BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE LABOR ASSOCIATION OF WISCONSIN, INC., (LAW)
GRAFTON POLICE OFFICERS ASSOCIATION, LOCAL 305

and

VILLAGE OF GRAFTON (POLICE DEPARTMENT)

Case 42
No. 70397
MA-14956

(Meiller Grievance)

Appearances:

Benjamin Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of LAW.

Mary Hubacher, Attorney, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of the Village of Grafton.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., Grafton Police Officers Association, Local 305, hereinafter LAW or the Association, and the Village of Grafton, hereinafter the Village or Employer, requested a list of five arbitrators from the Wisconsin Employment Relations Commission from which to select a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement. Raleigh Jones, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on April 14, 2011, in Grafton, Wisconsin. The hearing was transcribed. The parties submitted briefs and reply briefs by July 8, 2011, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to the issue(s) to be decided in this case. The Association framed the issue as follows:

> Did the Employer violate the expressed or implied terms of the collective bargaining agreement when on October 2, 2010, Chief Charles Wenten changed Officer Tom Meiller's shift from first to second shift and Officer Scott Brinkman's shift from second shift to first shift without compensating them at the rate of time and one-half?
>
> If so, what is the appropriate remedy?

The Employer framed the issue as follows:

> Did the Employer properly exercise its management rights to make assignments of jobs and to determine the work schedules and work to be performed by the work force and each employee when it temporarily reassigned the grievant to the second shift on October 2, 2010, due to the temporary reassignment of another officer to the day shift to work a special assignment?
>
> If so, what is the appropriate remedy?

I have essentially adopted the Association's issue, but I've broken it down into two separate parts so that the shift change matter is one issue and the overtime matter is another. Thus, I'm going to decide the following issues:

1. Did the Employer violate the collective bargaining agreement when it changed the work shifts of Officers Meiller and Brinkman on October 2, 2010 and had Meiller work the second shift and Brinkman work the first shift? If so, what is the appropriate remedy?

2. Did the Employer violate the collective bargaining agreement when it did not pay Officers Meiller and Brinkman overtime for the shifts that they worked on October 2, 2010? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

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

ARTICLE II – MANAGEMENT RIGHTS

. . .

> The Village has the exclusive right and authority to make assignments of jobs, to determine the size and composition of the work force, to determine work schedules and the work to be performed by the work force and each employee, to establish methods and processes by which said work is performed,

to determine the competence and qualifications of the employees, to determine the location where the operations of the Village are to be conducted, to hire, promote and lay off employees and to make assignments and promotions to supervisory positions, to transfer employees within the Police Department, to suspend, demote and discharge employees, to assign and schedule overtime work, 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, and to consolidate existing positions, departments or operations.

The Association pledges cooperation to the increasing of the departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the Police Force shall be exclusively the right of the Village and the Chief of Police, unless otherwise provided by the terms of this Agreement as permitted by law.

. . .

ARTICLE IV – WORKWEEK

The normal work shift for all full-time Association employees will consist of eight (8) hours and twenty (20) minutes worked continuously on an established shift, four shifts on duty followed by two days off followed by four shifts followed by two days off then repeating. . . .

. . .

The Chief of Police shall designate the working shifts as per individual officer with all due consideration given to rank and seniority. Employees in November/December shall be annually allowed to choose their shifts for the following year on a seniority basis.

ARTICLE V – PAY POLICY

. . .

Section 2. Overtime. Each full-time member of the Association shall receive overtime pay at the rate of one and one-half (1½) times his regular hourly rate for all work performed in excess of his assigned workweek as outlined in Article IV. . . .

. . .

ARTICLE XV – GRIEVANCE PROCEDURE

Section 1. Scope. A grievance is defined as an alleged violation of a specific provision of this Agreement. Grievances shall be handled in accordance with the procedure set out in this Article. A grievance is required to be in writing; it shall state the specific provision of this Agreement alleged to have been violated. . . .

Section 2. Initial Time Limit. Both the Association and the Village recognize that grievances shall be settled promptly and at the earliest possible stage, and therefore, agree that Step One of the grievance procedure must be initiated within ten (10) calendar days of the incident. Grievances not filed within such period shall be invalid.

Section 3. Grievance Process.

Step One. The employee and/or Association shall present the grievance in writing to the Police Chief. . . .

Step Two. The grievance shall be considered settled at Step One unless, within ten (10) working days from the date of the Police Chief's written answer or last date due the grievance is appealed in writing by the employee and/or the Association to the Village Administrator, who will forward it to the appropriate committee of the Village Board. The committee may discuss the grievance with the employee and/or the Association, but shall submit its written answer to the employee and/or Association within fifteen (15) workdays after the presentation of the grievance to it.

Step Three. The grievance shall be considered settled in Step Two unless, within ten (10) working days from the date of the committee's written answer or last date due, the grievance is appealed to arbitration by the Association. In appealing a grievance to arbitration, the Association shall send a written notification of that fact to the Village Administrator and, at the same time, shall request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to the parties. The Association shall first strike two (2) names from the list and then the Village will strike two (2) names, the remaining name being the arbitrator who will hear the dispute.

BACKGROUND

The Village operates a Police Department. The Association is the exclusive collective bargaining representative for those police department employees with the power of arrest. Tom Meiller and Scott Brinkman are police officers in the Department and thus are members of the bargaining unit.

The Police Department operates twenty-four hours per day, seven days per week. There are three established shifts for the Department: day shift (also known as the first shift) which is 5:50 a.m. – 2:10 p.m.; early shift (also known as the second shift) which is 1:50 p.m. to 10:10 p.m.; and late shift (also known as the third shift) which is 9:50 p.m. – 6:10 a.m. A normal shift is eight hours and 20 minutes long. Officers work a repeating 4-2/4-2 rotation schedule on one of the established shifts. The minimum staffing coverage per shift is three officers assigned to patrol duty.

In November/December of each year, bargaining unit employees select their shifts for the upcoming year by seniority. For 2010, Meiller selected first shift (5:50 a.m. – 2:10 p.m.) and Brinkman selected second shift (1:50 p.m. – 10:10 p.m.) The day shift that Meiller selected consists of five slots. Meiller selected the fifth slot (which is the last slot in the day shift grouping). Meiller, who is not the least senior officer of the day shift group, could have selected the fourth slot but has for the last several years requested the fifth slot. He did so despite discussions with Chief Wenten and Captain Gabrish that the officer in the last (fifth) slot is likely to more often be assigned to a different shift on a temporary basis.

In 2003, Charles Wenten became the Chief of the Department. The record indicates that after becoming Chief, he began having officers temporarily reassigned from their normal selected shift to a different shift on a scheduled workday to maintain minimum staff levels. For example, if there were only two officers scheduled for second shift, but there were four officers scheduled for first shift, an officer from first shift would be temporarily reassigned to second shift to provide the minimum three officers assigned to patrol on the second shift. Chief Wenten did this (i.e. temporarily reassign officers from one shift to another shift on a scheduled workday) to avoid incurring overtime pay. Thus, when officers were reassigned from one shift to another shift on a scheduled workday, they were paid at straight time (not overtime) so long as they did not work in excess of their regular workweek and did not work on a regularly scheduled off day. The record indicates that officers were repeatedly reassigned to different shifts (on their regularly scheduled workday) to attend and conduct training, to participate in special assignments such as community events, or to cover absences for officers taking paid time off (such as vacation, family medical leave, comp time off, etc.). As an example, in the years 2008-2010, Officer Meiller was temporarily reassigned from the first shift to the second shift on more than 100 different dates for a variety of reasons. When that happened, he was paid at straight time – not overtime. None of those temporary reassignments was grieved.

The record further indicates that when the Department temporarily reassigned officers from one shift to another on their scheduled workday, it has received some advance notice that an officer was going to be absent from his/her selected shift. That advance notice allows the Department to also give advance notice to those officers who were going to be reassigned to a different shift. The record also indicates that the Department does not reassign officers to a different shift where there is very short notice that an officer will not be reporting for his/her selected shift such as in the case of illness. In those instances, an officer would be called into work earlier than the scheduled shift start time or would be required to stay beyond the normal

shift end time and would be compensated at overtime (i.e. the rate of time and one-half) for the additional hours worked.

FACTS

In August of 2010, the Department received a request from the Home Depot store in Grafton for a safety officer to participate in a crime prevention and public service program that would be taking place at the store. Specifically, Home Depot requested that the Department's "in-house car seat check and review specialist" participate in a community safety program which was already scheduled for the hours of 10:00 a.m. – 4:00 p.m. on Saturday, October 2, 2010. The record reflects that Officer Brinkman is the Department's "in-house car seat check and review specialist". The Department, which routinely supports community programs such as this, agreed that it would have Officer Brinkman participate in the safety program. The Department was not given any input into the date of the event or the time that Officer Brinkman would need to attend the event. In early September, 2010, Officers Meiller and Brinkman were notified that their work shifts for October 2, 2010 were going to be changed so that Brinkman could participate in the safety event scheduled for that date. The shift reassignments which were made to effectuate Officer Brinkman's participation at this event were as follows. First, since Officer Brinkman's normal shift is second shift, he was reassigned to work a shift of 8:00 a.m. to 4:00 p.m. that day. Second, since there were already four officers scheduled to work the day shift that day (prior to Brinkman's reassignment for the day), Officer Meiller was reassigned from his normal first shift to work the second shift that day.

After Officer Meiller was notified of his shift reassignment for October 2, 2010, he did not attempt to trade the reassignment with another officer who was assigned to days for October 2, 2010. The Department has a trade policy that allows officers the opportunity to trade a shift with another officer if they need to be off on a particular day or particular shift. Another officer, Officer Cawley, offered to work the second shift for Meiller on October 2, 2010, but Officer Meiller declined and indicated that he was going to work the assigned second shift and then grieve it.

October 2, 2010 was a regularly-scheduled workday for both Officers Meiller and Brinkman. As previously noted, neither officer worked their regular shift that day. Thus, Meiller did not work the first shift and Brinkman did not work the second shift. Instead, both worked their temporary reassignments: Brinkman worked a shift which ran from 8:00 a.m. to 4:00 p.m. and Meiller worked the second shift. During part of his shift, Brinkman worked at the safety program at the Home Depot store. Each officer worked eight hours and 20 minutes that day. Each officer was paid at straight time (as opposed to overtime) for their shift.

The Association subsequently filed a grievance over the matter referenced above. The grievance named one person – Meiller – as the "grievant". The grievance did not also name Brinkman as a "grievant". As a remedy for the Employer's alleged violation of the collective bargaining agreement, the Association sought overtime for "the grievant". . . "for all hours

worked outside his established shift on October 2, 2010." The Employer denied the grievance and it was ultimately appealed to arbitration.

The record indicates that after the above referenced grievance was filed, Meiller was temporarily reassigned to a different shift on five other occasions later that year. Each time, he was paid at straight time – not overtime. None of those temporary reassignments was grieved.

. . .

At the hearing, Officer Meiller averred that on October 2, 2010, Officer Brinkman could have worked from 10:00 a.m. to 2:00 p.m. at the community safety event, and then worked his regular shift of 2:00 p.m. to 10:00 p.m. (for a total of twelve hours). In response, Chief Wenten testified that allowing an officer to work more than twelve consecutive hours is allowed only under extraordinary circumstances.

POSITIONS OF THE PARTIES

Association

It is the Association's position that the Employer violated the collective bargaining agreement when it changed Officer Meiller's shift from first shift to second shift and Officer Brinkman's shift from second shift to first shift without compensating them at the rate of time and one-half. It elaborates as follows.

As the Association sees it, the arbitrator need not look any further than the last sentence in Article IV to resolve this case. The Association contends that the last sentence in Article IV is clear and unambiguous in providing that employees get to select the shift they are going to work the following year. The Association points out that in late 2009, Meiller selected the first shift to work in 2010 and Brinkman selected the second shift. The Association argues that when the Chief assigned them to work different shifts on October 2, 2010 than what they had selected, the Chief not only ignored their shift selection preference, but he also failed to give "consideration" (as that term is used in the next to the last sentence of Article IV) to their seniority. The Association states rhetorically that if the parties had intended for the Chief to bypass seniority (when making shift assignments), they (i.e. the parties) would have said that. They did not. The Association also believes it is significant that employees have been picking their shifts by seniority for many years. Putting all the foregoing together, the Association contends that the Employer violated Article IV when it directed Meiller and Brinkman to work different shifts on October 2, 2010 than what they had selected.

Next, as just noted, the Association believes that the contract provision which is controlling here is the last sentence in Article IV. The Association argues that the contract provision which the Employer relies on (namely, Article II – Management Rights) does not control this case. Here's why. It notes that the last sentence in that article says in pertinent

part: "unless otherwise provided by the terms of this Agreement." As the Association sees it, the Employer ignores the last sentence in Article II in making its management rights argument. The Association also maintains that the language in Article IV about shift selection being by seniority is very specific and, as a result, it trumps the general language in the Management Rights clause which gives the Employer the right "to determine work schedules." To support that premise, it cites Elkouri for the arbitral proposition that specific terms are given greater weight than general terms. According to the Association, by agreeing to the last sentence in Article IV, the Village "gave up its management right to assign officers to shifts."

Next, the Association argues that notwithstanding the Employer's contention to the contrary, this case should not be controlled by an alleged past practice. Instead, as the Association sees it, the contract language should be controlling. Here's why. The Association cites the standard arbitral principle that when the contract language is clear and unambiguous (which the Association maintains is the standard here), then there is no need for the arbitrator to even consider an alleged past practice. The Association asks the arbitrator to follow that principle here.

Finally, as the Association put it in their brief, "events come up where employees might have to be moved from their selected shifts." The Association submits that if that happens, and the Chief makes the decision to have the employee work a different shift than the shift the employee selected, then the Department has to pay the employee overtime. It cites Article V to support that proposition. As part of its overtime argument, it repeats the assertion it made previously that specific language outweighs general language. It also cites Elkouri for the proposition that "many arbitrators have ruled that switching employee's assigned shifts to avoid paying overtime is not permitted." The Association maintains that the sole reason Meiller and Brinkman had their regularly assigned shifts changed on October 2, 2010 was to avoid incurring overtime. As the Association sees it, that violated Article V.

As part of its overtime argument, the Association calls the arbitrator's attention to a previous arbitration award between the parties, namely VILLAGE OF GRAFTON, Case 31, No. 64048, MA-12788 (Gallagher, 2005). The Association summarizes that award as finding "that the Village overstepped its' Management Rights when it changed the work week of officers to avoid paying overtime for training." It's the Association's view that "this case is no different" than that case. First, the Association maintains that in that case, "the Village tried to circumvent paying overtime for training." As the Association sees it, that makes the facts in the two cases similar. Second, the Association further avers that the contract language has not changed since that award was issued, and the Employer has not made any attempts to modify the contract language. Building on the foregoing, the Association opines that the result in this case should be the same as in that case (where the arbitrator found a contract violation).

The Association therefore asks the arbitrator to sustain the grievance and find a contract violation. As a remedy, the Association seeks 8 hours and 20 minutes of overtime for both Officers Meiller and Brinkman.

Employer

It's the Employer's view that it properly exercised its management rights to make assignments of jobs and to determine the work schedules and the work to be performed by the work force and each employee when it temporarily reassigned Meiller to the second shift on October 2, 2010 due to the temporary reassignment of another officer to the day shift to work a special assignment. Building on that premise, the Employer also believes it did not have to pay Meiller overtime for working a different shift. It elaborates as follows.

First, the Employer argues that it had the contractual authority – based on the Management Rights clause – to assign Officer Meiller to the second shift. Specifically, the Employer relies on the language in Article II which gives it the "exclusive right and authority" to assign work, determine work schedules, transfer employees and improve work practices. According to the Employer, that's exactly what the Department did on October 2, 2010 when it assigned Officer Brinkman the job of attending a special community event for which he was uniquely qualified during the day shift and scheduled Officer Meiller to work second shift that day "in order to meet the minimum staffing requirements in the most efficient manner possible".

As part of its management rights argument, the Employer contends that management's right to assign employees to a different daily shift within the regular work shift schedule is not limited by the reference to the "normal work shift" in the first sentence of Article IV. Here's why. First, the Employer believes it is well established that the use of the modifier "normal" in describing work shift or hours of work does not "guarantee that the work week will be as described." It cites several WERC arbitration awards to support that proposition. Second, the Employer emphasizes that in this case, the Department did not change the normal work shift of 8 hours and 20 minutes worked on an established shift using a repeating 4-2/4-2 schedule, nor did it assign an officer to work on a regularly scheduled off day; "rather it assigned the grievant, Officer Meiller, to a different shift on a regularly scheduled workday in order to address a shift staffing shortage on second shift." Third, the Employer argues that the Association's reliance on the parties' prior arbitration award is misplaced. According to the Employer, the issue in that 2005 arbitration award was whether the Chief had the right to alter the 4-2/4-2 workday schedule and require officers to attend training on a day that was not a regularly scheduled work day without paying them overtime. Here, though, that issue is not before the arbitrator in this case as there is no claim that the grievant was required to work on a day outside of his normal 4-2/4-2 rotation. The Employer opines that "the application of a contract provision to a different set of facts does not give rise to the Association's claim that the issue here has already been decided."

Next, the Employer addresses the Association's contention that the Employer violated the last sentence in Article IV which provides that employees are allowed to choose their (normal) shift based on seniority. It disputes that contention. First, the Employer emphasizes that the shift change at issue here was just for a single day – it was not a permanent or indefinite change. The Employer believes that is significant. Second, the Employer

emphasizes that the change was made to provide what it calls a "vital public service" (namely, assigning Officer Brinkman, the only car seat certified inspector, to participate in the safety program and maintain minimum patrol coverage on the second shift). Third, the Employer avers that the contract contains no specific language regarding whether daily shifts can be changed on a temporary basis within the normal work schedule. Building on that premise (i.e. that the contract is silent on whether a daily shift can be changed within the parameters of the normal 4-2/4-2 schedule), it's the Employer's view that the Department's exercise of its management right to determine work schedules was not contrary to any express term of the agreement and fell squarely within the rights retained by management under Article II of the contract.

The Employer also contends there is a past practice which supports its management right to temporarily reassign bargaining unit employees to a different daily shift. According to the Employer, since 2003, it has routinely changed officers daily shift assignments within the 4-2/4-2 work schedule in order to meet staffing minimums, and further, that it did this without paying overtime. To support that premise, it avers that the record evidence shows that officers have been reassigned to different shifts for the following reasons: 1) when another officer was given a special assignment other than patrol on that shift; 2) to accommodate training of officers; and 3) officers being off of work for vacation, comp time, and family medical leave. The Employer asserts that the Association knew of, and accepted, this practice. It specifically notes in this regard that Officer Meiller (who currently serves as the Association's president) has been temporarily assigned to a shift other than his normal shift more than 100 times during the past three years alone. As the Employer sees it, the foregoing demonstrates that the Department's practice of temporarily assigning officers to a shift other than their normal shift is broad and includes situations similar to that at issue here – namely, to meet shift staff minimums when an officer is assigned to a job other than patrol or on a shift other than that officer's normal annual shift. The Employer contends that the Association cannot distinguish the reassignment which is involved herein from the Department's well-established and broad practice of reassigning officers for a wide variety of reasons to meet staff shift minimums and to which the Association has acquiesced. Addressing the Association's contention that the arbitrator should ignore the past practice altogether because Article IV is clear and unambiguous, the Employer argues that by their actions, the parties have amended the agreement to be consistent with their regular practice.

Turning now to the Association's request for overtime pay, the Employer contends that no overtime is owed under the circumstances. In support thereof, the Employer relies on Article V, Sec. 2 which says that an employee is entitled to receive overtime pay for all work performed in excess of his assigned workweek. The Employer goes on to note that the language does not say that an employee is entitled to be paid time-and-one-half if the employee is assigned to a different shift on a regular workday in a workweek and the hours worked do not result in the employee working in excess of the hours assigned for that workweek. The Employer emphasizes that what happened here was that Officer Meiller was reassigned from first shift to the second shift on a scheduled workday. When this happened, he did not work any hours in excess of those hours assigned to him for that week. As the Employer sees it,

that means Meiller did not qualify for overtime. Aside from the contract language, the Employer also relies on the previously-referenced past practice. The Employer avers that in the 100 or so situations in the last three years where Meiller was temporarily reassigned to a shift other than his normal selected shift, he was not paid overtime for any of those situations. The Employer contends that the Association offered no evidence that any officer who was reassigned to a different shift has ever received overtime pay. According to the Employer, the reason for this is simple: no such evidence exists.

Finally, in the event that the Association prevails on the grievance and the arbitrator finds that overtime is owed, it's the Employer's view that no overtime should be paid to Officer Brinkman. Here's why. First, the Employer avers that the grievance named just one employee – Meiller – as the grievant; Brinkman was not a named grievant. Second, building on that, the Employer notes that the Association never processed a separate grievance on his (Brinkman's) behalf. It points out in this regard that the contract has very specific requirements in Article XV dealing with the filing and processing of grievances, and the Association did not follow that procedure for Brinkman's overtime claim. Instead, what happened was that at the hearing, the Association simply attempted to add Officer Brinkman as a grievant for the first time at the arbitration hearing via its proposed statement of the issue. Third, anticipating that the Association will argue that there is no prejudice to the Village if the grievance is amended to include Officer Brinkman as a grievant, the Employer reiterates that "the contract sets forth specific procedures and timelines that must be adhered to when processing a grievance – and also provides a clear remedy if the timelines are not followed: the grievance is invalid." Since both the Association and Officer Brinkman failed to follow the procedures for processing a grievance including failing to satisfy the agreed upon timeline, the Employer asks the arbitrator to dismiss the Association's attempt to join Officer Brinkman as a grievant.

DISCUSSION

I've decided to begin by reviewing the following pertinent facts. Officer Meiller normally works the first shift and Officer Brinkman normally works the second shift. On October 2, 2010, neither worked their normal shift. Instead, each officer worked the other's shift. The reason for this shift change was this: there was a community event that day that the Employer wanted Brinkman to attend. That event was during the day, so the Employer essentially had the two officers switch shifts for the day. Brinkman worked a shift that wasn't technically the first shift, but nonetheless was close enough to it that I'm going to refer to it as the first shift. Meiller worked the second shift. Neither was paid overtime for working a different shift. Instead, both were paid at straight time.

In my view, this case involves two separate issues. First, did the Employer violate the collective bargaining agreement when it changed the work shifts of Meiller and Brinkman on October 2, 2010 and had Meiller work the second shift and Brinkman work the first shift? Second, did the Employer violate the collective bargaining agreement when it did not pay overtime to those employees for the shifts that they worked that day? Based on the rationale

which follows, I answer both those questions in the negative (meaning I find no contract violation). I will address those issues in the order just listed.

I'm going to start my discussion of the contract language by looking at the contract provision which identifies the employees' workweek, namely Article IV. The first sentence in that article identifies both the employees' work schedule and the shifts that they work. With regard to the former (i.e. their work schedule), this sentence provides that employees work a 4-2/4-2 schedule. With regard to the latter (i.e. their work shift), this same sentence provides that the "normal work shift" will consist of 8 hours and 20 minutes "worked continuously on an established shift." While this sentence does not say so explicitly, I think that the phrase "an established shift" implicitly refers to the time of day when an employee works, such as first, second or third shift.

In this case, the Employer did not change anyone's work schedule. The day in question (October 2, 2010) was a scheduled workday for both Meiller and Brinkman and both worked that day. That's significant for this reason. In the 2005 arbitration award that the Association cites, the Employer changed the employees' 4-2/4-2 work schedule and required them to attend training on a day that was not a regularly scheduled workday. In other words, the employees were required to work on a regularly scheduled off day. Here, though, that didn't happen because neither Meiller nor Brinkman was required to work on an off day. That being so, I conclude that the prior arbitration award is factually distinguishable on that basis alone. Returning to what happened here, the Employer also did not change the length of either Meiller or Brinkman's shift. Both employees worked the time period referenced in Article IV that day (namely, 8 hours and 20 minutes). Instead, what management did that day was this: it changed those two employees shifts on that workday and essentially rotated them so that each worked the other's shift.

The Association argues that the Employer could not do that (i.e. change those employees' shifts) because doing that allegedly violated the last sentence in Article IV. That sentence says that employees get to "choose their shift for the following year" based on their seniority. The record shows that Meiller had selected the first shift as his "normal" shift and Brinkman had selected the second shift as his "normal" shift. As the Association sees it, since the employees had selected those shifts as their "normal" shifts, the Employer could not change their work shifts on October 2, 2010. I disagree. Here's why.

As just noted, while the last sentence in Article IV says that employees get to select their "normal" shift based on their seniority, that sentence does not guarantee that employees will always work the shift they select. If the parties had intended that the shifts employees' select could never be changed, they would have used a stronger term in the first sentence than the term "normal". In labor relations, the terms "normal" and "regular" are hedge words. Said another way, the word "normal" is a modifier. Its explicit presence in the first sentence of Article IV, and its implicit presence in the last sentence of Article IV, means that employees are not guaranteed they will always work their "normal" shift.

Some collective bargaining agreements contain language that limit the situations where the employer can change the employee's "normal" shift on a temporary basis. Here, though, Article IV contains no such language. As a result, Article IV is silent on whether the daily shift can ever be changed within the parameters of the 4-2/4-2 schedule.

Since Article IV does not guarantee that employees will always work their "normal" shift, and that same article does not say anything about whether "normal" shifts can ever 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 "normal" shifts can ever be changed. There is: it's the contractual management rights clause. That clause gives the Employer the "exclusive right and authority" to assign jobs, determine work schedules, transfer employees and improve work practices. When that provision granting those express rights to the Employer is juxtaposed with the language contained in Article IV dealing with the "normal work shift", it means that the Employer has retained the right to assign employees to a different daily shift within the regular work schedule – notwithstanding the reference in Article IV to the "normal work shift."

Not surprisingly, the Employer relies on the portion of the management rights clause just quoted to justify changing Meiller and Brinkman's "normal" work shifts on October 2, 2010. 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 Employer avers that the reason it unilaterally changed Brinkman's "normal" shift – and assigned him to the first shift – was to provide what it called a "vital public service" (namely, assigning Brinkman [who is the Department's only car seat certified inspector] to participate in a community safety program). The Employer further avers that the reason it unilaterally changed Meiller's "normal" shift – and assigned him to the second shift – was that Brinkman's transfer to the first shift created an opening on the second shift that needed filling, and the Department decided that Meiller's assignment to that open shift satisfied its "minimum staffing requirements in the most efficient manner possible." There is no objective basis in the record herein for me to find otherwise. That being so, it is held that the Employer's action in changing Meiller and Brinkman's "normal" work shifts on October 2, 2010 passes muster under an arbitrary and capricious standard. Building on that, I also find that the Department's actions here in changing Meiller and Brinkman's work shifts was not contrary to any express term of the agreement, so it fell within the rights retained by management under Article II.

Next, as part of its argument concerning Article IV, the Association asks me to ignore how that language has been applied in recent years. I decline to do so. Here's why. I consider it noteworthy that the contractual interpretation I just made (namely, that management has the contractual right to temporarily reassign employees to a different daily shift on their regular work day) coincides with the way Article IV has been applied in recent years. What I'm referring to is this: the record establishes that since 2003, the Department has routinely reassigned officers from their "normal" selected shift to a different shift on the same scheduled

workday to maintain minimum staff levels. More specifically, the record shows that officers were reassigned from their "normal" shift to different shifts (on their regularly scheduled workday) to attend and conduct training, to participate in special assignments such as community events, or to cover absences for officers taking paid time off. In fact, the record shows that in the years 2008-2010, Officer Meiller – who is the Association President – was temporarily reassigned from his "normal" first shift to the second shift more than 100 times for a variety of reasons. The foregoing satisfies me that what has happened previously qualifies as a past practice within the conventional meaning of that term. I'm further satisfied that the Association knew of, and acquiesced to, this practice. In some past practice cases, a party tries to distinguish the practice from the instant facts. Here, though, the Association did not do so. It therefore follows that the Department's reassignment of Meiller and Brinkman to different shifts on October 2, 2010 has not been distinguished from the Department's established practice of reassigning officers from their "normal" shift to a different shift on their regular workday to meet shift staff minimums.

. . .

I now move to the question of whether the Employer was contractually obligated to pay overtime for the shift reassignments made October 2, 2010.

The Employer argues at the outset that no overtime is owed Brinkman because he was not a named grievant in this case. A review of the grievance document indicates that the Employer is correct – the only named grievant was Meiller. Be that as it may, I've decided to presume for the sake of discussion that if overtime was owed to Meiller, it was also owed to Brinkman. My reason for making this presumption will become apparent at the end of my discussion on this matter.

I've decided to begin my discussion by empathizing with Meiller's view that he thought he deserved overtime for working a different shift. After all, working a shift other than one's "normal" shift is, at a minimum, disruptive to one's personal life. However, the outcome of this case is not going to be based on my subjective view of what ought to be. Instead, since this is a contract interpretation case, it's going to be based on the contract language. As the following discussion shows, the contract language does not require overtime to be paid under the circumstances.

The overtime provision is found in Article V, Section 2. It says that an employee is entitled to receive overtime pay "for all work performed in excess of his assigned workweek . . ." That's all it says. What's significant – in the context of this case – is that the language does not say that an employee is entitled to be paid overtime if the employee is assigned to a different shift on a regular workday. Thus, under this language, working a different shift on a regular workday does not warrant overtime. Instead, an employee must work "in excess of his assigned workweek" to qualify for overtime. That didn't happen here. In this case, neither employee worked hours in excess of their assigned workweek, so no overtime was contractually owed. Were I to find otherwise, and award either employee

overtime under the circumstances present here, that would render meaningless the language in Article V, Section 2 that says that officers are only entitled to overtime if they work "in excess of [their] assigned workweek."

The contractual interpretation I just made concerning Article V, Section 2 also coincides with the way that language has been applied. What I'm referring to is this: since 2003, no employee who has been reassigned from their "normal" shift to a different shift on the same scheduled workday has been paid overtime; instead, they were all paid straight time. As previously noted, this happened to Meiller more than 100 times between 2008 and 2010, and each time he was paid at straight time (as opposed to overtime). That fact obviously undercuts the Association's position that overtime was owed here.

In light of the above, I find that the Employer did not violate the collective bargaining agreement by its actions herein.

Accordingly, I issue the following

AWARD

1. That the Employer did not violate the collective bargaining agreement when it changed the work shifts of Officers Meiller and Brinkman on October 2, 2010 and had Meiller work the second shift and Brinkman work the first shift;

2. That the Employer did not violate the collective bargaining agreement when it did not pay Officers Meiller and Brinkman overtime for the shifts that they worked on October 2, 2010. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 6th day of September, 2011.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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