BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FITCHBURG POLICE OFFICERS ASSOCIATION
WISCONSIN PROFESSIONAL POLICE ASSOCIATION (WPPA)
LAW ENFORCEMENT EMPLOYEE RELATIONS (LEER) DIVISION

and

CITY OF FITCHBURG

Case 44
No. 69174
MA-14512

(Furlough Grievance)

Appearances:

Andrew Schauer and **Roger Palek**, Staff Attorneys, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of the Association.

Michael Westcott, Leslie Sammon and **Saul Glazer**, Attorneys, Axley Brynelson, LLP, P.O. Box 1767, 2 East Mifflin Street, Suite 200, Madison, Wisconsin 53701-1767, appearing on behalf of the City.

ARBITRATION AWARD

Fitchburg Police Officers Association, WPPA, LEER Division, hereinafter referred to as the Association, and the City of Fitchburg, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. The parties requested a list of five staff arbitrators from the Wisconsin Employment Relations Commission from which to select an arbitrator to hear and decide the instant dispute. The undersigned was selected to arbitrate the dispute. No hearing was held in this case. Instead, in lieu of a hearing, the parties filed a stipulation with the undersigned on September 22, 2010. The stipulation covered the following: exhibits, issue and factual record. Thereafter, the parties filed briefs and reply briefs, whereupon the record was closed on December 17, 2010. Based upon the stipulations referenced above and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

As noted above, the parties stipulated to the following issue:

Whether the City of Fitchburg violated Articles 18 or 23 of the collective bargaining agreement when it temporarily modified the work schedule for each employee in the bargaining unit four times during the time period from August 16, 2009 through November 29, 2009; and if so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2009-2011 collective bargaining agreement contains the following pertinent provisions:

ARTICLE V – MANAGEMENT RIGHTS

Section 5.01 Management Rights. The Association recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers or authority which the Employer has not specifically and expressly abridged, delegated or modified by other provisions of this Agreement, are retained exclusively by the Employer. Such powers and authority, in general, include, but are not limited to the following:

a) To determine the general business practices and policies and to utilize personnel, methods, and means in the most appropriate and efficient manner as possible.

b) To manage and direct the employees of the Employer, to make assignment of jobs, to determine the size and composition of the work force, to determine the work to be performed by the work force and each employee, and to determine the competence and the qualifications of the employees.

c) To determine the methods and means by which the operations of the Employer are to be conducted.

d) To utilize part-time employees in the manner most advantageous to the Employer.

e) To hire and promote employees, to transfer employees within the department, and to make promotions to supervisory positions in the manner most advantageous to the Employer.

f) To lay off employees.

g) To discipline, suspend, demote, and discharge employees for just cause.

h) To establish or alter the number of shifts, hours of work, work schedules, methods and processes.

i) To schedule overtime work when required in the manner most advantageous to the Employer.

j) To create new positions or departments, to introduce new or improved operations or work practices, to terminate or modify existing positions, departments, operations or work practices, to consolidate existing positions, departments or operations, and to contract with others to provide service.

k) To make and alter rules and regulations for the conduct of its business and of its employees.

Section 5.02 Limitations. The Employer's exercise of the foregoing functions shall be limited only by the express provisions of this contract and the Employer has all the rights which it had at common law, except those expressly bargained away in this Agreement, and except as limited by statute.

. . .

ARTICLE XVIII – HOURS OF EMPLOYMENT

Section 18.01 Normal Schedule. The normal work schedule shall be six (6) workdays of eight (8) hours and three (3) days off (6-3).

Section 18.02 Shifts. As far as practical, the employee shall work a straight eight (8) hours on an established shift. Shifts shall be maintained on the following schedule: 7:00 am – 3:00 pm; 3:00 pm – 11:00 pm; 11:00 pm – 7:00 am; swing shift. With reasonable notice to the affected employees, the Chief of Police may deviate from the established shift to meet specific needs. The Chief of Police, in his sole discretion, may assign one hundred percent (100%) of the total number of employees of the Police Department to work overlapping shifts in case of criminal investigation, riots, civil disturbances, strikes, or emergencies, and the decision of the Chief of Police to do so shall be final and not subject to the grievance procedure.

Section 18.03 Work Schedules. Except in the event of a sick leave request or temporary emergency leave, work schedules must be posted one (1) month prior to the effective date thereof. Changes in the posted schedule may only be made upon seventy-two (72) hours notice to the officer involved.

Section 18.04 Shift Changes. The Chief of Police shall post a notice on October 20 and accept requests for shift changes within the last ten (10) days of October. Shift changes shall be announced November 1 and shall be effective the following January 1.

Section 18.05 Shift Assignments. In making shift assignments, employee preferences shall be considered in accordance with seniority, unless it is in the best interest of both Employer and employee to make mutually agreed changes at other times.

Section 18.06 Shift Differential. Employees shall receive a shift differential of Forty Cents ($.40) per hour for all hours worked on a shift between 3:00 p.m. and 7:00 a.m.

Section 18.07 Shift Adjustments. The schedule may be adjusted for the convenience of mutually agreeing employees. In such an event, no overtime shall be paid.

Section 18.08 Rotating Detective Schedule. The City of Fitchburg bargaining unit detectives will be assigned to a 5-2, 5-2, 4-3 shift rotation. Under this shift rotation program, the detectives will be assigned alternating 5-2, 5-2, 4-3 shifts. In order to assure adequate availability of detectives on weekends, the detectives: will be required to be available on an “on-call” basis for all weekend hours. This “on-call requirement” will be rotated among the detectives on an equitable basis. The detectives will carry a cell phone or other appropriate communication device provided to them by the Department and will be available for and fit for duty at all times when they are “on call”. A detective who cannot be immediately contacted while on “on-call” status or who does not report to the work site within a reasonable period of time after receiving notice shall not receive “on-call” pay and shall be subject to discipline.

“On-call” status shall generally be from 11:00 p.m. on Friday to 8:00 a.m. on the following Monday. Detectives placed on “on-call” status shall receive Fifty-eight Dollars ($58.00) per week.

In the event an “on-call” detective is required to come in to work on any “on-call” status hours, the detective shall be paid one and one-half (1-1/2) times his or her straight time rate for all hours worked as provided by Article XX –

Overtime of the contract. "On-call" status shall not be counted as hours worked. Detectives called in for overtime work shall be compensated for such actual time worked at the applicable overtime rate of pay.

ARTICLE XIX – OVERTIME

Section 19.01 Definition and Rate. Employees shall be paid one and one-half (1½) times their straight time rate for all hours worked in excess of eight (8) hours per day and in excess of the 6-3 work schedule for patrol officers or the 5-2, 5-2, 4-3 schedule for detectives. Employees shall be paid two (2) times their normal rate for hours worked after thirteen (13) in succession. For purposes of computing overtime, the hourly straight time rate of pay is to be determined by dividing the annual salary by 1950 hours.

. . .

ARTICLE XXIII – COMPENSATION RATES

Section 23.01 Salary Commencing January 1, 2009:

POLICE OFFICERS		
	Annual Salary	Hourly
Starting	$50,315.64	$25.8029
After 1 Year	$54,127.94	$27.7580
After 2 Years	$56,637.42	$29.0448
After 3 Years	$57,104.54	$29.2844
After 4 Years	$57,627.31	$29.5525
DETECTIVES		
	$59,929.12	$30.7329

Section 23.02 Salary Commencing January 1, 2010:

POLICE OFFICERS		
	Annual Salary	Hourly
Starting	$51,825.11	$26.5770
After 1 Year	$55,751.77	$28.5907
After 2 Years	$58,336.55	$29.9162
After 3 Years	$58,817.68	$30.1629
After 4 Years	$59,356.13	$30.4390
DETECTIVES		
	$61,726.99	$31.6548

Section 23.03 Salary Commencing January 1, 2011:

POLICE OFFICERS		
	Annual Salary	Hourly
Starting	$53,379.87	$27.3743
After 1 Year	$57,424.33	$29.4484
After 2 Years	$60,086.64	$30.8137
After 3 Years	$60,582.21	$31.0678
After 4 Years	$61,136.81	$31.3522
DETECTIVES		
	$63,578.80	$32.6045

Placement on schedules in Section 23.01, 23.02 and 23.03 shall be in accordance with time of service with the City of Fitchburg Police Department.

Section 23.04 Longevity Bonus. After thirty-six (36) months of continuous full-time employment, the employee shall be paid an annual bonus equal to the number of years of continuous full-time employment, multiplied by Thirty Dollars ($30.00). Commencing upon completion of the fifth year of continuous full-time employment, an employee shall be paid an annual bonus equal to the number of years of continuous full-time employment, multiplied by Forty-Five Dollars ($45.00).

Section 23.05 Field Training Officer. Field training officers shall be paid a fifty cent ($.50) per hour premium in addition to their base rate of pay for hours actually worked in performing field training officer's duties.

BACKGROUND

The City operates a police department. The Association is the exclusive bargaining representative for a bargaining unit which includes patrol officers and detectives.

As will be noted below, the City implemented a "furlough program" for patrol officers and detectives in late 2009. The furlough eliminated four workdays for those employees. The Association filed a grievance which challenged that action. The grievance was ultimately appealed to arbitration.

. . .

The parties stipulated to the following factual record:

STIPULATED FACTS

1. The parties are signatory to a collective bargaining agreement (hereinafter CBA) that became effective January 1, 2009, and expires on December 31, 2011 (Joint Exhibit 2).

2. The Wisconsin Professional Police Association filed a grievance on August 17, 2009, which was denied by the City and proceeded to the various steps of the grievance procedure (Joint Exhibit 1).

3. This dispute is properly before the Arbitrator.

4. During negotiations for a successor CBA to the 1996-1997 CBA, the Association proposed that detectives no longer be normally assigned to a 6-3 work schedule, and instead requested that the detectives be normally assigned to a 5-2, 5-2, 4-3 work schedule.

5. During the negotiations for a successor CBA to the 1996-1997 CBA, the City's bargaining team asked the Association what the impact of agreeing to the Association's proposal would be. The Association's response to the question was that it would only impact what the normally scheduled hours for the detectives would be (changing them from 6-3 to 5-2, 5-2, 4-3).

6. The City agreed to the Association's proposal with the understanding that it would be piloted on a trial basis which was reflected in a Side Letter of Agreement to the 1998-1999 CBA (Joint Exhibit 3).

7. The Side Letter of Agreement was incorporated into the terms of the 2000-2002 CBA without discussion. There has been no change in the contract language of Article 18, Sections 18.01 or 18.08 since then.

8. From at least 1997 to the present there have been numerous incidents where both detectives and patrol officers have been required by the City to work a schedule different than their normal work schedule due to the needs of the City. No grievances or objections were filed by the Union regarding these situations. The Union position was that these modifications were in compliance with the CBA and/or practice of the parties.

9. In early summer of 2009, the City Administrator, Mayor and Common Council became concerned over a projected $300,000.00 revenue shortfall due to the recession. As a result of this concern, on July 6, 2009, City officials met collectively with business agents from all five of the City's bargaining units to explain the City's concerns and to seek assistance from each bargaining unit in the form of a reduction in costs.

10. Agreements for reduction in costs were reached with the bargaining units other than the bargaining unit at issue in this case.

11. There was no request by the Association to bargain either over the decision by the City to temporarily modify the work schedules of the patrol officers or the detectives, or the effects of said decision. The Union position, as shared at meetings on July 29, 2010 and August 4, 2010, was that this issue was already covered by the CBA and that no negotiations were necessary.

12. Beginning in August of 2009, temporary modifications were made to the normal 6-3 schedule of the patrol officers and to the normal 5-2, 5-2, 4-3 work schedule of the detectives. These changes were communicated more than 72 hours in advance to all employees impacted by the changes.

13. It was the City's intention to have each patrol officer and each detective work five fewer shifts in 2009 than the normal schedule would provide for.

14. The temporary modifications were scheduled to be contiguous with the particular patrol officer's or detective's normal or requested days off.

15. As a result of revenue shortfalls not being as large as originally projected, the temporary modifications to the normal work schedules of the patrol officers and detectives did not last as long as originally contemplated. As a result, each patrol officer and detective only had their normal work schedule temporarily modified four times rather than five times between August of 2009 and the end of the year. Additionally, the City offered to the Association the option for patrol officers and detectives to cash in up to three accrued vacation days in 2009 to partially recoup any loss of earnings they may have received as a result of the temporary modifications to their normal work schedules.

16. All patrol officers and detectives who were available for work for the entire calendar year 2009 received wages exceeding their "annualized salary." These wages include overtime payments, shift differentials and other regular hourly wage add-ons.

17. All patrol officers and detectives who were available for work for the entire calendar year 2009 received four less days of wages than they would have without the modifications. Each day an employee did not work in the year represents .41% of their base "annualized salary."

POSITIONS OF THE PARTIES

Association's Initial Brief

The Association's position is that the City violated two contract provisions when it temporarily modified the work schedule for each employee in the bargaining unit four times during the time period from August 16, 2009 through November 29, 2009. The two contract provisions which the Association invokes are Article 18 (Hours of Employment) and Article 23 (Compensation Rates). With regard to Article 18, the Association contends that the City violated Sections 18.01 and 18.08 when it deviated from the "normal work schedule" on four occasions between August, 2009 and the end of the year. With regard to Article 23, the Association maintains the City violated the Annual Salary provision "by paying the employees who worked throughout 2009 less straight time pay than [that provision] demands." It elaborates on these contentions as follows.

Before the Association addresses the two contract provisions just noted, as well as the other provisions which the City relies on, the Association begins with the following overview of this case. According to the Association, this case involves the maxim "a deal is a deal." The "deal" that the Association is referencing is the salary schedule found in Article 23 wherein it lists an annual salary. The Association notes that when the City modified the employees' work schedule, this unilateral action resulted in a pay cut of 1.64% (about $825) for the employees. The Association contends that this change in schedule not only broke the aforementioned "deal", but it also violated the collective bargaining agreement. The Association put it this way in their brief: this case "pulls at the basic sense of fairness and fidelity on which we have based an economy and a country."

The Association makes the following arguments about Article 18. It notes at the outset that Sections 18.01 and 18.08 provide that employees must work either a 6-3 or a 5-2, 5-2, 4-3 schedule, depending on their rank. It then comments on other portions of Article 18 which the Association anticipates the City will cite to justify the changed work schedule. First, it addresses Section 18.02, which allows the Chief to "deviate from the established shift to meet specific needs." The Association avers that even if the word "shift" is read as meaning a workday, the City did not change a certain shift or workday; instead, they eliminated it. Second, the Association notes that that provision establishes the "specific needs" which may cause the Chief of Police to deviate from the normal work schedule. It then goes through these named "specific needs" (i.e. a criminal investigation, a riot, a civil disturbance, a strike, an emergency), and maintains none were involved herein. With regard to the last category (i.e. an emergency), the Association maintains that while the City has tried to make an economic downturn into a fiscal "emergency", it submits that the fact of the matter is that the parties stipulated that the City merely had a "concern" over a "revenue shortfall due to the recession." As the Association sees it, given that factual stipulation, the City cannot now argue that this "concern" constitutes an "emergency" within the meaning of Section 18.02. Third, the Association expects the City to try to read a whole lot into the qualifying word "normal" in

Section 18.01, so that the word "normal" means that it can deviate from that "normal work schedule" whenever it wants to for whatever reason. It disputes that interpretation. To support its contention, the Association notes that the record contains no evidence of bargaining history that could make the word "normal" so broad as to mean that. Thus, it's the Association's view that Section 18.02 specifies all the situations where the "normal work schedule" (referenced in Section 18.01) could be deviated from. Fourth, the Association anticipates that the City will rely on a portion of Stipulated Fact 8 to establish a past practice. The part which the Association is referencing says: "there have been numerous incidents where both detectives and patrol officers have been required by the City to work a schedule different than their normal work schedule due to the needs of the City." As the Association sees it, that stipulation does not create a binding past practice allowing the City to deviate from the "normal work schedule" whenever it chooses. Here's why. No specific number of incidents are listed in the stipulation, nor is there evidence in the record that establishes mutuality (i.e. Union acceptance of a practice). The Association emphasizes that the stipulation further provides that it did not grieve these situations because "these modifications were in compliance with the collective bargaining agreement and/or the practice of the parties." As the Association sees it, that statement establishes that it "recognized that there were situations where the exceptions in Section 18.02 applied, or other provisions of the CBA applied (vacation, sick, comp, etc.) and therefore did not grieve them." It further opines that "without more specificity in Stipulated Fact 8, an argument of union acquiescence is completely baseless and unsubstantiated." Putting all the foregoing together, the Association maintains that since there was no binding past practice which allowed the City to vary from the normal work schedule, the schedule adjustment days in 2009 were a violation of Sections 18.01 and 18.08 which list the employees' normal work schedules. As the Association sees it, none of the exceptions listed in Section 18.02 apply, so the "normal work schedule" should be enforced.

Next, the Association makes the following arguments about Article 23. It avers at the outset that the Annual Salary column in Article 23 is a "promise from the City to the Employee of the amount of money an employee will make when the employee works the entire year, not including taxes and withholding (which vary from employee to employee), and not including overtime, shift differential, etc. (which also vary from employee to employee)." Here's why. First, the Association maintains that "the hourly rate of pay number comes from the Annual Salary, not vice-versa." To support that assertion, it cites Section 19.01 of the collective bargaining agreement which says that the hourly rate of pay is the Annual Salary divided by 1950. It also notes that each entry under "Hourly" is the Annual Salary divided by 1950 and then rounded to four decimal places. According to the Association, it was done this way because the math does not work the other way. Second, the Association opines that because the Annual Salary is listed first, this must have been the number that was negotiated. The Association sees the Annual Salary as a guaranteed wage. It maintains that the Annual Salary must be given some meaning, and should not be written off as being for illustrative purposes only. Third, it cites the standard arbitral principle that contracts are to be interpreted in a way that gives all the terms of the contract meaning. The contract term which the Association wants to be given meaning and effect is the term "Annual Salary". As the Association sees it, that term refers to "the amount of money an employee in that classification and years of

service will earn if s/he works the entire year, before adding in the additional amounts. . .” The Association argues that if the arbitrator finds for the Employer in this case, that will render the Annual Salary column in Article 23 meaningless. Fourth, the Association maintains there are no “wiggle words” in Article 23. For example, there could have been an asterisk next to Annual Salary with a footnote that says “This figure is for illustrative purposes only. This amount should not be viewed as a guarantee of an annual salary.” Here, though, there is no such disclaimer in the contract language. That being so, it’s the Association’s view that the term “Annual Salary” should be interpreted as a guaranteed wage. Fifth, the Association argues that the fact that each employee made more than their Annual Salary is not relevant in the slightest. What the Association is referring to is that Stipulated Fact 16 states that “[a]ll patrol officers and detectives who were available for work for their entire calendar year 2009 received wages exceeding their ‘annualized salary.’ These wages included overtime payments, shift differentials and other regular hourly wage add-ons.” The Association expects the City to argue that the “Annual Salary” provision of the contract is not violated as long as an employee who works the entire year makes at least that much, including overtime and shift premium. It responds to that argument by asking what would have happened if a person just worked their normal shift, with no overtime and no shift differential. The answer is this: such an employee would have made 1.64% less than their base Annual Salary. The Association asserts that the fact that every employee made more than the “Annual Salary” listed in the contract “just means that every employee has worked some overtime or other add-on, and received compensation as provided for in another provision of the CBA, separate from the amount of base compensation promised to every employee by Article 23.” Sixth, the Association argues that the City wants the Annual Salary line to simply be read “as an amount of money that the employee might receive if they work the entire year (and the City does not decide to unilaterally cut its hours).” The Association maintains that is not a reasonable interpretation.

Next, the Association believes that the layoff language in the collective bargaining agreement does not apply to this case. It notes in this regard that the City did not shut down the entire department, and has continued to employ all of its employees. Further, it acknowledges that all the bargaining unit employees were treated equally. The Association avers that there are two ways of looking at how layoffs affect this case. One way is to say “that these schedule adjustment days are not at all akin to layoffs and therefore the language allowing the City to engage in same does not apply to this situation, and the parties are left to determine whether these schedule adjustment days are allowed under the remaining provisions of the CBA.” The other way is to say that “the schedule adjustment days are mini-layoffs, but since there were occasions where more senior employees were made to stay home while less senior employees worked, the seniority provisions of Section 11.03 [were] violated.” Either way, the City maintains the schedule adjustment days imposed by the City violate the collective bargaining agreement.

The final portion of the Association’s initial brief addresses six cases where WERC arbitrators have dealt with layoff/furlough/schedule adjustment days. In cases one, two, four and five, it was held that the layoff/furlough/schedule change adjustment did not violate the collective bargaining agreement, while cases three and six found a contract violation.

First, it comments on FOND DU LAC COUNTY, Case 184, No. 69519, MA-14636 (2010). In that case, the employer implemented four involuntary furlough days on all County employees that did not work in a twenty-four hour, seven day a week operation. The bargaining unit involved (the Professional unit in the Department of Social Services) grieved the imposition of the furlough days. The arbitrator held that the unit-wide layoff for a day did not violate the seniority provision. The Association distinguishes that decision from this case on the following grounds. It initially notes that the union in that case "conceded out of the gate that these furlough days could be rightfully characterized as a temporary lay-off." The Association makes no such concession here. It specifically notes that in this case, the Employer did not shut down the police department for a day and send everyone home and then call them all back the next day. Instead, the City simply adjusted their work schedule. Next, the Association emphasizes that the "Work Schedule" article of that contract included a provision which stated that "[t]he provisions of this Article shall in no way be construed as a guarantee by the Employer of any amount of work in any period. . ." Thus, under that contract, there were what the Association calls "wiggle words". It avers there are no such "wiggle words" in this contract language. The Association sees that as significant.

Second, it comments on LANGLADE COUNTY, Case 103, No. 63466, MA-12597 (2005). In that case, the County shut down all operations of the highway department for two days. The arbitrator held that this unit-wide layoff did not violate the seniority provision. The Association distinguishes that decision from this case on the following grounds. First, it notes that here, not all the police officers were laid off on the same day. Second, it notes that the contract involved there did not contain the "Annual Salary" provision that exists here.

Third, it comments on LINCOLN COUNTY (COURTHOUSE), Case 70, No. 37514, MA-4329 (1987). In that case, the Employer implemented what the arbitrator called "rolling layoffs." The arbitrator held that "rolling layoffs" without regard for seniority violated the seniority-based layoff procedure contained in the collective bargaining agreement. According to the Association, the schedule adjustment days which the City enacted here amounted to "rolling layoffs". The Association acknowledges that "from the record in front of us, we cannot prove on which specific days that less senior employees worked while more senior employees were not working." However, since each patrol officer and detective had their normal work schedule modified four times, the Association maintains it can be assumed "that the less senior employees worked on those days that the most senior employee worked."

Fourth, the Association comments on JACKSON COUNTY, Case 148, No. 62559, MA-12338 (2005). That case was another Highway Department case where the entire department was shut down for three specific days in one month. The arbitrator held that this unit-wide layoff did not violate the collective bargaining agreement. The Association distinguishes that decision from this case on the following grounds. First, it characterizes what it calls the arbitrator's "musings" about the meaning of the word "normal" as dicta. Second, it notes that the contract involved there did not contain the "Annual Salary" provision that exists here.

Fifth, it comments on MARATHON COUNTY, Case 315, No. 64644, MA-12962 (2005). In that case, the County reduced the hours of the employees in the Aging and Disability Resource Center Department. The arbitrator held that the Employer did not violate the collective bargaining agreement by reducing the employees' hours. The Association distinguishes that decision from this case on the following grounds. First, it avers that in this case, the management rights clause is not as broad as it was in that case. Second, it asserts that in that case, the hours of work provision was not as strong as it is here. As previously noted, the Association believes the hours of work provision at issue here guarantees bargaining unit employees both "a set number of hours and wages."

Sixth, the Association addresses FOND DU LAC COUNTY (SOCIAL SERVICES EMPLOYEES), Case 176, No. 66362, MA-13502 (2007). In that case, the Employer decided to address a "budget shortfall" by closing one hour early on Friday for 32 weeks. The arbitrator found that this schedule adjustment violated the collective bargaining agreement. In so finding, the arbitrator noted that the schedule change lasted more than half the year, and that this action effectively redefined the normal work week. The Association sees this award as comparable here and it urges the arbitrator to reach the same conclusion in this case.

The Association summarizes the arbitral case law referenced above as follows:

> If an employer shuts down an entire department for a day here or there, it can invoke the layoff language in the contract, and be free from an accusation of improperly adjusting the schedule. If the employer does not shut down the entire department for a day, that is, it does not lay off the entire unit temporarily, then the analysis turns to whether the schedule modification is allowed under the specific language of the contract.

The Association contends that in this case, the collective bargaining agreement has weaker management rights language than in the contracts where cases have gone the other way. It also maintains that the collective bargaining agreement in this case has strong language regarding the regular work schedule, and specifically lists the situations where the regular work schedule can be modified. Finally, it emphasizes again that the collective bargaining agreement in this case includes an Annual Salary provision. It argues that if the arbitrator finds for the City in this case, that will make this provision meaningless. It therefore asks the arbitrator to find that the schedule adjustment days unilaterally instituted by the City violated Articles 18 and 23 of the collective bargaining agreement. With regard to the remedy, the Association seeks a make-whole order.

City's Initial Brief

The City's position is that it did not violate the collective bargaining agreement when it temporarily modified the work schedule for each employee in the bargaining unit four times during the time period from August 16, 2009 through November 29, 2009. It elaborates as follows.

First, the Employer relies on the management rights clause for the proposition that it has retained the right to establish the hours of work and work schedules. Specifically, it cites Section 5.01(h) wherein it gives the Employer the right "to establish or alter the number of shifts, hours of work, work schedules, methods and processes." The City characterizes this as broad language. As just noted, the City extrapolates from this language that it has retained to itself the right to establish the hours of work and work schedules. It avers that arbitrators have found that employer deviations from the "normal work schedule" for reasons that are not arbitrary or capricious - "such as to accommodate for the budget crunch" - have been found to be a legitimate and reasonable exercise of management rights.

Next, the City disputes the Association's contention that this collective bargaining agreement guarantees employees a certain work schedule and number of work hours. In its view, there is no such guarantee in the collective bargaining agreement. Rather, Section 18.01 simply indicates that the "normal" work week will be six days on and three days off, and eight hour days for patrol officers, while detectives work two weeks with five days on and two days off, and then one week with four days on and three days off. The City acknowledges that Section 18.08 (which is the language dealing with the detectives work schedule) does not include the word "normal". Be that as it may, the City maintains that the bargaining history referenced in Stipulated Fact 5 and Joint Exhibits 3 and 4 show that there was no intent to set a guaranteed number of hours for detectives; rather, the change was implemented to allow detectives to work during week days, and not weekends. It specifically notes that Stipulated Fact 5 says that when the City agreed to the Association's proposal to modify the detectives' work schedule, the Association stated that this changed schedule would only impact what the ***normally*** scheduled hours for the detectives would be.

To support its view that the phrase "normal work schedule" does not create a guaranteed work schedule, the City cites several arbitration awards wherein it was so held. First, the Employer relies on JACKSON COUNTY, MA-12338 (2005), wherein the arbitrator found that a three-day shutdown of a county highway department did not violate the collective bargaining agreement. It specifically cites the following language from that award:

> The use of the term "regular" (or normal, standard, etc) has almost universally been held not to guarantee the hours set forth in the defined week. The term "regular" modifies the phrase that follows; i.e. "workweek shall consist of five (5) consecutive eight (8) hour days, ..." Had the parties not inserted the term "regular", the provision would have mandated the workweek and work day. By inserting the term "regular" the clause achieves something less.
>
> The Article does guarantee that the normal or typical workweek will be as described. Some variation is tolerated. And so, the County would not be free to establish a permanent 32 hour work week.

> Here, there was a budget shortfall. The County determined to address it with a three week (3 day) variation in the regular workweek. Once the lack of money was addressed the County reverted to, and maintained, a regular workweek. The contract does not specifically define just how much variation is permitted. I do not believe that a single incident, involving a three-day variation violates either the spirit or the intent of the Article.
>
> MA-12338 at pp. 4-5.

Second, the Employer relies on FOOD SERVICES OF AMERICA, A-4791 (1991), wherein the arbitrator found that the employer did not violate the CBA by failing to offer the grievant 40 hours of work because the CBA did not provide for a guaranteed number of hours. It specifically cites the following language from that award:

> The case therefore turns squarely on whether or not the language of Article 11, Section b. constitutes a guaranteed workweek. Neither party cites any arbitral precedent in support of its argument, but upon review of the published decisions I am convinced that arbitrators generally have taken a disapproving view of the argument that a "regular" workweek constitutes a guarantee. In TRIANGLE CONDUIT AND CABLE COMPANY, [33 LA 610, 613] Arbitrator Howard Gamser determined that a contract provision specifying that "the regular hours of work shall be 8 hours per day, 40 hours per week, Monday through Friday each week inclusive" did not prevent the Company from reducing senior employes along with others to a shortened workweek: "Such a provision, when found in the form set forth herein, cannot be regarded as a guarantee of employment for all or any group of employees for any specific number of hours per day or days per week. A guarantee of this type, because it is a departure from general practice, is customarily accompanied by specific language to that affect." Arbitrator Gamser stated, in support of this view, that the language is not deprived of meaning by this conclusion, because it is designed for other purposes - to regularize employment and to furnish the norms from which overtime premiums are calculated. The contract language in question here is similar to that in the TRIANGLE case, and I have not found any arbitral view to the contrary (i.e. to the effect that "regular" means "guaranteed.")
>
> The thrust of Arbitrator Gamser's view is mirrored in a NEW YORK HERALD TRIBUNE [36 LA 753, 761] award by Arbitrator David L. Cole, stating that very clear language is required for a guaranteed wage. [See also other cases cited at page 522 of Elkouri, F and Elkouri, E.A., *How Arbitration Works*, 4th Ed., BNA 1985.] In addition, I note that the persons who originally negotiated this language, long gone though they may be, were apparently capable of using the word "guaranteed" when they meant "guaranteed", as in section (a) of

> Article 11. This implies that they recognized that the word "regular" would mean something less.
>
> A-4791 at pp. 3-4.

Next, the City cites three recent arbitration decisions which have addressed the issue of whether furloughs violated the collective bargaining agreement. The three decisions were MILWAUKEE POLICE DEPARTMENT (Yaffe, 2009), CITY OF GREENFIELD, MA-14520 (Gordon, 2010) and FOND DU LAC COUNTY, MA-14636 (Jones, 2010). In all three cases, the arbitrator held that the furloughs did not violate the collective bargaining agreement. The City asks the arbitrator to follow their lead and find that the furloughs involved did not violate the collective bargaining agreement.

Turning now to the facts, the City emphasizes that the parties stipulated that from at least 1997 to the present, there have been numerous instances where both detectives and patrol officers have been required to work a schedule different than their "normal" work schedule due to the City's needs. The City sees that as significant.

Finally, the City addresses the Association's contention that the furloughs violated Article 23. It disputes that contention. In doing so, it relies on Stipulated Fact 16 which provides thus:

> 16. All patrol officers and detectives who were available for work for the entire calendar year 2009 received wages exceeding their "annualized salary." These wages include overtime payments, shift differentials and other regular hourly wage add-ons.

The City argues that "assuming for the sake of argument that Article 23 created some kind of floor for compensation (which it does not), all patrol officers and detectives received more than the purported floor."

In sum, it's the City's view that the Association failed to meet its burden to establish a violation of the collective bargaining agreement. The City emphasizes that Section 18.01 merely states what the "normal" work day may be. It avers that patrol officers and detectives sometimes work a "normal" work week, sometimes they work more than that and sometimes work less. The City believes that this collective bargaining agreement contains no guarantee with respect to hours. In its view, a four-day furlough was well within its managerial discretion "in light of the severe budgetary constraints." It therefore asks that the grievance be dismissed.

Association's Reply Brief

The Association begins by addressing two of the cases which the City cited in their initial brief: MILWAUKEE POLICE DEPARTMENT and FOOD SERVICE OF AMERICA. The Association argues that both are distinguishable from this case.

The Association acknowledges that in MILWAUKEE POLICE DEPARTMENT (Yaffe, 2009), the arbitrator found that the employer "did not violate the parties' Agreement when it furloughed (scheduled days off without pay) certain Police Officers and Aides for either one or two days in 2009." As the Association sees it, that case is distinguishable from this case for two reasons. First, the Association notes that the contract in that case stated "[t]here shall be no guarantee of, or limitation on, the number of hours to be worked per day, per week or any other period." Thus, the contract included what the Association calls a "non-guarantee of hours." It maintains that here, though, there is a guarantee of hours under the Fitchburg collective bargaining agreement. In making that statement, what the Association is referencing is the work schedule language in Article 18 when read in conjunction with the Annual Salary provision in Article 23. Second, the Association also notes that the contract in that case included a biweekly base salary, but also included a description of the process by which an employee's salary is reduced '[w]hen less than the full schedule of hours is worked." As the Association sees it, this language "underscores the understanding in that case that the schedule provided no guarantee of hours and provided no protection from the employer's ability to furlough its employees." It points out that there is no such similar language in the Annual Salary section of Article 23 of this collective bargaining agreement.

Next, the Association acknowledges that in FOOD SERVICE OF AMERICA, the arbitrator found that the contract did not guarantee the employees a certain work week. The Association sees that case as distinguishable from this case for three reasons. First, while the contract in that case provided for a "regular work week", it did not list any specific instances when that regular work week could be deviated from. The Association emphasizes that this contract does (namely "in the case of criminal investigations, riots, civil disturbances, strikes, or emergencies.") Second, it notes that the contract in that case did not contain an Annual Salary, while this contract does. Third, it points out that in that case, the parties agreed there was a work shortage. The Association avers that here, though, the parties stipulated that these schedule adjustments were put in place because of a "concern" over a "revenue shortfall".

Next, the Association argues that arbitral case law and accepted precepts of contract interpretation "do not allow the City to depend so heavily on the use of the word 'normal'". Here's why. First, it asserts that the stipulated facts contain no evidence that the parties ever agreed to a special, technical or colloquial use of the word "normal". That being so, the Association asks the arbitrator to give the word "normal" its ordinary and popularly-accepted meaning "without the connotation that some arbitrators have given it." Second, it cites the definition of "normal" from *Black's Law Dictionary* as being "according to a regular pattern" or "according to an established rule or norm". Building on that definition, the Association opines that the word "normal" is not a synonym for "non-guaranteed", or "except when there

is financial difficulty", or "whenever the employer feels like following it." Third, the Association cites the arbitral precept that all of the provisions of the contract are to be given meaning. It contends that when Articles 18 and 23 are read together, the word "normal" means "that there may be deviations from the normal schedule for reasons listed in the contract, but not for some nebulous concern over a budget shortfall." Finally, the Association acknowledges that while the parties could have put the word "guaranteed" in the contract, they chose to use other words which, as the Association put it in their brief, got "the same point across much more artfully and specifically."

The Association asks the arbitrator to find that the City varied from the normal schedule for a reason not allowed for in the contract. It also asks the arbitrator to hold the City accountable for its breach of the collective bargaining agreement.

City's Reply Brief

The City begins its reply brief with the following overview of this case. It contends that the collective bargaining agreement does not guarantee employees a set number of days and hours per week. Instead, it simply sets forth what the "normal" work schedule should be. The Employer acknowledges that it deviated from the "normal" work schedule when it reduced the total number of days of work for all patrol officers and detectives in the course of one year by four working days. In its view though, that was not a "substantial" deviation from the "normal" work schedule. It argues that it could take that action for several reasons. First, it points out that the management rights clause expressly gives it the authority to "establish or alter the number of shifts, hours of work, work schedules, methods and processes." Second, it argues that nothing in the collective bargaining agreement expressly limits the Employer's right to impose the minimal furlough based on undisputed budgetary constraints. Third, it contends that none of the arbitration awards cited by the Association support the Association's position. As the Employer reads them, those awards support the Employer's position "that where a contract does not guarantee any number of hours annually or in any specific week, it is within the employer's discretion to modify the normal work week and work schedule for reasons that are not arbitrary, capricious or unreasonable, such as the budgetary reasons recognized in this case." The City opines that the four-day furlough it imposed "was the least invasive and the fairest alternative to minimize the unavoidable consequences of the tough economic issues facing the Employer at that time." The City emphasizes that the furlough was applied across the board, so all the patrol officers and detectives were treated equally. The Employer believes it acted reasonably, responsibly, and in full compliance with the collective bargaining agreement. It elaborates on these contentions as follows.

First, the City contends that in its initial brief, the Association blended the terms "shift" and "schedule" in an improper attempt to rewrite the collective bargaining agreement. The City points out that "schedule" and "shift" are different terms. Section 18.01 refers to "schedule", and Section 18.02 refers to "shifts". According to the Employer, those terms are completely different. The City agrees with the Association that the word "shift" in Section 18.02 refers to the time of day when the employee works – such as first, second or

third shift. The City also agrees that Section 18.02 says that the Chief may deviate from the established shift to meet specific needs. The City then points out that while Section 18.02 identifies when the "shift" can be changed, there is no such corresponding language in Section 18.01 dealing with the "normal work schedule". Since there is no such limitation in Section 18.01, the Employer believes that the management rights clause gives it the right to "alter. . .work schedules" and deviate from the "normal schedule" for reasons that are not arbitrary and capricious. In its view, its actions here were not arbitrary and capricious.

Second, the City argues that the arbitral case law supports its interpretation of the phrase "normal work schedule" to allow for modification of the schedule in the circumstances faced by the Employer. To support that proposition, it cites the following cases and quotes extensively from them: JACKSON COUNTY, FOOD SERVICE OF AMERICA, MARATHON COUNTY and MILWAUKEE POLICE DEPARTMENT. The City then repeats these three previously referenced contentions: 1) that it has the contractual authority to establish and alter work schedules; 2) that the contract simply indicates what the "normal" work schedule may be; 3) that there is no language in the contract that establishes a guaranteed number of hours worked. After doing so, the City avers that the record shows that throughout 2007-09, there were "numerous instances" where both patrol officers and detectives did not follow the "normal" work schedule of either six days on and three days off, or five days on and two days off. It opines that, "as with any job, other commitments or obligations, or sickness or other reasons to take off work routinely modify the normal work schedule."

Third, the Employer characterizes the Association's annual salary argument as a "non-issue". Here's why. As the City sees it, nothing in the contract gives any employee a guaranteed salary at the standard rate listed in the collective bargaining agreement. In its view, compensation is based purely on what hours are worked – including shift differentials and overtime – so the "salary" listed in the contract is nothing more than a "place holder". The City contends that compensation is calculated on an hourly basis, so the salary figure was only derived "as a means to set an hourly rate."

Fourth, the City agrees with the Association that the layoff language contained in Section 11.03 does not apply to this dispute. It points out that the stipulated issue requires only that the arbitrator decide whether the Employer violated Articles 18 or 23, not Article 11. The City maintains that Section 11.03 applies only when laying off employees "because of reduction in forces", and here there has been no reduction in force because all bargaining unit members remained employed during the modification to their work schedules.

Fifth, the City opines that "in its brief, the Association cites every arbitration decision involving furloughs that it can find and then tries to analogize those cases where the grievance was sustained and to distinguish those cases where the grievance was denied." The City maintains that the Association's attempt to distinguish those arbitration decisions supporting the Employer's right to modify the work schedule and furlough employees is unpersuasive.

Finally, the City argues that two basic rules of contract interpretation militate in favor of denial of the grievance. First, the City cites the arbitral principle that if one interpretation of a disputed provision would give meaning and effect to another provision of the contract or the other interpretation would render the other provision meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions. The reason it cites that principle is this: it emphasizes that the Association is arguing that there is a guarantee that all bargaining unit members would be paid a minimum annual salary. In response, the City contends that "if one were to follow the Union's twisted logic in this regard, the Employer would effectively not have the right to lay off employees, which right is expressly given to it in Article 5, Section 5.01(f) of the collective bargaining agreement." The Employer submits that its interpretation of the disputed language does not render those provisions meaningless. Second, the City cites the arbitral principle that when one interpretation of language would lead to harsh, absurd or nonsensical results, while an alternative interpretation would lead to just and reasonable results, the latter interpretation will be used. The reason the City cites that principle is this: it contends that under the Association's interpretation of the collective bargaining agreement, all police officers with four or more years of experience would be paid an annual salary of $57,627.31. The City characterizes this as a strained interpretation of the language because it would mean that part-time officers with four or more years of service would also earn $57,627.31 per year regardless of the number of hours worked. The City maintains that the Association's interpretation of Article 23 would result in harsh, absurd and nonsensical results.

In sum then, it's the City's position that it did not violate the collective bargaining agreement by its actions herein. It asks that the grievance be denied.

DISCUSSION

In response to severe budgetary constraints, the City decided in 2009 to modify the work schedule for patrol officers and detectives. Their Union grieved, contending – broadly speaking – that that action violated the collective bargaining agreement. The parties stipulated that the specific question to be answered is whether the City violated Articles 18 or 23 of the collective bargaining agreement when it temporarily modified the work schedule for each employee in the bargaining unit four times during the time period from August 16, 2009 through November 29, 2009. The Association answers that question in the affirmative, while the City answers it in the negative. Based on the following rationale, I answer that question in the negative, meaning that I find that the Employer did not violate the collective bargaining agreement by its actions herein.

Since this is a contract interpretation case, the main part of my discussion will involve the two articles just referenced. Before I address that contract language though, I've decided to make the following comments about other arbitration awards and their applicability here.

What I'm referring to is this. In their briefs, the parties cited close to a dozen different Wisconsin arbitration awards which have dealt with different aspects of employee furlough

programs. Then, the parties either analogize those cases to the facts and contract language involved here, or distinguish those cases from the facts and contract language involved here. I could do that too and go through all those awards and comment on their applicability, or lack thereof, to this case. Were I to do that, the likely result would be that I would say that decisions A, B and C support my conclusions, while decisions X, Y and Z are distinguishable. I've decided not to do that. In my view, I don't need to address the cited arbitration awards to decide this case. As a result, what the parties are going to get here – for better or worse – is simply my analysis without any reference to those other awards. Consequently, no other comments are going to be made about the various arbitration awards cited by the parties.

. . .

The focus now turns to the contract provisions referenced by the parties in the stipulated issue.

Before I address those provisions though, I've decided to note that the provision that is often involved in arbitration awards dealing with employee furloughs is the contractual layoff provision. Here, though, that particular contract provision is not involved. In this case, the parties agree that the contractual layoff provision (namely, Section 11.03) is not involved because there was no reduction in force, loss of employment, or reduction in the number of employees employed by the Employer. Rather, what happened here is that all bargaining unit employees remained employed, but everyone in the bargaining unit had their work schedule changed four times in late 2009. Specifically, each bargaining unit employee worked four fewer days than the normal number of scheduled days for calendar year 2009.

The focus now turns to the first contract provision referenced in the stipulated issue, namely Article 18. That article, which is entitled "Hours of Employment", is almost two pages long. In their arguments though, the parties cite just three sections: Sections 18.01, 18.02 and 18.08. I begin my analysis by looking at Section 18.01. It provides thus:

> Section 18.01 Normal Schedule. The normal work schedule shall be six (6) workdays of eight (8) hours and three (3) days off (6-3).

In plain, unambiguous terms, this section identifies what the "normal" work schedule is (i.e. a 6-3 schedule, 8 hours a day). The meaning of the word "normal" will be addressed later.

Although that section does not say so, the record indicates that patrol officers work the 6-3 schedule identified in Section 18.01. Detectives work a different schedule. Their schedule is found in Section 18.08 wherein it provides:

> Section 18.08 Rotating Detective Schedule. The City of Fitchburg bargaining unit detectives will be assigned to a 5-2, 5-2, 4-3 shift rotation. Under this shift rotation program, the detectives will be assigned alternating 5-2, 5-2, 4-3 shifts. . . .

In the context of this case, what is noteworthy about this language is that it does not include the word "normal". As just noted, the language in Section 18.01 uses the word "normal", but that word is not found in Section 18.08.

Having just noted that distinction in the language (i.e. that Section 18.01 includes the word "normal" while Section 18.08 does not), I'm nonetheless going to treat Section 18.08 as if it included the word "normal" in the detectives' work schedule. Here's why. The parties' bargaining history referenced in Stipulated Facts 4-7 makes it clear that the parties intended the word "normal" to apply to the detectives' work schedule (even though it is not listed in Section 18.08). What I'm referring to is this. Under the 1996-1997 collective bargaining agreement, the detectives worked the same work schedule as the patrol officers (i.e. a 6-3 schedule). During negotiations for a successor to that agreement, the Association proposed that detectives work a five day shift rather than a six day shift. Specifically, the Association proposed a 5-2, 5-2, 4-3 work schedule for the detectives. When the City's bargaining team asked the Association what the impact of agreeing to the Association's proposal would be, the Association's response was that it (i.e. the changed work schedule) would only impact what the **normally** scheduled hours for the detectives would be. What is significant about this response is the use of the word "normal". Given the context and usage of that term, the inference which is drawn from that bargaining history is that while the detectives' work schedule does not include the word "normal" in it, the parties mutually meant for it to be part of the language (just like it is in Section 18.01). Thus, the "normal" work schedule for patrol officers is six days on and three days off, while the detectives normally work two weeks with five days on and two days off, and then one week with four days on and three days off.

What happened here, of course, is that the Employer deviated from that "normal" schedule in late 2009. As already noted, it modified the work schedule for each employee in the bargaining unit (i.e. both patrol officers and detectives) four times during the time period from August 16, 2009 through November 29, 2009.

The Association argues that the Employer could not deviate from the "normal" work schedule because the collective bargaining agreement specifies all the "situations" where the "normal work schedule" could be deviated from. According to the Association, those "situations" are a criminal investigation, a riot, a civil disturbance, a strike and an emergency. Building on that premise, the Association asserts that none of those "situations" were shown to exist here, so the Employer had to maintain the employee's "normal work schedule" and could not change it. The problem with this contention is that it rewrites the contract. Here's why. The "situations" just referenced (i.e. a criminal investigation, a riot, a civil disturbance, a strike and an emergency) are all mentioned in Section 18.02. That section (Section 18.02) deals with shifts. As previously noted, Section 18.01 deals with the work schedule. A shift is not the same thing as a schedule. Simply put, the two words are different and are not synonymous. As noted by the Association, the word "shift" refers to the time of the day when the employee works – such as first, second or third shift. In this case, the Employer did not change any employee's shift; instead, it changed their normal work schedule. In my view, it follows from that that the contract language applicable here is Section 18.01; Section 18.02 is

simply inapplicable herein. Knowing this, what the Association does in its briefs is blend the two provisions (i.e. Sections 18.01 and 18.02) together. It does this by taking the language from Section 18.02 dealing with when the Chief "may deviate from the established shift to meet specific needs", and applying it to Section 18.01, so as to require the Employer to show that one of the aforementioned "situations" exist before the "normal" work schedule can be changed. Doing that impermissibly rewrites the contract since it takes the "specific needs" shift deviation language from Section 18.02 and bootstraps it into Section 18.01 so that Section 18.01 has schedule deviation language. As noted earlier, the problem with that is that there is no language in Section 18.01 dealing with deviating from the "normal work schedule". Thus, while Section 18.01 identifies the "normal" work schedule for the patrol officers, and the parties' bargaining history establishes that Section 18.08 identifies the "normal" work schedule for the detectives, neither section says anything about when that "normal" schedule can be changed.

Next, the Association contends that the "normal work schedule" language in Section 18.01 constitutes a guaranteed workweek for the patrol officers and the detectives. I find otherwise. On its face, Section 18.01 does nothing more than identify what the "normal" work schedule is. It does not guarantee any number of hours annually or in any specific week. The term "normal" modifies the phrase which follows (i.e. "work schedule shall be six (6) workdays of eight (8) hours, and three (3) days off."). If the parties had intended the work schedule in Section 18.01 to be a guaranteed workweek, they would have used a stronger term than the term "normal". Terms like "normal" and "regular" are hedge words. Their usage implies that there can be exceptions. That being so, it follows that the workweeks referenced in Sections 18.01 and 18.08 are not guaranteed workweeks.

Since neither Sections 18.01 nor 18.08 establishes a guaranteed workweek, and neither section says anything about when the "normal" work schedule can be changed, I'm going to look elsewhere in the collective bargaining agreement to see if another contract provision is applicable and provides any guidance to help me decide whether the "normal" work schedule can ever be changed. There is; the contractual management rights clause. One section in that clause, namely Section 5.01(h) says that the Employer has the right "to establish or alter the number of shifts [and] work schedules. . . ." That section expressly gives the City the right to "alter. . .work schedules." When that provision is juxtaposed with the "normal" work schedules referenced in Sections 18.01 and 18.08, it means that the City has the discretion to modify the "normal" work schedules.

Not surprisingly, the City relies on the portion of the management rights clause just quoted to justify changing the employees' "normal" work schedules. When an employer relies on the management rights clause to justify an action, arbitrators often review that action via an arbitrary and capricious standard. I will do so here as well. In this case, the Stipulated Facts provide that the reason the Employer unilaterally modified the employees' "normal" work schedules was because of its serious financial difficulties. There is no basis in the record herein for me to find otherwise. That being so, it is held that the City's action in changing the employees' "normal" work schedules passes muster under an arbitrary and capricious standard.

Finally, I consider it noteworthy that the "normal" work schedule has been changed before. In making that statement, what I'm referring to is Stipulated Fact 8 which says that "from at least 1997 to the present, there have been numerous incidents where both detectives and patrol officers have been required by the City to work a schedule different than their normal work schedule due to the needs of the City." While Stipulated Fact 8 does not establish a past practice that the City can deviate from the "normal" work schedule whenever it chooses, I've quoted it simply to show that the contract interpretation I reached above concerning Article 18 is consistent with what has happened before (namely, that the Employer has changed the employees' "normal" work schedules "due to the needs of the City.")

. . .

The focus now turns to the second contract provision referenced in the stipulated issue, namely Article 23. That article is entitled "Compensation Rates". In Sections 21.01, 21.02 and 21.03, it lists the salary, respectively, for patrol officers and detectives for 2009, 2010 and 2011. Sections 23.04 and 23.05 have no bearing on this case. The only parts of Sections 21.01, 21.02 and 21.03 that are relevant here are the lines at the top of each pay grid which says "Annual Salary" and "Hourly". Those lines identify the rate of pay on both an annualized basis and an hourly basis. Section 19.01 says that the hourly rate of pay is the annual salary divided by 1950 hours. As the Association sees it, the words "Annual Salary" create a guarantee that all bargaining unit members will be paid at least 1950 hours times the hourly salary set forth in Article 23. Said another way, the Association argues that there is a guarantee that all such bargaining unit members will be paid this minimum annual compensation. I find otherwise for the following reasons. First, employees are not paid a yearly salary – they are paid on an hourly basis. Their pay is calculated on an hourly basis. An hourly rate is used to pay the employees for their straight time and to compensate them for any shift differential and overtime. Thus, their total compensation is based on what hours they worked, including their shift differentials and overtime. The only way that an employee could be paid the "Annual Salary" listed in Article 23 is if they worked precisely 1950 hours in a year with no overtime or shift differentials. The Association essentially argues that if there was a hypothetical employee that worked the entire year at straight time (with no overtime and shift differentials included), minus the four furlough days, then Article 23 was violated because that employee was not paid the (purportedly guaranteed) annual salary. The problem with this contention is that it is not supported by the evidence set forth in the record. What I'm referring to is this. Stipulated Fact 16 provides that all the patrol officers and detectives earned more than the annualized salary listed in Article 23. Thus, even with the four furlough days, all the bargaining unit employees were paid more than the "Annual Salary" listed in Article 23. Second, were I to find otherwise (i.e. find that Article 23 guarantees employees a minimum annual salary), that would mean that if the Employer laid off or fired an employee in say, February, it would still have to continue to pay that employee's salary for the next ten calendar months (when theoretically the annual salary number would be met). While such arrangements sometimes occur as part of a severance package, the point is that there is no language in this collective bargaining agreement which requires that result. In my view, the Association's reading of the phrase "Annual Salary" to be a guarantee of employment for one

calendar year lacks a sound contractual basis. Moreover, were I to accept the Association's proposed interpretation (and find that all employees had to be paid the annual salary listed in Article 23), another problematic outcome would be that part-time employees would earn the same annual salary as full-time employees, regardless of the number of hours they worked. That outcome makes little sense. When one interpretation of a contract provision would lead to nonsensical results while the alternative interpretation would not, arbitrators usually opt for the latter rather than the former. In accordance with that arbitral principle, I reject the Association's proposed interpretation of Article 23. Accordingly, no violation of Article 23 has been found.

. . .

In light of the above, I find that the four schedule adjustment days which the Employer implemented in late 2009 did not violate either Articles 18 or 23 of the collective bargaining agreement. Accordingly, that action passes contractual muster.

I therefore issue the following

AWARD

That the City of Fitchburg did not violate Articles 18 or 23 of the collective bargaining agreement when it temporarily modified the work schedule for each employee in the bargaining unit four times during the time period from August 16, 2009 through November 29, 2009. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of February, 2011.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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