

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF SHOREWOOD

and

**SHOREWOOD POLICE ASSOCIATION LOCAL 307 OF THE
LABOR ASSOCIATION OF WISCONSIN**

Case 54
No. 68425
MA-14237

(Overtime Compensation Grievance)

Appearances:

Mark Olson, Attorney, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202, appeared on behalf of the Village of Shorewood.

Benjamin M. Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, WI 53022, appeared on behalf of the Shorewood Police Association Local 307 of the Labor Association of Wisconsin and Officers Kelvin Walton and Deanna Otto.

ARBITRATION AWARD

The Village of Shorewood, herein the Village, and the Shorewood Police Association Local 307 of the Labor Association of Wisconsin, herein the Association, 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 two grievances filed by the Association on behalf of the Association and two of its members, Officer Kelvin Walton and Officer Deanna Otto, concerning overtime and mileage claims submitted by the Officers respectively. The grievances were processed through the grievance procedure and were combined for purposes of arbitration. When arbitrator Marshall Gratz became unavailable, the parties jointly requested Commissioner Paul Gordon to serve as arbitrator. Hearing was held in the matter on April 29, 2009 in Shorewood, Wisconsin. A transcript was prepared. The parties filed written briefs and reply briefs and the record was closed on July 14, 2009.

ISSUES

The parties did not stipulate to a statement of the issues and agreed the arbitrator could frame the issues. The Association states the issues as

Did the Village violate the collective bargaining agreement when it did not pay members of the Association the appropriate overtime rate and mileage rate for being ordered to update their uniforms outside of their regularly scheduled work hours?

If so, what is the correct remedy?

The Village states the issues as

Did the village violate any provisions of the 2008-2009 Collective Bargaining Agreement when it did not pay overtime and mileage reimbursement to employees who were directed to place new patches on their uniforms in April of 2008?

The undersigned frames the issues as

Did the Village violate the collective bargaining agreement when it did not pay the overtime rate and mileage reimbursement to Officers ordered to place new patches on their uniforms, which was expected to be done outside of their regularly scheduled work hours?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section 2.01: The Association recognizes the prerogatives of the Village to operate and manage its affairs in all respects in accordance with its responsibilities and in the manner provided by law, and the powers or authority which the Village has not specifically abridged, delegated or modified by other provisions of this Agreement are retained solely by the Village. Such powers and authority, in general include, but are not limited to the right to determine the services and level of services to be offered by the Village, to establish, continue, abolish, or alter policies, practices and procedures for the operation of the Village, to determine the number and types of employees required, and to increase or decrease the number of employees accordingly, and to assign work, to determine if overtime work is to be required, the amount of it and the employees who are to perform it, to promulgate reasonable rules and regulations, discipline for just cause, and the right to contract with others to provide service. The Village agrees and recognizes that the Association does not forfeit any of its statutory rights to negotiate on mandatory subjects of bargaining regarding wages, hours, and conditions of employment pursuant to Wisconsin State Statute, 111.70.

ARTICLE VI – OVERTIME

Section 6.01: Overtime shall be paid at the rate of time and one-half (1-1/2) for all hours worked over eight (8) hours per day or forty (40) hours per week, subject to the provisions of Section 5.03 hereof. The rescheduling of a work shift to avoid payment of overtime will not be permitted unless the officer mutually agrees, and the rescheduling period is not less than thirty (30) days nor more than sixty (60) days. However, the scheduling of hours worked for a duty shift will remain under the control and discretion of the Chief of the Police Department as prescribed by the Police Department Rules and Regulations. In addition, the Police Chief may continue to reschedule employees' hours so as to avoid any overtime payments when such employees attend the annual twenty-four (24) hour in-service training program. Subject to provisions of Federal and State law:

A. Employees of the department shall have the option of having overtime paid in cash or compensatory time off.

B. Compensatory time off, if requested by the employee, shall be at the discretion of the Chief.

It is the understanding between the parties that regulation of compensatory time shall remain within the guidelines set forth in the Fair Labor Standards Act where it applies to law enforcement personnel, and that the work period shall be twenty-eight (28) days in length. Wages received while on training will be limited to eight (8) hours of straight time per day.

Section 6.02: A recall to duty for any reason will be paid at the rate of time and one-half (1-1/2) with a minimum guarantee of three (3) hours.

Section 6.03: A guaranteed minimum of three (3) hours at time and one-half (1-1/2) will be paid for court time for all off duty personnel.

Section 6.04: Overtime paid under this Agreement shall be based upon the regular rate of each employee as of the date the overtime is earned.

* * *

Section 6.06: Overtime will only commence upon reporting for duty and end upon completion of said duty. Travel time reporting for duty, and travel time after completion of duty will not be considered compensable unless traveling in a department vehicle. All time spent using a department vehicle traveling to and from a destination point while on official police business or at the direction of the Chief of Police, shall be compensable time and the Officer shall be considered on duty. The Employer will make a vehicle available for all Village related business unless circumstances exist that preclude the Employer for being able to make a vehicle available. If a vehicle is not available, then the employee will take his own car and collect mileage from the Employer. In this case the employee will not be considered on duty until the employee reaches the point of destination and will be considered off duty as soon as he leaves the point of destination provided that he is through working for the day. If there is more than one point of destination which the employee will be required to attend

on Village business, then all travel time between points of destination will be considered as on duty time. The Employer may, if the situation warrants it, direct the employee to use his vehicle to attend a school or training seminar if it is more reasonable to travel from the employee's home to the point of destination and the distance to the point of destination is less than the mileage to the police station. Wages received while on training will be limited to eight (8) hours of straight time per day.

* * *

ARTICLE XVIII - CLOTHING ALLOWANCE

Section 18.01: Employees shall be entitled to a clothing allowance to be accumulated in a drawing account for the purpose of purchasing all leather goods pertinent to the uniform, uniforms, equipment, and for the purpose of cleaning uniforms. New employees shall be covered under the provisions of Section 18.03. For all uniformed employees except those assigned to bike patrol, the clothing allowance shall be five hundred seventy five dollars (\$575.00). For Detectives and persons assigned to bike patrol, the clothing allowance shall be six hundred twenty five dollars (\$625.00). The Chief of Police shall have complete discretion in the approval or disapproval of items eligible for purchase. Payments from such allowance are to be made to the vendor or to the employee, if he/she has paid the bill, upon presentation of an itemized voucher verified and approved by the Police Chief and allowed by the Village Board. Such verification, approval and allowance shall not be unreasonably withheld provided the voucher relates to an item of the uniform or equipment. Any unused accumulation in any drawing account shall at all times remain the property of the Village and a part of the general fund; under no circumstances shall it be considered as salary. Any unused accumulation in any drawing account at the end of each calendar year may be carried over into the following year.

ARTICLE XXV - USE OF OWN MOTOR VEHICLE TO CODUCT VILLAGE BUSINESS (MILAEGE)

Section 25.01: If an employee uses his/her own vehicle conducting Village business, the employee shall be paid mileage in the same amount per mile as is paid all other Village employees for such use, in addition to the cost of parking; provided, however, that in no event shall an employee be paid for using his motor vehicle when traveling from the employee's residence to the Village, or from the Village to the employee's residence.

BACKGROUND AND FACTS

The Village Police Department has about 25 sworn Officers and a non-sworn staff of 10. The Department, through the Chief of Police, from time to time directs that Officers change or add certain emblematic patches or U.S. flag patches to their police uniforms. New patches were ordered to be added in 1997, and U.S. flags were ordered to be added in 2002. The costs of the patches and flags and any cost to have them sewn onto uniforms have been paid for by the City directly or out of each Officer's uniform allowance account. In 2008 the Department adopted a new shoulder patch for uniforms. By memorandum of April 7, 2008 to all sworn personnel, Chief David Banaszynski issued the following order:

Effective immediately all new uniform items which require a department shoulder patch will use the new department patch.

A supply of these patches will be taken to Lark – you will not need to take new patches to Lark with your uniform items.

All existing uniform items will be changed out at the department's expense. You will not need to have a purchase order to have this work done. I am requiring this work to be done by July 15, 2008. After that date, this change to any of your uniform items will require an approved purchase order and the cost will be deducted from your uniform account; so make sure you include both your summer and winter uniform items prior to July 15th.
(emphasis supplied)

The Lark mentioned in the memorandum is a uniform supply store that is used for the Shorewood Police Department for about 90 percent of its uniform supplies. The Department also uses Streichers, which is a gun uniform store used for more of the leather-goods type equipment. Were an Officer not to comply with the memorandum by the required dates they would have faced discipline.

The 1997 emblematic patch and the 2002 flag patch directives were complied with by the Department Officers for the most part on their own time and without any wage, overtime or mileage claims, and no grievances were filed by the Association concerning those matters. Officers were allowed to do this while on duty if manpowered levels permitted and the store was open during the shift. Some Officers did attend to those matters while on duty; some did it while off duty. The relevant language in the collective bargaining agreements for those respective time periods was the same as in the agreement in effect in April through July of 2008.

Uniformed Officers are required to maintain and clean their uniforms and replace them when necessary. The purchase, repair, cleaning and replacement of uniforms is done by the Officers usually while not on duty. Plain clothes Officers in the bargaining unit, like uniformed Officers, have clothing allowance accounts and purchase clothing usually while not on duty. Payment of wages, overtime and mileage for these matters done while not on duty has

not been made by the Village or requested by Officers in the past. Similarly, the Department has grooming requirements as to hair length, moustaches and beards. These grooming matters are attended to by the Officers while not on duty, and no claims for wages, overtime or mileage have ever been made or paid.

The Officers complied with the April 17, 2008 order while off duty. None asked to do it during their normally scheduled work hours or shifts. Village vehicles were not made available for that purpose. No Officers received any wages for the time involved in taking their uniforms to Lark or having the patches sewn on. No Officers received mileage for using their own vehicles associated with having the patch put on their uniforms.

There were other purchase orders issued in 2008 for uniform changes – other than the new patch - and no payment of wages, overtime or mileage was claimed by or made to Officers for those. There were at approximately such 54 purchase orders for Lark, and approximately 15 for Streichers. No grievances were filed by the Association concerning those other uniform purchase orders.

All overtime hours in the Department are authorized or assigned by supervisors and the Officers themselves do not unilaterally determine if they are going to work overtime. As to the April 7, 2008 memorandum, no overtime was authorized or assigned by supervisory personnel to any Officer to have the patch put on the uniforms, and no Officers requested overtime before having the patches put on their uniforms.

After the Officers complied with the April 7, 2008 order two of them filed claims for overtime and mileage for the time and personal vehicle mileage involved in taking their uniforms to Larks to have the patches changed and then picking them up afterwards. Officer Otto submitted an overtime card for 1 hour and ten minutes and a mileage reimbursement card for 58 miles for the time spent off-duty to update her uniform. Officer Walton submitted an overtime card for 1.5 hours for the time spent on his off-time to update his uniform. The overtime and mileage cards were denied by the Department. The Association then filed grievances over these denials, contending that the Officers had been ordered to update their uniforms outside regularly scheduled work hours and were not paid the appropriate overtime rate and mileage. The grievances alleged these were violations of the collective bargaining agreement under Article II Management Rights, Article VI Overtime, Article XXV Use of Motor Vehicle to Conduct Village Business (Mileage) and any other Articles or Section that may be applicable. The Chief of Police denied the grievances. Through the grievance process the grievances were refined to include a claim for each officer of three hours of overtime pay. This was also denied, leading to this arbitration.

Further facts appear as are set out in the discussion.

POSITIONS OF THE PARTIES

Association:

In summary, the Association argues that all work time must be compensated. The most basic aspect of the Fair Labor Standards Act is that it requires employees to be paid at least the minimum wage for all hours worked. The Chief's memorandum of April 7, 2008 was ordering

the Officers to engage in specific duties as members of the Police Department. The memo states in pertinent part that: "I am requiring this work to be done by July 15, 2008". By doing so the Village is required to pay each employee for their time. If an officer failed to follow the order they would be disciplined. This is a completely different issue than purchasing uniforms on a yearly basis. Employees receive an annual uniform allowance to continually update their uniforms, and they only lose that annual uniform allowance amount that they do not use. In this case the Chief made the sole decision to order the employees to add the patch by July 15, 2008. Thus, the Chief turned this into something more than using the annual uniform allowance. To say the two issues are the same is a great stretch of imagination. If the Chief had not put out his order, no Officer would have been required to engage in their job duties to comply with the order.

The definition of "work" is contained in *Black's Law Dictionary, Eighth Edition, 2004* as "To exert one's self for a purpose; to put forth effort for the attainment of an object; to be engaged in the performance of a task, duty, or the like. The term covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement."

The Association fails to see how a disagreement could still exist on whether or not the members of the Association were engaged in the performance of a task, duty, or the like that was ordered by the Chief. Since the Officers were engaged in the performance of a task ordered by the Chief, the Village has the obligation to compensate them under Section 6.01 and 6.02 of the collective bargaining agreement.

The Association argues that there is not an established past practice - it being likely the Village will argue that a past practice has been established to support the failure to compensate the employees for updating their uniforms. A binding past practice must include, among other things, both parties' acceptance, mutual agreement or understanding, and that it can never prevail over the specific language of the contract, citing various arbitral authorities. Clearly lacking in this case are mutual understanding and mutual agreement. There is no meeting of the minds as to how the Department uses Section 6.01 and Section 6.02 for work outside the normal work schedule or when called to duty for any reason. If there were such mutual understanding that the Officers would not be paid, then why would they put in overtime cards requesting compensation? For that reason there is a difference of opinion on the language in Section 6.01 and Section 6.02. And, the Village only offers one previous memo of January 25, 2002, which has a number of differences from the 2008 memo. The former gave the members 1.5 years to add the U.S. flag to new uniforms, not the 2.5 months in the current order. The Chief understood a longer length of time would allow employees to work through the current uniforms without being required to add patches. Here, the urgency to add the patch was as part of a Village marketing program. Ironically, the old logo is still on a sign in front of the Police Department. The Association does not follow the logic on why uniforms needed to be updated within 2.5 months but the sign did not need to be changed in over 13 months. The parameters of a past practice have not been met and there cannot be any mutual agreement that the Village interpretation is correct. There is no mutual understanding or mutual agreement.

The Association also argues that the remedy requested by the Association is reasonable and appropriate. The Association is asking for compensation for all members of the Association who were required to update their uniforms while off-duty per the order of the Chief, and that they be compensated for three (3) hours at the rate of time and one-half plus mileage. That remedy was brought forth by the Association during the grievance process. It is based on the clear and unambiguous language of the collective bargaining agreement and is appropriate and reasonable.

In reply to the Village arguments, the Association contends that it has no choice but to address the Village's misstatements of fact. If an employee could have been disciplined for not following this order, then how can the Village claim the employees were not on duty at the time? Why would the Grievants have to receive prior authorization to be compensated at the appropriate overtime rate of pay for complying with a direct order from the Chief of Police? This was not your typical off-duty uniform change; this was a very specific order from the Chief to have the new patch on the uniforms, and no vehicle was made available to these Grievants. The Officers were performing Village Business in their personal vehicles. Comparing an order from the Chief to update uniforms with new patches to the every year uniform update is like comparing apples to oranges. Had it not been for the order from the Chief, no officer would have had to take all their uniforms to Lark's. There was no grievance in 2002 because the Chief understood the issues, grandfathered in current uniforms, and gave the Association approximately 1.5 years so a normal uniform cycle would have been completed. If the Chief's intent was to allow Officers to go to Lark while working, the memorandum should have stated as such. Once the Chief ordered the employees to update their uniforms with the new patch or face discipline, the officers were engaged in the performance of a task, duty, or the like by following the Chief's order. Consequently, the Village has the obligation to compensate them per Sections 6.01 and 6.02 of the collective bargaining agreement. Dropping uniforms off at Lark's became Village Business as soon as the Chief made his order to the employees and testified that they would face discipline if they refused his order. How that cannot be Village Business is beyond the Association. The Village is trying to distort the issue as if the order was nothing out of the ordinary.

Village:

In summary, the Village argues that the clear and unambiguous language of the contract dictates that employees are not entitled to overtime pay or mileage for off-duty time spent having new patches placed on their uniforms. Clear and unambiguous contract language must be given affect by the arbitrator. Section 6.02 stats that "a recall to duty for any reason will be paid at the rate of time and one-half (1-1/2) with a minimum guarantee of three (3) hours." Section 6.03 states that "A guaranteed minimum of three (3) hours at time and one-half (1-1/2) will be paid for court time for all off-duty personnel." Pursuant to the clear and unambiguous language, a minimum of three hours under Section 6.02 is only provided if the Officer is "recalled to duty". A three hour minimum under Section 6.03 only applies to court time. Section 6.06 states that "Overtime will only commence upon reporting for duty and end upon completion of said duty." For an employee's own vehicle use, "the employee will not be

considered on duty until the employee reaches the point of destination and will be considered off duty as soon as he leaves the point of destination.” The language has not changed since 1977. The Village followed this language to provide for overtime only for court appearances and recall to duty. The agreement does not provide for overtime for uniform changes. All overtime must be assigned and pre-approved, not unilaterally taken by an Officer. Here, overtime was never assigned or authorized by a supervisor. The employees were not “recalled to duty”. The memorandum did not authorize overtime pay in order to replace the patches. Overtime has never been approved for adding patches to uniforms or for uniform maintenance and replacement. The Association admits that pursuant to Section 6.06, if an Officer uses his or her own car for the purposes of dropping off a uniform at Lark’s, he or she would not be entitled to any overtime pay for any time spent driving their vehicle, but only for the few minutes in the shop. But the Association requested three hours despite the Grievants’ requests for less than three hours. The clothing allowance does not provide for payment of mileage reimbursement for uniform changes. It is only paid for Village Business. Village Business is only going to court while using their own vehicle, going to school, or reporting to the District Attorney’s office. Village Business is not dropping off uniforms at Lark’s. Mileage has never been paid for off-duty uniform changes. Dropping off uniforms at Lark’s only takes a few minutes and could have been accomplished during on-duty time if anyone had asked the Chief. It does not qualify for any overtime whatsoever. The Agreement does not provide for mileage for such purposes. There is no support for the Association’s claims. The benefits have never in the past been paid to any employee under circumstances such as here.

The Village argues that past practice dictates the Officers are not entitled to overtime pay or mileage reimbursement for time spent having patches replaced on their uniforms. The essence of past practice is mutual agreement, manifested by the parties’ conduct, citing arbitral authorities. The long standing practice in the Shorewood Department is that overtime pay and mileage reimbursement have not been provided to Officers who spend off-duty time in maintenance, repair or updating their uniforms. Consistent with past practice, the Officers were not required to pay for the changes in the patch here. And the Village has not paid for mileage reimbursement consistent with clearly established and long standing past practice. The Department did not pay overtime or mileage in 1997 for patch changes, and there was no grievance. The Department did not pay overtime or mileage in 2002 for flag patches, and there was no grievance filed. The Village did not pay overtime or mileage in 2008 for 69 separate purchase orders for uniform items, and no grievances were filed. The Village has not paid overtime or mileage for off-duty time spent keeping uniforms maintained, in good repair, and clean throughout Village history, and there have been no grievances filed. The Village has not paid overtime or mileage for detective clothing purchases, and no grievances have been filed. The same goes for haircuts or grooming to comply with Department grooming standards. There is no justification for the Association’s position. Neither language in the agreement nor practice supports the Association argument here.

In reply to the Association’s arguments, the Village contends that established past practice dictates that the Officers should not receive overtime pay or mileage reimbursement

for having patches changed on their uniforms. The Association fails to admit or comprehend that its repeated historical inaction in deciding not to grieve the numerous past instances in which its members were not compensated for uniform maintenance constitutes acceptance of a past practice. There are numerous occasions in which this past practice was exercised. By Village action and Association inaction by failing to grieve, the Association has agreed to that past practice and cannot now unilaterally renounce it. Association agreement and acceptance of this is in the 1997 uniform patch, the 2002 flag patch, the 69 purchase orders in 2008, and 27 years of the Department never paying overtime or mileage for uniform items. No Officer has ever requested to go on duty and be paid overtime for this. It has always been done off-duty. The Association has never grieved these matters. This like the grooming and plain clothes detective matters which also supports the past practice.

The Village contends that dropping off uniforms to have patches changed is not compensable work. This case is not a complaint under the Fair Labor Standards Act as to the meaning of work. The parties have not authorized the arbitrator to decide federal law. And the *Black's Law Dictionary* citation, which is not precedent, ignores the fact that repair or maintenance of uniforms is similar to the daily tasks necessary to report to work, but is not compensable work. And the definition does not say one must be compensated for that work. The Association argument leads to an absurd result, which must be avoided, citing arbitral authority. The Association argument is like asking compensation for things like shaving before a shift, eating breakfast, or opening the garage door to drive to the station. These things must be engaged in to work for the Department and are obligatory, but are not compensable work. These things do not serve the public. Dropping off a uniform is not a job duty; it is an act to conform to a Department standard. Similarly, uniform cleaning and personal grooming carries the same weight as a direct order and employees can be disciplined for not following those policies. None of these activities, which are necessary in order to be prepared to work, are work as alleged by the Association here. By performing these activities the Officer is only placing himself or herself in a position to be ready to do on-duty activities. That the officers are directed to make themselves ready to perform their job duties does not make such preparation compensable work. It is like putting fuel in a personal vehicle to be able to transport oneself to work. Requesting three hours compensable time for an act no different than that is absurd.

The Village further contends that the Association requests relief for individuals who are not party to the grievances. The Association asks for three hours overtime pay, plus mileage, for all Association members required to update their uniforms. However, the grievance itself only referred to two Officers and did not contemplate a remedy for all Officers in the Association. At no point in the grievance does the Association request that the remedy be extended to all members. It does not ask for three hours of overtime pay for either Officer. To expand the remedy beyond the request in the grievance deprives the Village of due process rights and notice of potential remedies. This is historically denied, citing arbitral authority. Any relief should not be extended to three hours or to any other members not a party to the grievance. The grievance was not amended and the Association did not clarify its remedy at the hearing.

The Village argues that any editorial comments made by the Association regarding the use of the new logo are irrelevant and inappropriate. Association statements about the logo throughout the facility are not supported by record evidence. Any copies of the old logo are irrelevant to the contract issue and past practice. Signs in the Village facilities are for the administration to determine, and the Association's arguments should be disregarded.

The Village requests that the grievance be denied.

DISCUSSION

The issues in this case concern whether the Village breached the collective bargaining agreement by not paying overtime and mileage claims of two Officers for taking their uniforms to a uniform store to have shoulder patches changed while off-duty. The uniforms were taken there pursuant to a memorandum from the Chief of Police which was an order that could be enforced by disciplinary action if not complied with. Although the memorandum does not state it, the record demonstrates that there was an expectation by everyone involved that the uniforms would be taken to the store while the officers were off-duty. The memorandum does not indicate otherwise, in the past attending to uniform matters was done while off-duty, the Officers' actions, grievances and arguments demonstrate that they did this off-duty, and no Officer asked to do this while on-duty as some had occasionally asked in the past. This all strongly indicates, and demonstrates, that everyone understood this was expected to be done while off-duty.

The Association contends that by following the order the Officers were performing work and duties for the Department and are entitled to overtime because they were, through the memorandum, recalled to duty entitling them to three hours of overtime pursuant to Section 6.01 and Section 6.02 of the Agreement. The same argument is made for the mileage claim under Section 25.01. The Village contends that there is no contractual language that entitles the Officers to overtime and mileage in this case, that this was not compensable work, and that there is a longstanding past practice of not paying overtime wages of mileage for attending to uniform matters while off-duty.

Resolving the issues ultimately is a matter of determining if the parties intended these actions to be covered by the wages, overtime and mileage provisions of the collective bargaining agreement. Usually the language of the agreement itself indicates the intent of the parties if clear and unambiguous with the various provisions of the agreement read as a whole. If the language is ambiguous or there are gaps, then the interpretation of the agreement is informed by bargaining history or established past practice, if any.

The Grievances contend that Section 6.01 entitles the Officers to overtime because the uniforms were to be dropped off outside the eight hour per day and forty hour per week provisions. That Section states in pertinent part:

Section 6.01: Overtime shall be paid at the rate of time and one-half (1-1/2) for all hours worked over eight (8) hours per day or forty (40) hours per week, subject to the provisions of Section 5.03 hereof.

The Association argues that this then became a recall to duty which entitles the Officers to a minimum of three hours of overtime under Section 6.02, which states:

Section 6.02: A recall to duty for any reason will be paid at the rate of time and one-half (1-1/2) with a minimum guarantee of three (3) hours.

And, because the Officers used their own vehicles to drop off the uniforms, the Association invokes Section 25.01 to claim mileage because this was Village business. The April 7, 2008 memorandum was enforceable by discipline and, as explained above, it was expected to be followed while off-duty. The Association has put forth a plausible argument and interpretation of the agreement.

The Village also puts forth a plausible argument and interpretation of the agreement. It points out that there is no specific language in the agreement that makes attending to the uniform patch, similarly to cleaning, maintaining, repairing and purchasing uniforms or Detective plain clothes, compensable work. The Village also points out that overtime must be authorized by a supervisor or requested by an Officer before overtime is requested, and that was not done here. The Village notes that this is not court duty under Section 6.03 of the agreement. It argues that this was not a return to duty under Section 6.02 of the agreement because this was a uniform matter to be prepared to work, rather than actually performing Department work and duties as Village business. That also eliminates the applicability of the mileage provisions because the Officers were not on duty under Section 25.01. The provisions for clothing allowance under Section 18.0 does not provide for payment of wages for purchasing uniforms, equipment and cleaning uniforms.

With both parties presenting plausible interpretations of the agreement language, there is an ambiguity. There is no bargaining history of record to aide in resolving the ambiguity and determine the intent of the parties. There is, however, significant history of how attending to uniform matters has been viewed and handled by both parties. When faced with ambiguous contract language, evidence of past practice can indicate the proper interpretation of the language. In order for a past practice to become binding as part of a collective bargaining agreement, such practice must be well established. 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.

The threshold question, one raised by the Association, is whether putting on the patch is attending to uniform matters as otherwise established by the record. The Association contends that by specifically ordering the patch to be on the uniforms within 2.5 months this makes it different than the 1.5 years the officers had in 1997 to add new patches. The undersigned is not

persuaded that this difference is material. There is no question that the patch is part of the uniform. Uniforms are expected to be clean and in good repair. That is an ongoing matter, even if the 1997 change was allowed to be made in conjunction with getting new replacement uniforms. The uniform account was specifically referenced in the April 7th memorandum as one way that Lark's charges for the patch change might be paid. This is in compliance with and is a reference to the clothing allowance under Section 18.01 of the agreement. Contrary to the argument of the Association, the patch change here is a matter covered by uniform or clothing allowance accounts. This places it squarely in the scope of past practice related to uniforms. Dropping the uniforms off to have a patch put on is the same type of thing as having a uniform repaired, cleaned, or purchased in the first place.

It is true, as the Association argues, that the Officers were ordered to take certain actions and do certain things by a specific date. On the face of it the memo does require work as defined by the dictionary. But, the question here is whether this is compensable work or a duty requiring payment under the collective bargaining agreement. That question is answered by looking to past practice.

The question then turns to what, if any, past practice has developed to aide in resolving the ambiguity. There is no question that for at least approximately 27 years attending to uniform matters has usually, although not always, been done while an officer is off-duty and no overtime or mileage have been claimed or paid. There have been a few times when Officers have asked to attend to uniform matters while on duty and that permission has been granted, depending on the workload and store availability. In 1997 when patches were ordered to be put on uniforms the uniforms were mostly, if not exclusively, dropped off while off-duty and wages and mileage were not asked for or paid. In 2002 when the U.S. flag patches were added the uniforms were dropped off by Officers mostly, if not exclusively, while off-duty and no overtime or mileage was asked for or paid. In 2008 there were approximately 69 purchase orders for uniform matters attended to while off-duty and without claim for wages or mileage. No grievances have ever been filed by the Association for overtime or mileage for time spend by Officers in attending to any of these uniform matters. This demonstrates that both parties understood and accepted as a longstanding and binding practice that attending to uniforms is not considered compensable work or a compensable duty entitling the Officer to be paid wages, overtime or mileage. They have not viewed or considered this as Village business. The parties do not disagree that uniforms must be kept clean, repaired and maintained. Failure to do so would subject them to being out of compliance with Village policy. That would implicate discipline. Accordingly, the fact that the Officers would be subject to discipline if they did not comply with the April 7, 2008 order does not make this case different from the other uniform matters. This is unequivocal. It has been clearly enunciated and acted on over a substantial period of time as an established practice. This past practice manifests the intent of the parties that wages, overtime and mileage are not compensable work duties and are not payable under the collective bargaining agreement.¹

¹ The Association's arguments about the other signs at the Village Hall do not relate to uniforms and are not matters of the record in this case. Those arguments cannot be considered.

The Association argues that it never agreed to this practice and that it was not the mutual intent or understanding of the parties to accept this as a binding practice. The Village argues that the Association's failure to grieve these matters over a long period of time is evidence of the Association's mutual agreement. The Village is correct. While failure to grieve in any particular matter may not necessarily be seen as implicit agreement with a practice, failure to grieve over a long period of time may be seen as evidence of mutuality. As noted in Elkouri & Elkouri, How Arbitration Works, (6th Ed.) p. 624 concerning mutuality in past practice:

Unilateral interpretations may not bind the other party. However, continued failure of one party to object to the other party's interpretation is sometimes held to constitute acceptance of such interpretation so as, in effect, to make it mutual.

Here, the record of the Village not paying wages or mileage, and the record of the Officers not claiming wages, overtime or mileage, or grieving over not being paid wages, overtime or mileage clearly demonstrates that both parties understood that uniform maintenance matters done while off-duty are not compensable. This was mutual. The two instant grievances filed here, argues the Association, are evidence that the Officers did not understand or agree to such an interpretation. But these two grievances are in the face of 27 years of practice. They are an exception that proves the rule.

The Association argues that a past practice cannot effectively contravene provisions in the agreement. But, as has been set out above, the agreement is ambiguous. And, the Association hinges its argument in large part on the return to duty provision in Section 6.02. The Association claims that Officers were ordered to return to duty when ordered to drop off and pick up the uniforms. Yet, the Association claims the uniforms were dropped off and picked up while the Officers were off-duty. If they did it while off-duty then they could not have been on duty or recalled to duty. The past practice resolves this dilemma and is not contrary to any clear and unambiguous language in the agreement.

The Association's argument that the Officers' time must be compensated under the Fair Labor Standards Act does not reach this case. The parties' agreement does mention compliance with the Fair Labor Standards Act in Section 6.01. But there it is clearly in reference to regulation of compensatory time, and compensatory time is not the issue here. Moreover, no specific provision or section of the Fair Labor Standards Act, which is a matter of federal law, is cited or argued here. The issue to be decided in this case is one of interpretation of the agreement between parties. While sometimes parties to a collective bargaining agreement will ask an arbitrator to make decisions implicated by federal law under the specific provisions of particular contracts,² that is not the case here.

² See, e.g., DOUGLAS COUNTY, MA-13262 (Gordon, 10/16/2007).

There is no provision, or combination of provisions, in the agreement which clearly and unambiguously entitled the Officers to the wage, overtime and mileage payments they seek here. The binding past practice of the parties is that such payments are not made. The Officers were not on duty when they dropped off and picked up the uniforms. It follows that they are not entitled to the mileage reimbursement under Section 25.01. They were not on duty and not performing Village business in their own vehicles. The Village did not violate the collective bargaining agreement by not making the payments claimed by the Officers. Because of this, it is not necessary to consider the Village objections to the scope and nature of the remedy requested by the Association, that of having three hours of overtime and mileage paid to all members of the Association who complied with the order while off-duty.

Accordingly, based on the evidence and arguments in this case I make the following

AWARD

1. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 7th day of October, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator