overtime or scheduling language in a manner similar to this case as pointed out immediately above. Past practices can also be helpful in determining if certain conduct of the parties is binding even if the subject matter is not found in the written agreement. As set out in *Elkouri & Elkouri*, HOW ARBITRATION WORKS, (6TH Ed.) pp. 605 – 609, a past practice, to be binding, must be unequivocal, clearly enunciated and acted on, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. As is seen from factual distinctions between the instant case and the other cases where overtime was paid for training in addition to scheduled time, there are no other instances of record where overtime was paid for working a schedule, but not in excess of that schedule, which had been changed. There is no past practice that helps Grievant's case.

The collective bargaining agreement does contemplate and allow the County to make some, at least temporary, changes in the normal schedules. Grievant did not work in excess of his scheduled, albeit changed scheduled, work day, work week and work year, when he attended training on April 11 and April 12, 2007. The Employer did not violate the expressed or implied terms of the collective bargaining agreement when it ordered the Grievant to attend training on his regularly scheduled off-days without compensating him the appropriate overtime rate.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 15th day of April, 2008.

Paul Gordon /s/

Paul Gordon, Arbitrator