STATE OF WISCONSIN
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF NEW HOLSTEIN
(POLICE DEPARTMENT)
LOCAL 1362
AFSCME, COUNCIL 40,
AFL-CIO

And

Case 16
No. 66305
MIA-27370
Dec. No. 31996-A

CITY OF NEW HOLSTEIN

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the Wisconsin Employment Relations Commission. A hearing was held on April 27, 2007 in New Holstein, Wisconsin. The parties were given the full opportunity to present evidence and testimony. At the close of the hearing, the parties elected to file Briefs and Reply Briefs. The arbitrator has reviewed the testimony of the witnesses at the hearing, the exhibits and the over 140 pages of briefs of the parties in reaching his decision.

BACKGROUND

The City of New Holstein is located in Southeast Wisconsin. There are two represented bargaining units in the City. One of the Units consists of employees that work in the Department of Public Works. The other unit is comprised of police

officers. The City employs five full-time officers, as well as several part time officers. The full-time officers are represented by AFSCME, Local 1362.

The parties' collective bargaining agreement expired on December 31, 2006. They entered into negotiations for a successor agreement. They agreed upon all issues except one. The Union proposed adding a Section that addressed the distribution of overtime. Its proposal provides:

> Section 4. It is intended that each full-time officer shall have opportunity to work at least eight (8) hours overtime bimonthly (in each two month period), if such hours are available.
>
> (a) When a regular shift is vacant for any reason which the Chief or the Chief's designee intends to fill, or if additional hours become available, such shift or hours shall first be offered as overtime to regular full-time officers who have not worked at least eight (8) hours of overtime within the bimonthly period. If no full-time officer desires to work the shift or hours, or if all full-time officers have already worked at least eight (8) hours overtime within the bimonthly period, the shift may be offered to other personnel.
>
> (b) Such vacant regular shifts or additional hours shall be equally offered to full-time officers who have not worked at least eight (8) hours of overtime within the bi-monthly period, on a rotating basis, beginning with the most senior officer. The employer may contact the employees by phone, if necessary and will leave a message when possible, however if the employee cannot be reached, or if no response is received within ten minutes (10), the employer may contact the next employee on the list.
>
> (c) When the Department needs to fill a regular vacant shift with notice of less than four hours, the Department may fill the vacancy in the most expeditious manner available.

The City has made no proposal on this issue and seeks to maintain the status quo. There is currently no provision addressing this subject in the Agreement.

POSITION OF THE UNION

The Union was mindful of the cost to the City of health insurance. It agreed during negotiations to increase the share of the premium paid by the employees. The Statute states that the Arbitrator should consider any stipulations of the parties. The other bargaining unit received something in return for that concession. This unit did not. This factor favors the Union.

The interests of the public are better served by the Union's proposal. It would put officers who are better trained on the street. The full-time officers have considerably more years on the force and more experience. They have received far more extensive training than the part-time officers. Its proposal is also in line with the cost of living, which is another factor the Arbitrator must consider.

The additional cost of the Union proposal is a maximum amount of $22,000 over three years. This amount is derived by calculating the overtime expense incurred and deducting the savings derived from not utilizing part-time officers for the periods that would be covered now by full-time officers. This increase is 1/3 of a percent of the total expenditures for 2007.

The City's assertion that external comparables are a minor factor and that internal comparability is paramount is in error. The internal comparable does not provide the same type of services as do the police officers and this factor is of little value here for that reason. It is also important to consider that there is only one internal comparable and that a single unit does not establish a pattern. That is especially true here where overtime for police is at issue. The work schedule for DPW is totally different than the schedule for the police. They also have a provision in their Agreement that precludes using part-time employees if it displaces full-

time employees from "ordinary or customary overtime" work. That is not in this agreement.

The majority of the external comparables provide some guarantee for overtime. The Union's proposal is a modest proposal that would still leave this bargaining unit near the bottom in terms of the hours guaranteed. The total wages earned by officers in this Department would also remain at the bottom even if the Union's proposal were adopted. The Union proposal is needed to gain some equity with those other jurisdictions. The difference in the total wages earned is not due, as alleged by the City solely to the fact that fewer regular hours are worked here, but reflects the substantially fewer overtime hours available to these employees. The City has argued that it is important to know the bargaining history for the external comparables when the Union's obtained a guarantee for overtime. The Union disagrees. Several arbitrators have noted that this fact is not "determinative." The City when it made the argument that the total compensation here is reasonable did not produce any evidence regarding the total compensation earned by employees in the comparable jurisdictions. The failure to provide that information defeats their argument.

The City maintains that a quid pro quo is required. They are not correct. Many arbitrators have found that when the employees in question lag behind the employees in the comparable jurisdictions that no quid pro quo is required. A need to catch-up creates an exception to the general rule. If a quid pro quo was required here, the Union would have to give up something that would put it behind in that other area. The main case cited by the City to support its argument is readily

distinguished.[1] The proposal there was far more complicated and restrictive than the proposal here. Comparability was not even raised as an issue in that case and it is a factor in this one.

The City also maintains that the Union has not shown that a need for the change exists. The Union has shown that a need does exist because earnings for this bargaining unit compare unfavorably with the earnings in the comparable jurisdictions. The fact that the current practice has existed for years does not change the need here or the ability of the Union to seek to change the practice. The City contention that the wages are less because employees take comp time instead of money is incorrect. Most of the comp time is from holidays, not overtime.

The Union has also shown that its proposal is clear and not overly burdensome. It states when an employee should be called and who should be called. It does not mandate overtime. It will not deprive part-time officers of an ability to gain experience. Even if the Union proposal is adopted, there would still be overtime hours available to them. Many do not work many hours already.

The City has cited several cases to support its position. They can be distinguished from this case. The change sought by the Union here is minor. In many of the cases cited, the change proposed called for a major restructuring of wages or benefits, which often was not supported by the comparables. None of that is true here.

[1] Marathon County Decision No. 22462(Malumud,1986)

POSITION OF THE CITY

The City for over thirty years has used part-time officers to fill overtime needs. This system has worked well for the City. The Union seeks to change the status quo. In order to obtain this fundamental change it must meet certain tests developed by arbitrators over the years. The burden of proof is on the Union. It has failed to meet that burden and its proposal should be rejected on that basis. The City has cited numerous decisions where arbitrators have so held. If such a drastic change as proposed here is to be obtained, it should be accomplished through the negotiation process and not through interest arbitration. Arbitrators have so noted over the years and have found when the Union makes a proposal similar to the type of fundamental change proposed here by the Union negotiation not arbitration is how it should be obtained. A change in the overtime system has been found to be a fundamental change.

Employees already earn overtime. They can take a cash payment or compensatory time. Many have opted for compensatory time and have not even used their accumulated time. The exhibits also show that there has been ample opportunity for overtime for bargaining unit members and they have elected to take compensatory time rather than overtime pay the majority of the time. These facts show there is no compelling need for the change proposed by the Union. An award by Arbitrator Malumud in Marathon County [2] is directly on point. This Arbitrator should adopt his analysis in this case. Like was true in that case, the Union proposal here is ambiguous and that ambiguity is another reason to reject the proposal.

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[2] supra

The proposed change would impose a difficult burden on the City to administer. The system proposed by the Union would require the City to keep track as to who has worked overtime already and then to start calling those next on the list until it found someone to work. This would take time to accomplish and could cause a delay in filling the needs of the Department.

There are many problems associated with the Union's proposal. It will add cost to the City and it will deprive part-time officers of valuable experience. The fact that some of the proposed comparable jurisdictions have a provision like that proposed here is not significant. Each jurisdiction uses part-time employees in a manner best suited to their needs. That some do not use them for overtime does not mean that this City should not. Each Department has its own unique situation that may require more or less overtime than somewhere else. There are a "myriad of reasons" why overtime might be treated differently in one jurisdiction than it is in another.

The City has restrictions from the State on what it can spend. The additional cost that would be incurred if the Union proposal were adopted would further strain the City.

The most serious flaw in the Union's proposal is its failure to offer a quid pro quo. That is required if the Union wishes to change the status quo. The Arbitrator should reject any argument by the Union that one is not required. Even in the other jurisdictions where language similar to that proposed here has been adopted, there was some give and take at the bargaining table. The Union has made no proposal to give up something to get this provision into the agreement. The Union has argued that the changes in health insurance are a quid pro quo, but it

received substantial wage increases as a quid pro quo from the City to gain the changes in health insurance.

The Union proposal is not in the best interests of the citizens of the City. It is also out of line with the settlement in the other bargaining unit. Similarly, the wage settlement here compares both internally and externally with other wage settlements. Externally, the three-year increase is almost identical to the increases obtained in the external comparables. The wage rates of the Officers also compare favorably with the wages paid in the other jurisdictions. Its benefits also compare favorably. Internally, the two bargaining units have shared for some time similar increases and this sets the standard for what is a reasonable increase. The amount of overtime has actually been increasing in this unit while decreasing at DPW.

The Union urges the Arbitrator to look at the total compensation package of these employees and compare them with the wages paid elsewhere. There is no basis to use that comparison in this case. Many employees in the City could earn more if they cashed in their comp time. In addition, the best comparison is the base wage without overtime. Furthermore, the employees in this City work fewer hours than employees in the comparables. This accounts for any discrepancy in what these employees earned versus the comparables.

DISCUSSION

The Statute requires an interest arbitrator to consider several factors in rendering a decision. As is always the case, not every factor is relevant in any particular proceeding. The Arbitrator shall only address those issues that he feels are relevant here or that need explanation given the arguments of the parties.

Internal Comparables

There is only one internal comparable. The employees who work at the Department of Public Works are also represented by AFSCME. Unlike Police, they work a normal work schedule. They have a forty-hour workweek. There is no provision in their agreement regarding overtime distribution, but there is a provision addressing the rights of full-time employees to overtime. The City argues that this contract sets a pattern that the Union is trying to break. The Arbitrator must disagree. Police work an entirely different type of schedule than other bargaining units. Their overtime requirements and their duties are not at all similar to those of public works employees. Police work all holidays among other things. Many arbitrators have made a distinction between the type of work performed by police and fire from that of other public employees. This Arbitrator has himself noted in the past that there is a distinction.

When a party to an interest proceeding argues that a pattern has been set, it usually involves numerous bargaining units that have agreed to certain benefits, usually health insurance or wages, with a lone holdout. In that situation, arbitrators tend to continue the pattern and not reward the lone holdout unless there is some special circumstance that justifies a deviation. In this case, there is only one other unit, and as noted it is dissimilar to this unit. This single unit cannot create a pattern on an issue like this one.

The City has argued that internal comparables favor its position. For the reasons noted here, the Arbitrator finds that internal comparables do not support its position or for that matter the Union's. It is a non-factor.

External Comparables

Appropriate comparables

The parties agree on the inclusion of some of the comparables and disagree on others. They agree that Brillion, Chilton, Kiel, Plymouth and Sheboygan Falls are appropriate. The Union proposes adding Horicon, Kewaskum and Mayville to the list. The Employer would add Kohler and N. Fond du Lac.

Position of the City

The City's proposed comparables are favored when considering the factors generally utilized by Arbitrators when choosing between two proposals. All of the comparables proposed by the City are located within 30 miles of New Holstein. The number of officers employed is approximately the same. The only jurisdictions that are somewhat larger are Sheboygan Falls and Plymouth and both parties agree they should be included. The equalized value of property is near the bottom of the list for this City. The population is also in line with the others, except for the Plymouth, Sheboygan Falls and North Fond du Lac. The Union's proposed additions are geographically more distant from New Holstein than those proposed by the Employer. The Union concedes they are located in a separate labor market. In a prior arbitration in North Fond du Lac, New Holstein was used as a comparable, but it was not used as a comparable in Horicon.

Position of the Union

Kohler is much smaller than New Holstein. Given its size, it does not even come under the Wisconsin Law that provides for interest arbitration. For that reason, it should not be accepted as a comparable. Other arbitrators have excluded comparables proposed by a party on this basis. The City failed to offer any

evidence on how overtime has been distributed in North Fond du Lac. While statistically, it could be argued that it should be included on the list, the absence of any data upon which to make a comparison would exclude it from consideration. The Cities of Horicon, Kewaskum and Mayville are all similar in size to New Holstein. They also have a similar number of police officers. Adding these cities would give the Arbitrator a greater sampling to make a comparison.

Discussion

The City is correct that Mayville, Horicon and Kewaskum are the farthest from New Holstein. They are in a different labor market. While they are similar in size to New Holstein, they are too geographically remote to be included. It is true that in some situations their distance would not be considered too great. Here, however, there are enough other localities that are closer in proximity to choose from without having to go this far a distance to find a comparable. Given the availability of other choices, the Arbitrator finds that extending the list to include these three cities is not warranted.

The Union's argument concerning Kohler is valid. It is much smaller than New Holstein and its size does take it outside the interest arbitration law. Even though it is proximate in location to New Holstein, all other factors point against including it on the list. North Fond du Lac is larger than New Holstein, but smaller than Sheboygan Falls and Plymouth. Both of which the parties agree should be included. It also has fewer officers than those two Cities. It is geographically proximate. Therefore, the Arbitrator shall include it on the list. In so doing, the Arbitrator notes that the City did provide the complete police contract from that City. While some data, as the Union noted is missing, the contract language is

available and thus can be compared. The Arbitrator finds that Brillion, Chilton, Kiel, N. Fond du Lac, Plymouth and Sheboygan Falls shall make up the comparables.

Impact of External Comparables

The Union seeks to require the Chief to offer at least 8 hours of available overtime to each officer every other month. The Union has argued that the external comparables support its proposal. It makes this argument based upon the language contained in the agreements of the external Cities and the amount of overtime earned in this City versus the other Cities being compared. Conversely, the City does not believe that external comparables are a factor at all in this matter. Despite the City's position, the Arbitrator shall discuss and consider this factor as it does have some relevance. Exactly how relevant is a question that will have to be answered later.

The parties have cited numerous cases to support their respective positions. One case cited by the Union is Town of Beloit (Law Enforcement.[3] In that case, Arbitrator Greco found for the Union noting that "every external comparable" provided the benefit sought by the Union. Conversely, in Sawyer County (Sheriff's Dept.),[4] the Arbitrator found that "the Association failed to demonstrate" that the practice was as alleged by the Association.[5] What do the externals show here?

The Arbitrator has prepared two charts. The first chart shows the type of provision contained in the jurisdictions that he has found to be comparable. The

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[3] Dec. No. 30796-A, (Greco, 6/10/04)

[4] Dec. No. 29199-A, [Oestreicher ,3/25/98]

[5] See also Northeast Wisconsin Vocational Dec. No. 26365-A (Rice, 1991), where Arbitrator Rice also found that the Union proposal "would expand the emergency leave benefit well beyond… most of the external comparables."

second chart shows the amount of hours worked, including overtime in the various jurisdictions.

City	Language
Brillion	OT distributed evenly
Chilton	No equalization, but offer 1st to Full-time
Kiel	Officer can select 1 OT shift/month
N. Fond du Lac	Chief's discretion, but where possible follow rotating call-in sequence
Plymouth	No equalization, but overtime is offered 1st to full-time
Sheboygan Falls	OT divided evenly

	RegularHours	**O.T. Hours**	**Total Hours**	**Rank**
Brillion	**2,067**	**184**	**2,250**	**1**
Chilton	**1,947**	**232**	**2,179**	**3**
Kiel	**1,976**	**197**	**2,174**	**5**
Plymouth	**2,068**	**159**	**2,227**	**2**
Sheboygan Falls	**2,068**	**108**	**2,176**	**4**
Comparables Ave.	**2,025**	**176**	**2,199**	
New Holstein	**1,941**	**56**	**1,995**	**6**

The first chart indicates that all jurisdictions either equalize or try to equalize overtime, have a minimum overtime hour requirement or require that overtime be offered first to full-time employees. This last proviso would apply to all overtime,

not just a minimum as is proposed here. The second chart shows that the average wage and the number of hours worked are clearly greater in the comparables than it is in this City. The Union proposal in comparison to the external comparables contract language is a moderate one. It does not require that all overtime be distributed equally or that all overtime be offered first to full-time employees. It sets a minimum per employee, like is done in Kiel. On that basis, the proposal of the Union would be closer to the situation that existed in Town of Beloit.

The Arbitrator agrees with the City that there can be numerous reasons why the employees in the other jurisdictions earn additional overtime. The City is also correct that it is impossible to know what transpired at the bargaining table in those jurisdictions that enabled the Unions there to get the provisions they obtained. It is important to note that the provisions in those agreements do not appear to be new additions to their contracts. They had those provisions, while the employees in this bargaining unit were negotiating not just this contract, but also the predecessors over other matters of concern to it. Nevertheless, the Arbitrator finds that this factor does favor the Union, because of the disparity in language. The proposal provides for less than what most of the others get and puts the employees on a somewhat more even par to the comparables than does the current contract, which has no provisions addressing this issue at all. However, this is only a single factor in favor of the Union. It is not standing by itself the determinative one as has been suggested by the Union.

Other Factors

The main argument of the City is that the Union is seeking to change the status quo. It cited numerous cases where arbitrators held that a party seeking to change

the status quo must pass certain tests in order to prevail. The burden is on the party seeking to make the change to show that it has met the tests or that the circumstances are such that it is not required to meet some or all of the components of the test. The Arbitrator agrees with the City that it is the ability of the Union to show that it has met its burden on these points that will decide the outcome in this matter. Put simply, the Union's case will rise or fall on how well it has fared in meeting these test requirements.

The City contends that the tests are best described in the case before Arbitrator Malumud in Marathon County (Sheriffs Deaprtment). The Association sought to obtain the following language.

> Any excess bargaining unit work shall be offered to the full-time employees on a rotating, seniority basis, prior to using part-time or casual employees. Any excess time worked shall be compensated at the employee's overtime rate of pay or compensatory time off, at the employee's option at the rate of time and one-half. Provided, however, in those instances where the sheriff reasonably determines that an emergency exists, in which case he can call upon that deputy he believes can respond in the shortest period of time.

This was brand new language. Arbitrator Malumud then listed what he felt the Association had to demonstrate in order for it to succeed. He noted that not all of the tests had to be met, but that "it is difficult for a party seeking to change the agreement to achieve that change through an impasse proceeding." He then enumerated those tests or factors that must be met.

> This arbitrator asks first: Is the proposal clear and unambiguous? Is it clear as to the scope of its coverage? Disputes may arise even under the clearest language, however, in many cases, interpretation problems may be anticipated.

> A second factor in this Arbitrator's analysis is a review of the total offer of the party proposing the change to ascertain if there is a quid pro quo to achieve the change... Certainly, under Sec. 111.77(6)(h)--a normal and traditional consideration in the Collective Bargaining Process--is the give and take which normally accompanies a demand for a change. The parties may disagree over whether the price offered for the change is sufficient to justify granting the change. However, the statutory criteria contemplate the offer of some quid pro quo where a substantive change in working conditions is demanded. In this case there is no evidence in the Union offer of any quid pro quo, despite the likely increase in income which may be generated by the language demand made here.
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> The third element which this arbitrator looks for is whether the proposing party has demonstrated a need for the change.[6]
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> The fourth element which this Arbitrator looks for is whether or not the proposal made is reasonably designed to effectively address the problem.[7]

The Arbitrator will apply these four criteria, as urged by the City, to the facts of this case, although they will not be covered in the order set forth by Arbitrator Malumud. The City contends that all must be met. The Union disagrees. The Arbitrator will discuss whether the Union has met each factor and if not whether it is required to do so in this case in order for it to prevail.

Ambiguity

The Chief testified that he believed there were unanswered questions in the Union proposal. For instance, does he call those on shift first or those off shift? The Arbitrator in reviewing the language does not agree that this proposal creates the type of ambiguity that concerns the Chief or that was present in the language before Arbitrator Malumud. The Union's proposal seeks to have all full-time officers be given the opportunity to work eight hours every two months. If a shift or extra hours are available, they are to be offered first to anyone who has not worked eight

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[6] See also Chippewa County (Sheriff's Department), Dec. No. 28764, (Roberts, 1997).
[7] See also City of Madison (Public Health Department) (Petrie, 1996); School District of Fort Atkinson, supra. City of Manitowoc Dec. No. 28785 (Michelstetter, 1997)

hours during the two-month period. That is all that it requires. The only limitation on the Chief is that he must offer overtime to an officer who is short on hours for the current two months, before offering them to anyone else. It does not require he call any specific person first. This language is not unclear or ambiguous. There is no confusion as to what "bargaining unit work" meant as there was in Marathon. The Arbitrator finds the first part of Arbitrator's Malumud's test has been met.

Has a need been shown?

It was interesting that in the case before Arbitrator Malumud, he noted that the Union sought the new language because it wanted to:

> a. increase the income of its membership; b. limit the work opportunities… to reserve deputies; c. provide that all bargaining unit work be first offered to bargaining unit personnel; d. perform all this excess work at the overtime rate.

He then observed that the Union during its presentation relied instead on an argument that "the Sheriff does not distribute overtime fairly and shows favoritism." He concluded that the Union "failed to present any hard data which would indicate that any employee receives far more overtime or is asked to work more overtime than any other employee."

In this case, the Union argues that a need has been shown here. One of the reasons it believes there is a need is to increase the income for the bargaining unit to put them closer to the pay of the external comparables. To support this monetary argument it introduced evidence to show the wages of the employees here when compared with the wages earned in the comparables. They were at the bottom. However, that fact does not provide the whole answer. The Arbitrator to fully evaluate this argument had to ascertain how in reality this proposal would change that situation. To do that, the Arbitrator reviewed the overtime each

employee had earned during the previous two years. There are five full-time officers. According to the records in evidence, there are six part-time officers. The part-time officers worked 1126 total hours in 2005 and 1375 hours in 2006. Some of the part-time employees worked more than others. The five full-time officers worked 296 and 406 hours of overtime in 2005 and 2006, respectively. This total excludes all overtime work on holidays. An officer regularly scheduled to work on a holiday receives overtime pay for work that day. Those hours have not been included. The Arbitrator has prepared charts for 2005 and 2006 showing how many overtime hours each of the five full-time officers worked each two-month period during 2005 and 2006. The Association proposal requires each officer be offered 8 hours of overtime every two-month period, provided there is overtime to be worked. Using that formula, the Arbitrator calculated how many hours short of the minimum each officer would have been during each two-month period over those two years had the Union proposal been in effect then. An average wage of $36 was then used to calculate the cost plus a 1.2 factor to include roll-up costs, such as FICA and Retirement benefits. These dollar figures will show how much impact the proposal would have on the wage disparity referenced by the Union. This review and the chart also have a secondary purpose. It will help show whether the Union proposal would have the impact on the hours available for part-time employees that the City contends would be so. One of the arguments of the City has been that there would be too little work left for part-time if the Union proposal were accepted. Do the facts bare that out?

NAME							
Voland							
	2005						
	1st 2 mos	2nd	3rd	4Th	5th	6th	Total Short
	3.75	13.5	3.75	11.25	0	.75	23.75
Reedy	2005						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	6.0	7.5	16.5	9	6	15	4.5
Baldwin	2005						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	29.25	25.25	13.5	12.75	19.5	11.25	0
Lepisto	2005						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	0	12	7.5	9	18	3	13.5
Presto	2005						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	3	7.5	4.5	9.75	12	4.5	12.5
TOTAL Available Hrs/2 mos	42	65.75	45.75	52.75	55.5	34.50	296.25
TOTAL Short for 2 Mo. period	19.25	1.	8.25	0	10	15.75	52.25

Total Cost 52.25 hrs x $36/hr x 1.2 (roll-up costs = $2275
Total Hours for PT Employees during 2005 = 1128.25

NAME	Hours Worked for each Two Month Period by Each Officer for 2006						Hrs Short - U Proposal
Voland							
	2006						
	1st 2 mos	2nd	3rd	4Th	5th	6th	Total Short
	9.75	7.5	12.75	0	0	.75	16.5
Reedy	2006						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	46.5	15	6	15.75	10.5	12.75	2
Baldwin	2006						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	35.25	12.75	36.75	23.25	26.25	13	0
Lepisot	2006						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	9.75	3	12.75	9.75	11.25	1.5	11.5
Presto	2006						
	1st 2 mos	2nd	3rd	4th	5th	6th	Total
	22.5	8.25	17.25	6.75	11.25	8.25	1.25
TOTAL Available Hrs/2 mos	123.75	46.5	85.5	55.5	59.25	36.25	406.75
TOTAL Hrs Short for 2 Mo. Period	0	5.5	2	9.25	8	13.75	38.5

Total Cost 38.5 hrs x $36/per hour x 1.2(roll-up costs) = $1663

Total Hours for Part-time in 2006 = 1375.6

As can be seen, the impact on part-time employees is minimal. If some of the hours offered to one full-time officer were offered to another rather than taken from a part-time employee, there would have been hardly any hours lost to part-time employees. Even if that could not be done, the maximum hours lost over two years would have been 90.75 hours out of a total of 2501 available hours for the two-year period. While there is certainly no guarantee that overtime will continue as it has in the past, the Union proposal only comes into play if there is overtime. It is hard to imagine that available hours for part-time employees would drop so substantially in the three years covered by the agreement that the 240-hour requirement would deprive the part time employee of much work. If overtime or available hours should for some reason fall that low, there would be little work for the part-time employees anyway and the City argument regarding experience for the part-time employees would be a moot point.

The chart it turns out also serves a third purpose. Arbitrator Malumud noted that there was no hard data that the distribution of overtime was unbalanced in the case before him. The chart shows in this case there is evidence that it is unbalanced. Over the last two years, some officers would have attained the Union goal in almost every two-month period. Others would have hardly ever attained it. That the Union is making this proposal would indicate that it believes and the employees believe a problem has existed in how overtime has been awarded. Otherwise, why make the proposal, especially since the total hours required by the proposal would have been surpassed the last two years. The Union is not asking that full-time employees get overtime first. It is asking that each member of the bargaining unit be guaranteed some

overtime, if there is overtime to be had. That type of proposal can only be geared towards equitable distribution, especially since the impact on part-time is, unlike Marathon, so minimal.

The Arbitrator finds from the above that the facts and language in this case provide what was absent in Marathon. When he applies the logic and rationale of Arbitrator Malumud to this case, he must conclude that a need has been shown for this proposal.[8]

The Union has also argued that a need has been shown based on the language contained in the agreements of the external comparables. Its argument has merit, despite the bargaining history differences that was discussed earlier. As has been noted, all of the exernal agreements contain some provision protecting full-time employees. There is no such provision here. Thus, the proposal would put it in line with the comparables and, thus provides an additional basis for concluding that a need exists.[9]

Does the proposal reasonably address the need

The Union proposal is, as it says, a modest one. Eight hours every two months is hardly extreme, especially since it is little more on average than they currently work. There is also an exception contained in the proposal that states that the minimum only applies if overtime hours are "available." If there is no overtime, none must be created in order to meet the minimum. It is in the

[8] As noted, the Union has argued that the total wages here are less and that this proposal would help rectify that, and that this proves there is a need for its proposal. However, the reality is that the extra wages that would be earned under this proposal are negligible. Thus, this argument does not help its cause. The City is also correct when it argues that wages cannot be a major concern for the employees. If it were, why would employees choose to take comp time rather than wages for their overtime work?

[9] As stated earlier, in Town of Beloit (Law Enforcement), Dec. No. 30796-A, (Greco, 2004), Arbitrator Greco found that "every external comparable… supports the Union position."

words of Arbitrator Malumud "reasonably designed to effectively address the problem."

The City argues that the proposal would create a hardship on the Department, and that it is unreasonable on that basis, as well. The Chief testified that it would be very difficult and time consuming to track each employee's overtime. The Arbitrator must again disagree. There are only five full-time officers. Counting their overtime each pay period to see if they hit the eight-hour mark for the current two month period is not unduly burdensome. While it does require some additional time, it is minimal at best. The proposal should also not delay the filling of vacancies. If the Chief knows where each employee stands regarding overtime hours, and a need arises, he can keep the Officer who is short of time over while he calls another officer who is also short on hours. If everyone has hit the minimum or if anyone else short of hours is already working that shift, he can do what he has always done. The change in the actual practice is, as noted negligible. Therefore, this argument is rejected.

Is a quid pro quo required?

The City wants to maintain the status quo and argues that it is the Union that is trying to change how things are done. Under those circumstances, it contends a quid pro quo is needed to obtain the gain that is sought. It cited several cases to support that position. In one case, Arbitrator Kessler held:

> It is well established that major policy changes in a labor agreement should not be imposed by a neutral through interest arbitration. It is preferred that such changes be secured through the collective bargaining process. In an interest arbitration, the offer that makes no policy changes, or that makes the fewest, is generally preferred over one that makes such changes.[10]

[10] *Columbia County (County Home Non-Professional),* Dec. No. 28960-A, (1997].

In that case, the Employer was seeking a substantial change in health insurance. Arbitrator Krinsky rejected the proposal because no quid pro quo was offered to support this major change. Arbitrator Malumud concluded because the Union was making a substantive change a quid pro quo was needed. The Union here has not offered a quid pro quo. Instead, it argues that none is required. It is significant that in the cases cited by the City, the arbitrators concluded that the proposal of the Union was a substantive change from the status quo, which was why a quid pro quo was needed. Does the change here fall within that category?

In Delevan-Darien School District,[11] cited by the Union, the Union wanted to add some minor additional coverage to its medical and dental plans. The changes were not substantial. The Union proposal was adopted without a quid pro quo being offered. Another case cited by the Union is School District of Ft. Atkinson.[12] In that case, the issue was layoff language. The record showed that when layoffs had been required in the past, seniority had been used as a basis for choosing the individual to be laid off. The decision was made by the District in the most recent round of layoffs to deviate from that practice. The Union then made a contract proposal to require seniority again be used as a basis for determining who is to be laid off. The District argued that it was the Union that was seeking to change language and which had the burden of proof. Arbitrator Kerkman agreed that they did carry that burden, but he still adopted the Union proposal. He found that:

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[11] Dec. No. 27152-A, (Yaffe, 1992)
[12] Dec. No. 17103-A, (Kerkman, 1979(

> The Employer has cited School District of Alma, Med/Arb-115, Dec. 16672-A(Hutchinson, May 1979), and School District of Barron, Med/Arb-14, (Krinsky,Nov. 1978). supra, asserting that the decision of both Arbitrators stand for the proposition that completely restructuring the parties' collective bargaining relationship, absent exceptional circumstances, should be left for the voluntary negotiations of the parties and not imposed by an arbitrator. The undersigned accepts the foregoing principle, however, the Employer's reliance on that principle in the instant matter is misplaced. Here we have terms of a predecessor Collective Bargaining Agreement, which in the opinion of the undersigned, leaves almost entirely within the discretion of the Employer, without limitation, which employee is to be laid off. At the same time, from 1972 to 1979, when lay-offs were necessary, the Employer implemented them based solely on seniority considerations. Thus, it cannot be said that the relationship, if the Association proposal is accepted, will be altered by adopting the Association proposal. Rather, the bargaining relationship as it had been practiced in actuality, except for the lay-off in the spring of 1979, would remain unaltered if the Association proposal is adopted. Given the history of the application of the language which heretofore existed in the Collective Bargaining Agreement governing lay-offs, the undersigned can only conclude that the Association proposal in the instant matter would restore the collective bargaining relationship previously enjoyed with respect to selection of personnel for lay-off, except for the spring of 1979. It would follow, then, that the Association proposal should be adopted. The burden in this case, then, can legitimately be said to have shifted to the employer to show why seniority should not be applied once the prior practice of having seniority applied has been recognized.

The chart prepared by the Arbitrator is highly significant on this point. Given the fact that the current practice is to provide some overtime to full-time employees and that the changes required by the proposal would be minor using the current practice, the Arbitrator finds that the proposed language does not substantially or significantly alter the current relationship. It certainly does not do so anywhere near the degree argued by the City. If the concern of the City is that the Chief wants unfettered discretion to assign overtime so he could

change the current practice of offering some overtime to full-time employees and to give it all too part-time, this case would fall squarely within the Ft. Atkinson framework. As was noted earlier, Arbitrator Kerkman observed that: "in the opinion of the undersigned, this leaves almost entirely within the discretion of the Employer, without limitation, which employee is to be laid off." He was referring to the unbridled discretion retained by the Chief to layoff whomever he chose. Arbitrator Kerkman restored the status quo ante. The proposal of the Union, despite the arguments of the City to the contrary, for the most part maintains the status quo ante, and changes it far less than might be so if the language were left out and the Chief decided he could assign overtime to full or part-time employees as he chose, regardless of what was done in the past.[13]

The facts in this case demonstrate to the Arbitrator that the proposal of the Union falls more closely within the cases cited by the Union than it does in the cases cited by the City. Consequently, the Arbitrator finds that the absence of a quid pro quo is not fatal to the Union's case. As noted by Arbitrator Malumud, not all parts of the test must be met. In this case, the Arbitrator finds that the absence of this element is excused.

Conclusion[14]

The Union is seeking to add language to the agreement. While not all of the external comparables have similar language, a good number do. All have some

[13] It would also be contrary to the argument of the City that all it wants to do is continue the past practice that has existed for twenty years. That practice has been to offer some overtime to the full-time employees.

[14] Both parties have raised the interest of the public and the CPI as factors to consider in their favor. Given the limited cost differential and the fact that wage issue was resolved, the Arbitrator does not find that CPI is an important consideration. As for the interests of the public, both sides make valid points and to the Arbitrator that issue is a wash.

variation. However, that fact alone would not carry the day for the Union. It is the fact that it modifies only slightly the status quo and provides the equity that other Arbitrators have found so important that tips the scales in the Union's favor. Overtime for whatever reason has not been distributed equally over the last few years. That the proposal requires only eight hours for the full-time officers every two months hardly hinders the City's use of part-time employees. It is on balance a reasonable proposal that is justified under the circumstances.

Finally, the City has argued that this proposal is simply the foot in the door for the Union with more to come in the future. Neither this nor any other arbitrator can decide a case based on what might be proposed by a party at some future negotiations. An arbitrator can only decide on the language and issues presented to him and evaluate that language based on the record before him. Based on the record and language proposed here, the Arbitrator adopts the Union proposal.

AWARD

The Union proposal together with all of the tentative agreements of the parties is adopted.

Dated: August 10, 2007

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Fredric R. Dichter,
Arbitrator