STATE OF WISCONSIN
Before the Arbitrator

In the matter of the Interest Arbitration between	
CITY OF MIDDLETON – POLICE DEPARTMENT	
and	Case 35, No. 61354, MIA-2471
TEAMSTERS UNION LOCAL NO. 695	Dec. No. 30541-A

APPEARANCES: ANDREA F. HOESCHEN of Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Union.

JACK D. WALKER of Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, appearing on behalf of the City.

OPINION AND AWARD

The City of Middleton, Wisconsin, hereinafter referred to as the City or Employer, and Teamsters Union Local No. 695, hereinafter referred to as the Union, were parties to a collective bargaining agreement covering law enforcement personnel employed in the City's Police Department, which expired on December 31, 2001. The parties met for the purpose of negotiating the terms to be included in a successor agreement, but were unable to reach agreement. On June 26, 2002, the Union, filed a petition with the Wisconsin Employment Relations Commission (Commission), asking the Commission to initiate compulsory, final and binding arbitration pursuant to Section 111.77(3) of the Municipal Employment Relations Act (MERA), for the purpose of resolving an alleged impasse in the parties' negotiations over the terms to be included in a successor collective bargaining agreement. Amedeo Greco, a member of the Commission's staff, conducted an informal investigation on July 30, 2003 and advised the Commission that the parties were at an impasse on the existing issues as outlined in their final offers. On January 30, 2003, William Houlihan, another member of the Commission's staff, transmitted the parties' final offers to the Commission and closed the investigation. The Commission issued a decision on February 4, 2003, wherein it ordered the initiation of compulsory, final and binding interest arbitration pursuant to the provisions of Section 111.77 of the Wisconsin Statutes, and directed the parties to select an arbitrator from a panel of arbitrators transmitted to them.

On or about March 24, 2003, the parties selected the undersigned (who is also listed on the Commission's roster) to serve as the arbitrator, in lieu of one of the arbitrators on the panel transmitted to them. On March 26, 2003, the Commission issued an order appointing the undersigned to serve as the arbitrator to issue a final and binding award in the matter, pursuant to the provisions of Section 111.77(4)(b) of the MERA. A hearing was held in Middleton, Wisconsin, on May 21, 2003, at which time the parties presented their evidence. A verbatim transcript of the hearing was prepared and received by the arbitrator on June 19, 2003. The parties filed written arguments and reply arguments, the last of which was received and exchanged on July 26, 2003. Full consideration has been given to the evidence and arguments presented.

ISSUES IN DISPUTE

A superficial comparison of the parties' final offers suggests that there may be numerous issues in dispute, dealing with wages, shift scheduling, overtime, holidays, longevity pay, dental insurance, bereavement leave, sick leave and pay for service as a field training officer. However, a careful review of the two offers discloses that all of the items included in the Union's final offer are included in the City's final offer or its list of tentative agreements. Thus, both final offers would provide for:

- A two-year agreement, effective from January 1, 2002 through December 31, 2003, with a 3.5% increase effective on January 1, 2002, and 2% increases effective on January 1, 2003 and July 1, 2003.

- A reduction in the year of service that must be attained to be eligible for the second and third longevity increases (of 2% and 3%), from 11 to 9 and from 21 to 16, respectively, and the creation of a fourth longevity step (of 4%) payable when employees attain their 23rd year of service.

- The payment of a premium of 50 cents per hour to field training officers for all hours worked in the performance of those duties.[1]

- Inclusion in the agreement of stated requirement that "Employees shall give prior notification of at least 24 hours when they intend to use sick leave for situations that can be planned in advance (e.g. elective surgery, doctors appointments, etc.)"[2]

- The addition of 1.5 new holidays (for a total, of 12) consisting of an additional half-day on December 31 and a full day holiday in honor of Martin Luther King, Jr. The Union would designate the day on which that holiday is customarily celebrated as the holiday, while the City would add it to the two floating holidays.

[1] The City includes this proposal among the tentative agreements.
[2] The City includes this proposal among the tentative agreements.

- Use of a competitive bidding procedure to secure dental insurance coverage, in exchange for an increase in the dental insurance cap to $1,500 and the orthodontic cap to $1,500.

- Modification of the wording of the sixth paragraph in Section 4.3 of the expired agreement, which deals with briefings that occur at a change of shifts. As reworded that paragraph would:

  State that an officer completing a duty shift "will not," (rather than "may") be required to remain on duty for the purpose of briefing the oncoming shift, "unless specifically requested [to do so] by a supervisor."

  Eliminate a sentence that states that the officer is not entitled to compensation unless the briefing requires more than 15 minutes.

  Change the sentence reflecting agreement that such briefings are "essential," to state that they are "important" and that "officers are expected to provide written or verbal communication to the oncoming shift prior to the end of their shift when significant issues are at hand."

The City's final offer also includes three proposals to improve existing benefits, to make them identical to the benefits provided in the agreements with AFSCME, the union that represents the other two bargaining units in the City: public works and city hall (including non-sworn personnel in the Police Department). The Union does not object to those proposed improvements, which, the Union believes, already may have been implemented by ordinance. They would:

1. Add "grandchildren" to the list of relatives covered by the bereavement leave provision in the expired contract.

2. Reduce the amount of time a new employee must wait to become entitled to have the City pay its share of the cost of health and dental insurance coverage, from the length of probation (six months) to one full calendar month.

3. Eliminate the cap on the accumulation of sick leave.[3]

City's Shift Scheduling Proposal.

As part of its final offer, the City included an item (#5) which would include in the agreement, certain "explanatory provisions and limitations," dealing with shift scheduling. The Union objects to this proposal, which represents the most significant difference between the two final offers. It reads as follows:

(a) Under this offer, the following explanatory provisions and limitations are part of the Contract:

[3] This proposal is also included among the tentative agreements attached to the City's offer. .

"Section 4.3 limits the City's right to schedule hours of work only by the express limitations which it contains. Accordingly, the only requirement for paying overtime as a result of a schedule change is if, "a schedule change is made without provision of ten (10) days notice…." The express limitations of the contract also do not require that shifts begin or end at particular times of the day, nor at the same times each day; the express provisions only provide that the "normal scheduling pattern" be a 6-3, and that the "normal duty day" be 8 hours. Overtime is required if work is assigned "in excess of their normal daily or normal monthly schedule," however that relates not to the particular hours of the day, but to the scheduling patterns, 8 hours, and the 6-3 or 5-2 rotations. There is a contractual shift differential, which provides an hourly premium for work performed during certain hours. Accordingly, there is no contractual restriction which would require the automatic payment of overtime under any of the following assignments:

A. Establishing 8 hour cover shifts, which may be for any hours the city deems appropriate, such as 2:00 P.M. to 10:00 P.M.

B. Establishing an 8 hour multi-shift under which a shift may begin for example at 7:00 A.M. for three work days, then at 3:00 P.M. for three work days.

C. Assigning an officer on 10 days or more notice, to work a different 8 hour schedule, for example having an officer who is scheduled to work from 7:00 A.M. to 3:00 P.M. work from 3:00 P.M. to 11:00 P.M. for some days of a normal work schedule (such as either a 6-3 normal work schedule or a 5-2 normal work schedule).

D. Assigning an officer on 10 days or more notice, to work a different 8 hour schedule for the purpose of filling a shift vacancy caused by a probationary assignment, a disciplinary assignment, an illness or vacation absence, or other absence, without the payment of overtime caused by the reassignment.

"The City of Middleton maintains that the above is the meaning of the existing contract language, but the City of Middleton agrees (provided the City of Middleton's offer is selected in this Arbitration so that the City of Middleton has the certainty of these issues as to its management rights under the existing contract) to the following limitations on these rights:

1. Assignments as described under C, above, will be made by reassigning the junior scheduled on duty officer working on a shift to the required different shift hours.

2. Assignments as described under C, above, will be paid an additional 1/2 their straight time hourly rate if there is more than one change (back and forth) in a duty rotation (such as either a 6-3 duty week or a 5-2 duty rotation).

3. Assignments as described under C, above, will be paid an additional 1/2 their straight time hourly rate if the assignment is changed after the monthly schedule is posted, even if 10 days notice is given.

4. Provided 10 days notice is given, reassignments may be made without the limitations of items 1-3 above without paying overtime if the reason for the reassignment is an officer vacancy, or caused by a probationary, disciplinary, or training assignment as provided in subsections 4.3 (a) and (c).

5. The City of Middleton will not establish a multi-shift as described under B, above, without first discussing specifics of such multi-shift and obtaining Union input. Employees assigned and working a multi-shift shall receive a shift premium of 50 cents per hour for all hours worked."

Two Additional Differences.

There are two additional differences between the parties' final offers. One is the City's proposal (#6) to add a new paragraph to Section 4.4. It would describe the relationship between the overtime and compensatory time provisions of the agreement and the provisions of the Fair Labor Standards Act (FLSA), and state that employees have an obligation to comply with reasonable directives to provide the City with an accurate record of their actual hours worked. It is the latter part of this proposal that the union finds objectionable. It reads as follows:

6. Section 4.4. Add the following language to the end of the section:

> "Without regard to the contractual requirements to pay time and one half the regular rate under 4.3, the Fair Labor Standards Act requires that officers be paid time and one half the regular rate for hours actually worked in excess of 165 hours in the designated work period which in the City of Middleton is a 27 day work period. Such overtime must by law be compensated by pay, not compensatory time. Overtime, whether by pay or compensatory time has not been pyramided and will not be pyramided. The Fair Labor Standards Act requires the City of Middleton to keep a record of hours actually worked. Employees will comply with reasonable directives of the City of Middleton to provide the City of Middleton with an accurate record of their actual hours worked."

The other difference is the City's proposal to modify the wording of the explanatory notes that follow the list of holidays in Section 5. The notes in question deal with the payment of holiday pay and the scheduling of employees to work on holidays. The City's stated purpose for proposing the modifications is to include in the agreement, reference to certain practices that were agreed to in the early 1990's and followed ever since. In recent years two grievances have been filed, challenging those practices. The proposed explanatory notes (with the new language underlined) read as follows:

> "It is understood that the above schedule shall apply regardless of whether the employee works or does not work on any given holiday. Employees whose shift begins <u>(i.e., who are assigned or 'hired' to work)</u> on any of the above-named days, exclusive of floating holidays, shall receive eight (8) hours of pay at time and one-half (1-1/2), <u>or eight (8) hours compensatory time at time and one-half (1-1/2) at the employee's option</u>. It is further understood that holiday pay will be paid on or before the end of the succeeding payroll period.
>
> "Holidays <u>(i.e., those holidays which the employees is not assigned or 'hired' to work)</u> will be paid at the negotiated hourly rate or at a straight-time compensatory time, at the employee's option.

"Compensatory time off shall be taken at a time mutually agreed to between employee and the Chief of Police or his representative.

"Employees hired or ordered to work holidays shall receive 24 hours or more notice if they are to be removed from the holiday schedule."

DISCUSSION

The above description discloses that there are four differences between the final offers, which are a matter of dispute in this case.[4] In order to determine which of the two final offers is more reasonable, the arbitrator will analyze each of those differences separately and then weigh the two offers overall. Before doing so, it should be noted that the four differences vary substantially as to their significance, and, consequently, the weight they should be accorded in weighing the results overall. The four differences will be analyzed, in reverse order of their perceived significance, i.e., beginning with the least significant and ending with the most significant.

Clarification of Holiday Coverage and Pay Practices.

In its brief, the union argues that the City's position on this issue should be rejected because it is like the City's position on the issue related to scheduling. In particular, it argues that the City is using the interest arbitration process inappropriately, to resolve an existing dispute over the proper interpretation of the agreement in its favor. It also argues that the City is thereby seeking a concession from the Union without meeting the "three pronged" test discussed below.

The evidence establishes unequivocally that the City is correct when it argues that its proposal on this issue does nothing more than clarify the intent of the existing agreement. While it is true that the City could have dropped this proposal and resolved it through grievance arbitration, it would place an unfortunate pall over the collective bargaining process to suggest that either party is precluded from taking to interest arbitration a proposal to clarify existing language in a way that has no impact on the status quo, simply because the other party objects.

The undisputed evidence establishes that, in the process of covering holidays, i.e., deciding which police officers will work on holidays, the City has followed practices that were first agreed to in bargaining in 1993. While the implementation of those practices was an integral part of the agreement reached on holidays and holiday pay in 1993, they were not spelled out completely in the wording of the agreement. They were spelled out in unilaterally prepared documents dealing with departmental policy and operating procedures that were communicated to the Union at the time and have been followed ever since.

In recent years, at least two employees, including the current president of the Officers Association, Gregory Dixon, have filed formal grievances questioning one of the fundamental

[4] As indicated, there are three items included in the City's offer and list of tentative agreements, which are of benefit to employees that are not objected to by the Union.

aspects of those practices, i.e., that all officers are deemed to be off work with pay on listed holidays and that coverage will be achieved through assignments or "hire backs."

The first grievance was initiated verbally, at Step 1, on December 1, 2001, by Dixon on behalf of Officer Ken Smith, a junior officer who was not scheduled or "hired back" to work on Thanksgiving Day in 2001 (November 22). The grievance correspondence indicates that there were special, aggravating circumstances present. The posted schedule incorrectly indicated that Smith was expected to work, starting at 11:00 p.m. on Thanksgiving Day, and that Smith was not told that he would not be working until November 19, 2001.

In denying the Smith grievance, Sergeant Steve Britt acknowledged the fact that the notice given to Britt was handled badly, but indicated that Officer Smith was not entitled to work the holiday in question. He cited and enclosed copies of "department policy and operating procedures" which delineate the procedures used for assigning "holiday overtime." He did not cite or enclose copies of the correspondence that preceded the agreement reached in 1993, which reflect the bilateral origin of the department policy and operating procedures. Sergeant Britt went on to note that the agreement did not clearly address holiday shift scheduling and suggested that the parties consider putting clarifying language in the agreement in these negotiations.

On December 12, 2001, Dixon appealed the Smith grievance to the Step 2. On December 19, 2001, Chief Fass denied the grievance. Like Sergeant Britt, Chief Fass referred to the department policy and operating procedures governing assignments and hire back procedures for listed holidays. Like Sergeant Britt he too did not refer to the correspondence reflecting the bilateral origin of the practices described. Dixon appealed the Smith grievance to the City's Personnel Committee. In a memo to the Personnel Committee dated January 11, 2002, Chief Fass referred to several questions raised by the grievance, including the following:

> "What was the intent of the negotiators on both sides of the table when the holiday issue was first discussed and consideration provided for additional compensation?"

Chief Fass went on to express the following thoughts in an effort to answer his own question:

> "…I am uncertain I can adequately answer question number one 'what was the intent of the negotiation process.' It may be necessary to listen to the comments of those involved and accept or reject the information provided. Unfortunately, most of the individuals directly involved in these negotiations are no longer available. The former Union President for the Police Officer Bargaining Unit is a current supervisor for the Police Department and provided me from his files additional correspondence that addresses this issue…."

On January 22, 2002 the Personnel Committee voted to deny the grievance. Since then, the Union has made no effort to move it to arbitration. Nor has the Union dropped it.

Dixon filed the second grievance on this topic on his own behalf, on June 18, 2002, during the contract hiatus. The grievance protested the fact that Dixon was not scheduled to work on one of the holidays listed in the agreement (Independence Day), even though July 4, 2002 otherwise would have been one of his regularly scheduled work days. Sergeant D. Kromm denied his grievance at Step 1 on June 24, 2002. Dixon appealed the grievance to Step 2 on June 25, 2002. Chief Larry Fass denied the grievance at Step 2 on July 1, 2002.

Dixon received holiday pay for July 4, 2002, but did not work. Consistent with the established and agreed-to practice, the city "hired back" a sufficient number of police officers to provide the desired level of patrol coverage on that day. They too, received holiday pay, regardless of whether or not they otherwise would have been scheduled to work on July 4, 2002. In addition, they received premium pay (time and one half) for working on a holiday.[5]

On July 6, 2002, Dixon appealed his grievance to the City's Personnel Committee. On July 29, 2002, the Personnel Committee denied the grievance. On August 2, 2002, the City Administrator, Mike Davis, sent Dixon notice to that effect. Again, the Union made no effort to move this grievance to arbitration. Nor did the Union drop it.

At the hearing, the City entered into evidence, the correspondence between representatives of the City and representatives of the police officers' bargaining unit that led to the agreement on holidays and holiday pay in 1993. That correspondence establishes that the current departmental policy and operating procedures reflect the agreement that was reached in 1993 on the making of assignments to cover listed holidays. Even if it is conceded that that correspondence is somewhat vague or ambiguous, contemporary documents reflect that it was implemented in that fashion, and has been followed ever since. Consequently, it would appear that the City's proposal to change the wording of the explanatory notes in Section 5 does nothing more than clarify and preserve the status quo. Doing so, will have the beneficial effect of making clear to all concerned the existence, and contractual nature, of the holiday assignment practices. For that reason, the City's offer on this issue is deemed to be more reasonable, under Section 111.77 (6) (h).

Listing the New Martin Luther King, Jr. Holiday.

The city's proposal on this issue is supported by internal comparisons. In addition, it too is deemed more reasonable under Section 111.77 (6) (h).

In its agreements with the other two bargaining units, represented by AFSCME, the City has agreed to grant the covered employees an additional holiday in honor of the memory of Martin Luther King, Jr. As part of those agreements (which included an additional one-half day for a total of 12 holidays), the new Martin Luther King, Jr. Holiday is treated as one of three "Floating Holidays." This gives employees who like flexibility in taking time off an additional day on which to do so, and avoids the need to close City offices and cease providing non-emergency City service.

[5] Under the express terms of the agreement they could if they wished, take compensatory time off instead.

While the additional time off of work is clearly a benefit to these other City employees, there would appear to be two potential arguments against the approach taken in the case of the Martin Luther King, Jr. Holiday. First, it means that there will be a limit on the number of employees who will be able to be off work on the day the holiday is officially celebrated. Secondly, it could be argued, by failing to list the holiday and closing down the non-emergency aspects of City government, the City has attached less importance to the Martin Luther King, Jr. Holiday than those employers who agree to list the holiday. Neither of these potential arguments applies to this bargaining unit.[6]

Of necessity, the Police Department is operated on a 24-hour per day, 7-day per week basis. Listing the Martin Luther King, Jr. Holiday will not have any impact on the number of police officers who will be able to be off work on the day that the holiday is officially celebrated. Nor will listing it serve to enhance the importance of the holiday in the eyes of the public. On the other hand, it would require the City to pay premium pay to all those police officers who work on the holiday. This would increase the cost to the City, well beyond the cost of providing the additional holiday to its other employees. Further, by listing the holiday and paying police officers a premium for working on the holiday, the City would be creating a precedent, which could be used as leverage by the other bargaining units to achieve the same result in the next round of negotiations.

FLSA Language and Record-Keeping Requirement.

Most of the language contained in the new paragraph the City proposes to add at the end of Section 4.4 could fairly be described as informative. It serves to inform bargaining unit members of the relationship between the requirements of the FLSA and the 27-day work period used by the City. It goes on to reiterate the existing understanding that overtime will not be pyramided, and notes that the FLSA requires the City to keep records of the actual hours worked. The only aspect of the provision that creates a new contractual expectation or obligation is the last sentence, which states that employees are expected to comply with reasonable directives to provide the City with an accurate record of their actual hours worked.

The City already has the right to issue reasonable directives requiring its employees to keep a record of the hours they work. On that basis it can be argued, that there is no need to include such a sentence in the agreement. However, facts developed at the hearing establish that the City's proposal to include this sentence--like its proposal to include the balance of the paragraph--is both reasonable and desirable.

In early 2002, Lieutenant Noel Kakuske discovered that the City had made a mistake in the manner in which it had been calculating overtime payments under the FLSA, resulting in some

[6] In fact, the Union has failed to advance any particular argument in support of its position that the Martin Luther King, Jr. Holiday should be listed.

underpayments of the amounts due under the law.[7] The City thereafter undertook an effort to compensate employees for the underpayments for the prior three years. While most employees were either unaffected or cooperated in the City's effort to calculate the amounts they were due (many of which were relatively small), approximately eleven did not. Specifically, they did not review, correct and return the materials sent to them, in an effort to insure that the calculations were accurate.

In a memo from Kakuske, dated March 1, 2002, bargaining unit employees were also asked to: (1) to complete a worksheet for the three most recent 27-day periods, to determine if they had any "FLSA overtime hours" and were due any additional compensation; and (2) as of March 7, 2002, begin using a new form (Hours Worked Report-PO) to record the number of hours they actually worked each week. None did so, apparently on the basis of the claim that they could not be required to do so since the law states that it is the City's obligation to keep a record of the hours worked by its employees. The city decided that, rather than treat the matter as one that could lead to discipline, it would pursue the matter in bargaining. On October 23, 2002, Kakuske sent the sergeants an e-mail directing them to fill out the Hours Worked Report-PO forms "until such time as the contract is settled."

If the failure of bargaining unit employees to complete the Hours Worked Report-PO forms is based on the belief that they cannot be required to do so, they are obviously wrong. While it is the City that has the obligation to comply with the record-keeping requirement in the law, it must utilize employees to do so. There is nothing unusual or unreasonable about the practice of assigning the task of recording hours actually worked to the employees whose hours are being recorded. That is especially true in cases where employees work outside the direct observation of supervision and are frequently required by their duties to work through breaks and beyond their scheduled hours.

For this same reason, it is desirable that the wording of the agreement reflect the existence of this obligation. If some members of the bargaining unit believe that they cannot be disciplined for failing to complete the new forms, they need to be informed that they are wrong. Doing so by putting reference to the requirement in the agreement will avoid the unfortunate situation where an employee must incur discipline in order to test the correctness of his or her belief that a directive is unlawful.

For all of these reasons, the arbitrator finds the City's proposal to include the new paragraph in the agreement is more reasonable than the Union's position that such information need not be included in the agreement.

New Language on Shift Scheduling.

[7] The FLSA overtime rate includes certain premiums the employee receives, that are not included in the rate used by the City to calculate contractual overtime.

The City's proposal to include this language in the agreement would appear to be the most significant difference between the two final offers. It may also be the issue that prevented the parties from reaching a voluntary settlement.[8]

City's Basic Position. In support of its proposal to include this language in the agreement, the City contends that it merely seeks to put into writing, those rights that it has retained and exercised in the past. The city argues that it is necessary to describe them in the agreement because recently the Union has objected to the City's exercise of those rights, and rejected the City's efforts to reach an agreement on mutually acceptable limitations, even though it was the Union that first sought the opportunity to do so.

Union's Position. In opposing the new language, the Union takes the position that the City is not merely seeking to clarify the existing language, it is using the interest arbitration statute inappropriately, to resolve in its favor grievances that it has refused to arbitrate. It argues that if the City already has the right to engage in the scheduling practices described, it is unnecessary to put them in the agreement. On the other hand, if the City does not already have the right to engage in the scheduling practices described—and the Union contends that it does not—then the City is asking the Union to make a major concession and it has failed to meet the three recognized requirements for securing such a concession through interest arbitration. In order to succeed in that effort, the City must meet a three part test. It must prove that there is a legitimate problem that requires attention, that the disputed proposal reasonably addresses the problem, and that the proposed concession is accompanied by an appropriate *quid pro quo*. In the Union's view, the City has failed to do so.

City's Responsive Position. There is nothing inappropriate about using the collective bargaining process to resolve grievances. Such use is consistent with the stated purpose of collective bargaining. It is also consistent with the position the Union took before the City's Personnel Committee in 1999, when it asked to defer grievance arbitration on this issue so the parties could seek to resolve it themselves. In the City's view, there is no legitimate dispute over the meaning of the existing scheduling provision or the practice thereunder and its proposal is consistent with that meaning and practice. Further, even if the three part test is applied in this case, the City's case meets all three parts of that test.

Has the City Retained and Exercised the Rights in Question? In order to evaluate these arguments, it is first necessary to review the evidence pertaining to the City's claim that the proposed language merely serves to spell out certain rights that it has retained and exercised in the

[8] The arbitrator finds it difficult to believe that any of the other differences between the two final offers was an insurmountable obstacle to settlement.

past. A review of the evidence and arguments convinces the arbitrator that, with one possible exception, the City's proposal is based on rights that it has retained, but reflects an intent to exercise those rights in a way that goes beyond the way in which they have been exercised in the past.

Section 2.1, in Article II – Management Rights, states that the parties agree "that the management of the City of Middleton and the Police Department and the direction of its officers and employees are vested exclusively in the City of Middleton." It goes on to state that this includes, but is not limited to a number of rights, including the right "to schedule the hours of work and assignment of duties." Section 2.2 of Article II goes on to state that "the exercise of the foregoing functions shall be limited only by the express provisions of this Contract, and the City has all the rights which it had at law except those expressly bargained away in this agreement."

Section 4.3 in the expired agreement must be read, in light of these provisions in Article II, in order to determine the extent to which the City has agreed to limit its retained rights "to schedule the hours of work and assignment of duties." Section 4.3 reads, in relevant part, as follows:

> **4.3 – <u>Shift Scheduling</u>.** Employees shall receive time and one-half (1-1/2) their straight time hourly rate for all hours worked in excess of their normal daily or normal monthly schedule.
>
> The specific schedule shall be made monthly and be posted ten (10) days in advance. In the event a schedule change is made without provision of ten (10) days notice, the affected officer shall be paid at the overtime rate. In the event of a sudden medical or family emergency, the affected officer shall not be paid at the overtime rate, unless twenty-four (24) hours or less notice is given.
>
> The normal scheduling pattern for police officers shall be six (6) duty days and three (3) days off. The duty day shall be eight (8) hours.
>
> The Chief of Police may schedule employees responsible for non-patrol duties with a normal scheduling pattern of five (5) duty days and two (2) days off. Additional duty time off will be granted to produce the 6/3 equivalent. Whenever scheduling adjustments are necessary, the additional days off will be scheduled in conjunction with the normal days off.
>
> In addition to the 6/3 and 5/2 schedules, other 6/3 equivalent schedules may be utilized if mutually agreed to by the Chief of Police and the Union.
>
> * * *
>
> The Chief of Police shall post a notice and accept requests for shift changes within the first ten (10) days of October each year. Shift changes shall be posted by November 15 and will take effect the following January 1. Any shift assignment requested by an employee at times other than the above shall be granted only when in the best interests of the department, as determined by the Chief of Police, and when mutually agreed to by each employee affected by such change.
>
> All shift assignments for patrol officers shall be made in accordance with seniority. The senior officer assigned to patrol shall be offered first opportunity to select any available patrol shift assignment. Each remaining officer assigned to patrol shall, by order of seniority, select any remaining patrol shift assignment until

all such assignments have been filled. All patrol shift vacancies shall be filled as indicated above except as follows:

> (a) The department reserves the right to place probationary officers on various shifts in order to provide training and the opportunity for evaluation. The least senior non-probationary officer may be assigned to a different shift to avoid two (2) or more probationary officers from being assigned to the same shift.
>
> (b) The department reserves the right to assign employees to non-patrol positions at the discretion of the Chief of Police or his designee. For the purpose of this section a non-patrol position shall be defined as any job assignment in which the duties require that the officer spend less than fifty percent (50%) of his duty in patrol functions. These assignments shall include, but not be limited to, the positions of Investigator and Community Awareness Officer. Any shift assignments within non-patrol positions shall follow the seniority shift selection process within the same job assignment. If an officer leaves or is transferred from a job assignment described above, he or she will be assigned to a vacant patrol position irrespective of seniority.
>
> (c) The department reserves the right to change the shift assignment of any officer when deemed necessary for disciplinary or training needs.

Based on a simple reading of this language, it would appear that the City has retained considerable flexibility in the scheduling of the hours of work and the assignment of officers to particular shifts. Even so, it is appropriate to consider the evidence of actual practice under this language, to determine the extent to which that reading may be inaccurate. In doing so, the inquiry here will be limited to those aspects of the actual practice which are relevant to the City's proposal

There are four such aspects. They involve the scheduling of 8 hour "cover shifts" that start at times other than the "normal" shifts that currently start at 7:00 a.m., 3:00 p.m., or 11:00 p.m.; the scheduling of 8 hour "multi-shifts" or "swing shifts" which have two different starting times during the same five or six day period; the assignment of officers, on 10 days' or more notice, to work a different 8 hour schedule for some days of their normal work schedule; and the assignment of officers, on 10 days' or more notice, to work a different 8 hour schedule for the purpose of filling a shift vacancy occurring for the reasons specified.

Use of "Cover Shifts." In his testimony, Lieutenant Kakuske acknowledged that, in the past, the department has generally scheduled most patrol officers to work "regular" 8 hour shifts, starting at 7:00 a.m., 3:00 p.m. and 11:00 p.m. However, he asserted the understanding that, under the terms of the agreement, the department could schedule shifts at different starting times if it wished. The Union offered no evidence to contradict that testimony. Further, any interpretation to the contrary would have to ignore the wording of Section 4.3, which clearly seems to have been written to retain such flexibility.

Finally, Lieutenant Kakuske testified that the department has scheduled "cover shifts" on a regular basis during the 25 years of his employment with the department. In making that claim, he was apparently referring to the school liaison officers, who have normally been reassigned to a 7:00 p.m. to 3:00 a.m. cover shift during the summer months.

Thus, it would appear that there is no question that the City has retained the right to establish "8 hour cover shifts, which may be for any hours the City deems appropriate, such as 2:00 P.M. to 10:00 P.M," as described in Item A of its proposal. However, the evidence indicates that it sought to expand upon the exercise of that right in 1999, and refrained from doing so when the Union objected and succeeded in convincing the City's Personnel Committee that the parties should be given an opportunity to reach an agreement on the use of such shifts.

Use of "Multi-Shifts." According to Lieutenant Kakuske, the department has also used "multi shifts" or "swing shifts" at various times during his tenure. He states that the department assigned one officer to a "multi shift" in 1999, and two years earlier, two officers were assigned to a "swing shift." At one time, he states, an entire "shift" of patrol officers was assigned to such a shift. Chief Fass corroborated this testimony.

Officer Dixon disputed Lieutenant Kakuske's testimony, in part. According to Officer Dixon the practice described by Lieutenant Kakuske primarily involved dispatchers and Sergeants, not bargaining unit personnel. He acknowledged that bargaining unit personnel may have been assigned to such shifts in the past "for a short period of time."

Again, this evidence serves to confirm the existence of the City's right, under the wording of Section 4.3, to establish "multi-shifts" as described in Item B of the City's proposal. There is nothing in the practice, as described in the City's proposal, which is prohibited by the existing language. On the contrary, it would appear to be perfectly consistent with that language. However, based on the testimony of Lieutenant Kakuske, it would appear that the City would like to exercise the right to do so to a greater extent in the future.

Assigning Officers to a Different 8 hour Schedule upon Notice. Lieutenant Kakuske also testified about his understanding of the department's contractual right to change an officer's shift assignment, on 10 days or more notice (or 24 hours notice in the case of a "sudden medical or family emergency"), without paying overtime. He stated his belief that the City had the right, upon giving proper notice, to assign officers to a different 8 hour schedule to help cover a special event or in any of those circumstances identified in Items C and D of the City's proposal. Even so, he acknowledged that, in dealing with day-to-day staffing shortfalls or the need to increase staffing for a special event, "Most commonly you deal with it by paying overtime."

Dixon testified that the only circumstances where the department has exercised its contractual right to change an officer's shift (upon giving the required notice and without paying overtime), have involved the assignment of a officer to a different shift for training, and that the only

time it has been done to fill a patrol vacancy, has been where the vacancy was caused by a "probationary assignment" or a "disciplinary assignment." In all other listed cases, such as vacancies or staffing shortfalls caused by illnesses, vacations etc., it has been done by the use of overtime, according to Dixon.

Based on this evidence, there would appear to be a legitimate question as to all of the circumstances where the department has the right to assign officers to different shifts (upon giving the required notice and without paying overtime). Even without Dixon's testimony, there could be no dispute that the City has retained the right to "place probationary officers on various shifts" and to reassign "the least senior non-probationary officer," as provided in subparagraph (a), or to assign patrol officers to a different shift "when deemed necessary for disciplinary or training needs," as provided in subparagraph (c). Also, the City has the right, under subparagraph (b), to assign officers to non-patrol positions under the circumstances described. However, it could be argued that, by including reference to only four circumstances in these three subparagraphs, the parties manifested an intent to limit the City's right to make changes in shift assignments without penalty to those four circumstances.

There are obvious weaknesses in this argument. The provisions of subparagraphs (a), (b) and (c) deal with exceptions to the procedure for filling "patrol shift vacancies." The wording of the second paragraph deals the posting of "specific schedules" and is open ended, suggesting no such implied limitation. Also, the reference to the right to make changes in the shift schedules on 24 hours notice in cases involving "a sudden medical or family emergency" strongly suggests that the right to make changes in the schedule may extend to a variety of unspecified circumstances. Even so, the meaning of this language is not entirely clear and remains untested.

For these reasons, the arbitrator concludes that the City's proposal on shift scheduling does more than clarify the existing language. If adopted,[9] it will give the City the ability to expand its use of "cover shifts" and "multi-shifts" and make changes in shift assignments on 10 days notice in certain circumstances going beyond those mentioned in subparagraphs (a), (b) and (c), without incurring the risk (however great or slight) that it will be required to pay overtime for the hours involved. In deciding whether the City's proposal should be adopted the arbitrator has weighed a number of factors.

Overall Analysis.

The above analysis indicates that the City's position on the three less important issues in dispute is deemed to be more reasonable than the Union's position. Even so, the fourth issue in dispute is deemed to be of sufficient significance to the legitimate interests of both parties that it could tip the balance either way. A number of matters have been given some weight in the process

[9] If it is not adopted, the City can still take the same actions, but will face the possibility of being required to pay overtime, which is a real possibility in those having to do with changes in the posted schedules.

of determining which offer is more reasonable, under the statutory criteria. Only those deemed particularly relevant will be discussed.

While internal comparisons lend strong support to both offers, the City's final offer has a slight edge. The City has offered to make three improvements in fringe benefits, in order to match improvements offered to others, while the Union's final offer is silent on those improvements. The Union apparently expects to receive the benefit of those improvements because of the City's desire to remain consistent in its provision of such benefits, and the evidence indicates that they may have already been implemented. However, by the terms of its final offer, the Union fails to give the City credit for those improvements. It also creates the possibility that there will be a dispute over their availability, if the Union's final offer is selected.[10]

Most of the other matters that are deemed to be of significance in this case relate the last of the statutory criteria listed in Section 111.77 (6). They include the Union's general argument, addressed and rejected above, that it is inappropriate to use the interest arbitration process to resolve grievances or potential grievances. One that remains to be discussed is the Union's claim that it is particularly inappropriate to do so in this case, because the City refused to arbitrate a grievance (i.e., the Zimmerman grievance) that sought to challenge the department's assignment practices, that arose after the agreement expired.

The Zimmerman grievance involved a situation where a police officer, Darrin Zimmerman, was given 10 days' notice that his hours of work on Saturday, June 8, 2002 would be "flexed" (from 7:00 a.m. - 3:00 p.m. to 11:00 a.m. - 7:00 p.m.), so that he could perform patrol duty while other officers were helping to cover a special event (the Festival of the Forks). His grievance was denied at the first two steps, and it was appealed to the Personnel Committee on June 20, 2002. The Personnel Committee met and voted to deny the grievance on July 29, 2002. It is undisputed that, when the Union sought to submit that grievance to arbitration the City refused to arbitrate it.

The City's refusal to arbitrate the Zimmerman grievance should be considered in the context of the other relevant facts. Not only had the contract expired, the City was then engaged in bargaining over its proposals related to Section 4.3. The Union filed the petition to initiate this proceeding while the Zimmerman grievance was still pending before the Personnel Committee. More importantly, the City (and the Union) had been attempting to resolve the issues related to Section 4.3 through bilateral discussions since November 1999.

On September 29, 1999, the department posted for bidding, three swing shift positions (in addition to the customary summer cover shift position). The Union objected to the establishment of the swing shift positions and eventually filed a grievance, on October 10, 1999, when the matter

[10] It should be noted that the Union's predecessor went to arbitration in 1982 over the City's failure to pay the cost of health insurance for employees on probation, and lost. The City has now agreed to reduce the wait for payment of its share of health and dental insurance to one month.

could not be resolved informally. The grievance was appealed to the Personnel Committee and was denied on November 1, 1999, when no representative of the Union appeared to argue the Union's case. On November 9, 1999 Dixon wrote a lengthy letter to the Personnel Committee, explaining why no one from the Union had appeared and why the issue was nevertheless of great importance to police officers. The letter concluded as follows:

> "I have offered to research the situation to come up with a mutually beneficial schedule, which would accomplish the desired outcome. There is almost a full 2 months before the new schedule is to be enacted. The Chief said he is not willing to look at different options at this point and will implement the swing shift effective January 1, 2000. He said that the shift would be assessed after 6 to 8 months to see if it accomplishes the desired goal. Unfortunately, the damage may be done by that time.
>
> "The Police Officer's Union is more than willing to work with the City to resolve this matter. We understand that the Administration has rights in regards to the scheduling of Department personnel and are not trying to dictate what it should and should not do. We only hope that you can see that the proposed shift does add stress to an already stressful position and that there must be a mutually agreeable solution to the problem.
>
> "Thank you for your consideration in this matter. Please feel free to contact me if you have any questions or concerns."

The Personnel Committee reconsidered its action denying the grievance and granted Dixon's request for an opportunity to attempt to resolve the matter through bilateral discussions before the swing shift was implemented. That decision is reflected in a memo Chief Fass sent Dixon, on November 24, 1999. It read as follows:

> "Mike Davis [City Administrator] asked me to contact you regarding the Swing Shift and the Police Neighborhood Officer Position. The Personnel Committee and Mayor have instructed me through Mike Davis to revise the shift assignment process for 2000 to be consistent with 1999 and previous years. I will be instructing Noel to create a new shift selection sign up form consistent with this information. I will provide more information for you and others with a cover memo that I will be putting out next week. In the mean time, Mike has asked me to see if you, (representing the bargaining unit), would provide in writing to him a memo withdrawing the grievance regarding the 10 day notice issue involving officer Keith Benson. Mike would like this at the beginning of next week if possible. Once this has been done, I don't believe that there will be any outstanding issues between the department and the bargaining unit. You and I have already talked about the school neighborhood officer issue, and I think that is also resolved consistent with the swing shift issue. I think this is pretty straight forward, but if you have any questions, contact me at your convenience. THANKS!!!!! Chief"

Thus, it would appear that there is a significant problem, having to do with the department's desire to exercise its retained rights to schedule shifts and make assignments to those shifts, that is largely not addressed and in part ambiguously addressed by the existing provisions of Section 4.3.

Without attempting to put the blame at the feet of either party, it is significant that that problem, which first surfaced in October 1999, remained unresolved during the balance of the term of the expired agreement and throughout the protracted negotiations for the successor agreement here under consideration. Once established, that agreement will expire within a few months. At that time, both parties will have an opportunity to seek changes or further changes in the provisions of the agreement touching on this problem.

In its final offer, the City offers a solution to this problem, albeit one that the Union is unwilling to accept voluntarily. The Union offers no solution to the problem, as part of its final offer. Instead, the Union would have the City continue to withhold making any changes, or proceed to establish shifts and make assignments to those shifts at its peril. If it does so, the Union will in all likelihood file more grievances and the City will either prevail in its position or be required to pay overtime to the affected employees. In the view of the arbitrator, that position is clearly less reasonable than the City's position.

In reaching this conclusion, the arbitrator has also given consideration to the interests and welfare of the public, under the provisions of Section 111.77 (6) (c). Specifically he has considered the testimony of Officer Dixon, and the matters discussed in the letter he wrote to the Personnel Committee in 1999. He has also considered the testimony of Lieutenant Kakuske concerning the department's reasons for seeking to increase the use of cover shifts and swing shifts and attempt to utilize of the 10 day/24-hour notice provision to cover officer vacancies. There is obvious merit to both considerations. However, the City has offered to include limitations that should serve to mitigate its exercise of the rights in question. Since they will be included in the terms of the agreement, those limitations will be binding and enforceable. Further, as previously noted, the agreement will expire within a few months. If during that period of time it becomes clear that further limitations are justified in its view, the Union can place a proposal on the table at that time.

The arbitrator has also given consideration to the Union's argument that the City is proposing language that will give the city new benefits, and take benefits away from the bargaining unit, and, therefore, should be required to show that it has offered a sufficient *quid pro quo*. This argument is of questionable application to the facts in this case. This case does not involve a proposal to grant or curtail benefits. It involves the resolution of an ongoing dispute over the scope of the City's retained rights and the circumstances under which those rights will be exercised. As such, both parties have an equal stake in resolving that dispute in a way that is reasonable. Even so, the arbitrator has considered the City's proposal in the context of the other aspects of its offer, and finds that it is far from one sided.

As part of its proposal, the City has agreed that the multi-shifts referred to in Item B will not be established without first discussing the specifics with the Union and receiving its input. If a multi-shift is established, the officers assigned will be paid a shift premium of 50 cents for all hours

worked. In the case of Item C, it has agreed that any such assignments will be based on reverse seniority, and it has agreed to pay a premium if there is more than one change in a duty rotation or if the change occurs after the monthly schedule is posted. Finally, it has agreed that Item D will only apply in cases where it can be said that there is an "officer vacancy."[11]

Further, the City has not only agreed to the Union's proposal to match the settlement terms agreed to by the employees in the other two bargaining units, it has taken steps to insure that other improvements in benefits which the Union may have overlooked are extended to employees in this bargaining unit.

For all of these reasons, the undersigned finds that the final offer of the City is more reasonable than the final offer of the Union and issues the following:

AWARD

The final offer of the city of Middleton shall be included in the parties' successor collective bargaining agreement, in effect from January 1, 2002 through December 31, 2003, along with the tentative agreements reached in bargaining and the provisions of the expired agreement that remain unchanged.

8-9-03
George R. Fleischli, Arbitrator Date

[11] There can be no serious dispute that the department already has the right to reassign officers for the three reasons described in subparagraphs (a), (b) and (c).