BEFORE THE ARBITRATOR

IN THE MATTER OF THE PETITION OF
VILLAGE OF PLOVER

AND

Case 15 No. 66464
MIA-2746
Dec. No. 32022-A

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION/LAW ENFORCEMENT
EMPLOYEE RELATIONS DIVISION

Appearances:	For the Village	Ronald J. Rutlin, Esq. Ruder, Ware
	For the Association	Robert E. West WPPA Consultant

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the Wisconsin Employment Relations Commission. A hearing was held on May 10, 2007 in Plover. 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 parties' briefs in reaching his decision.

ISSUES

The parties reached agreement on almost all of the terms to be included in this successor agreement. All of those tentative agreements are incorporated into this Award. The only remaining open issue is a proposal by the Village to amend Article 7 to provide:

Article 7 – Hours, Section 3:

> Annual work schedules for employees will be drawn up by the Chief of Police or his/her designee and shall be posted on or before December 1 prior to the calendar year before scheduled. However, it is understood that if necessary, the Chief of Police or his/her designee, may change posted work schedules to provide adequate shift coverage caused by employee absences due to sick leave, vacation, funeral leave, **State or Federal Family Medical Leave**, or emergencies. (Bold Language is new)

BACKGROUND

Section 3 has been in the parties' agreement since at least 1983. Initially, the Chief could only change the work schedule of an Officer without incurring overtime costs when the change was caused by absences due to sick leave, vacations or emergencies. In the 2001-02 contract, the parties added funeral leave to the list of exceptions. The language has stayed the same ever since.[1]

A Patrol Officer in December of 2005 requested and was granted leave under the Family and Medical Leave Act. As permitted under Wisconsin Law, the Officer utilized his sick leave for the period he would be absent so that he would be paid during this time. Another Officer had his schedule changed to cover the absence. He was not paid any overtime for the change. The Union grieved the decision to move the officer without paying him overtime arguing that changes that were necessitated by absences under the FMLA were not listed as an exception in Section 3. The Police and Fire Commission heard the grievance and denied it because the Officer that was off had used sick leave to

[1] The date by which the schedule must be posted has changed over the years, but that change is not relevant here.

cover the absence. Sick leave is listed as an exception under Section 3. The Union decided not to take the issue to arbitration and reached a settlement of the grievance with the Village on a non-precedent setting basis. The underlying issue remained unresolved.

The Village made a proposal during these negotiations to add FMLA Leave to Section 3. It believes it is simply clarifying the current language. The Association believes that this is a new addition to the Section that changes the status quo.

POSITION OF THE VILLAGE

The parties went to Interest Arbitration in 1993. During that proceeding a set of comparables was established by Arbitrator Zeidler. The Association has not proposed a deviation from that list. This Arbitrator should use those same jurisdictions. Those comparables support the Village position. In Everett Marshfield, Portage, and Stevens Point, no overtime is paid when a change is caused by an FMLA absence. The Chief in Mosinee and Rothschild can make a change for any reason with 24 or 12 hours notice, respectively. In the other Departments, a change can be made for any reason without incurring overtime costs. The contention of the Association that external comparables are but a minor factor here is in error. Many arbitrators have observed that where the external comparables uniformly support the position of a party that provides a basis for accepting that party's proposal.

The Association has cited several cases to justify its position. Those cases can be distinguished from the present one. In the cases cited, a party sought to make a major or significant change to the status quo. Because of that request,

the arbitrators required that a quid pro quo be offered in order to gain acceptance of the proposed change. Here, the Village is not proposing a major change to the status quo. The proposal will result in greater efficiency for the Department and that has been found to be a significant factor in favor of adopting a party's proposal. Thus, despite the Association's arguments to the contrary, no quid pro quo is needed. This is especially true where the external comparables, as they do here, supports the proposal. There is also no evidence that when funeral leave was added to the list in 2000 that any quid pro quo was offered by the Village to obtain that inclusion.

The Village has shown that there is a need for the change based on the earlier grievance filed and the questions it raised. Its proposal will resolve any ambiguity without the necessity of the parties having to litigate the issue in some future grievance arbitration.

The parties in their prior agreements understood during negotiations that there had to be a balance between the Chief's ability to adequately staff the Department and the Officer's right to notice as to what his or shift will be. That was why they agreed to the exceptions listed in Section 3. The proposed addition here is consistent with the other reasons the Chief can change an officer's schedule without incurring premium pay. Like the exceptions currently listed, there is no way for the Chief in advance to know there will be an absence. That is why the exceptions are included. That is also true for FMLA leave. The Association has argued that adding this exception to Section 3 would be another reason to disrupt the lives of the officers. The Village recently agreed to change the work schedule for the police to give them more days off.

They work longer workdays, but have more off days as a result. They currently have more days off than officers in most other jurisdictions.

POSITION OF THE ASSOCIATION

A party seeking to change the status quo must fully justify its position by showing a strong need for the change proposed. Absent a strong showing of need, it must offer a quid pro quo to get the change. Many arbitrators over the years have adopted a test that has to be passed before a proposed change to the status quo could be accepted. The party proposing the change must show that a problem exists, that the proposal reasonably addresses it and that the proposal be accompanied by a sufficient quid pro quo. Here, the Village has not shown a strong need and has not offered any quid pro quo. Contrary to the claim of the Village, the change is significant and not simply a clarification of existing language. Such changes are best left to the parties for voluntary agreement thorough negotiations and should not be imposed through interest arbitration.

The Village next maintains that it does not need the change, as it believes FMLA absences are already covered under Section 3. The role of an interest arbitrator is not to clarify current language. That is left to grievance arbitrators to decide. Thus, it is clear that the Village has failed to demonstrate that there is a need for the change. Based on that failure alone, its proposal should be rejected.

The Chief has the right to change an officer's shift. He acknowledged during the hearing that many officers have voluntarily agreed to change shifts

without requiring the payment of overtime. When it has had to pay overtime, it has had the financial ability to do so.

The Village relies on the external comparables as support for its proposal. Much of the information it has offered is in the form of a questionnaire sent to each Department and not from the language in the collective bargaining agreements for those Jurisdictions. The data it presented is incomplete and should be disregarded. There is no real evidence as to how FMLA leave is treated in each of the comparable jurisdictions. The Arbitrator should not consider these exhibits.

Conversely, the affected Officers testified as to the difficulties to their personal lives that are caused when their schedules are changed. This proposal would simply add another burden on them to change their schedule without compensating them for the inconvenience. The Village seems to minimize the impact on officers that results from a disruption of their schedules and the costs that may be incurred by them by having to change their plans. It is more important to the Officers than argued by the Village.

The Village argues that the interests of the public are better served by its proposal. It offered no evidence to support that claim.

DISCUSSION

The Statute lists numerous factors that an arbitrator must consider in interest arbitration. The Village contends that the most important factor in this case is external comparability. The Association disagrees. It believes that "other factors" is the most relevant one and that the Village has failed to pass the tests imposed by arbitrators on the party seeking to change the current

language. The Arbitrator shall discuss these factors and agrees they are the most relevant ones in this matter.

External Comparables

The parties do not disagree over which jurisdictions comprise the appropriate comparables. Arbitrator Zeidler established them several years ago. The primary comparables are Weston, Stevens Point, Rothschild, Mosinee and Wausau. The secondary group includes Marshfield, Wisconsin Rapids, Waupaca and Portage. Where the parties disagree is the weight that should be given to this factor. The Association also objects to the manner in which the Village has offered information regarding the comparables. A copy of the collective bargaining agreement for each comparable was provided to the Arbitrator. In some cases, the contract was silent as to whether the Chief could change the shift of an employee without incurring overtime costs. Because of that, the Village attempted to conduct a survey of each department to determine when overtime is and is not paid and in particular whether overtime is paid when a change in shift is necessitated by an FMLA absence. This Arbitrator has reviewed the agreements and the survey. He has prepared a chart indicating what the contract language says and then what the survey results for that jurisdiction were. A copy of that chart is attached to this Decision. It shows that in Everett, according to the survey, the restrictions on the Chief's ability to change a shift without a penalty are actually greater than what is listed in the contract. Both the contracts and the surveys in Marshfield and Monroe show that no premium is due for any change. In Portage and Stevens Point both the contract and survey show that any change for any reason requires overtime pay if not notified many days in advance. Overtime is

due in Rothschild only if less than 12 hours notice is given. It is in the last three jurisdictions that make up the comparables that there seems to be the biggest discrepancy between what the contract language says and what the survey shows. The survey indicates in Waupaca that FMLA is exempted, but not sick leave. The contract makes no distinction. In Wausau and Wisconsin Rapids, there are exceptions according to the survey that are not listed in the contracts, however, those exceptions do not deal with leave, but instead deal with who is and is not paid based on other non-related factors. No mention is made of any exception based on an absence caused by leave of any kind.

After careful review of what is done in the comparables on the issue at hand, the Arbitrator finds that it is not as clearly cut in favor of the Village proposal as it has argued. Everest is a jurisdiction that handles this type of leave in the manner proposed here by the Village. In some of the others, like Marshfield and Monroe there are no lists of exceptions. Instead, the Chief has total discretion on moving an officer to another shift without incurring a premium via overtime pay. That is not the same as here where the Chief has some discretion, but absent specific circumstances he must pay a premium. One cannot say simply because the Chief in those jurisdictions has complete discretion that the Village proposal here to add another exception to a rule that otherwise requires overtime payment is in keeping with what is done in those jurisdictions. Similarly a distinction can be made between this proposal and the treatment of leave in some of the other comparable jurisdictions because many of the jurisdictions that have an exception for FMLA leave have no exception for sick or vacation absences like is done here. It would be improper

to take a single item and claim a similarity when the same contract section contains so many other dissimilarities.

The Arbitrator finds that the information offered through the survey is admissible despite the form in which it was offered, but that the information contained in the survey does not carry the weight argued by the Village. There are simply too many areas of dissimilarity in the Village proposal and the comparables for the Arbitrator to conclude that the proposal here is in line with what exists in the comparables. While some are the same, some are not and some have just too many variations for the Arbitrator to find a clear pattern. Therefore, the Arbitrator does not find that this factor supports either party.

Other factors

The Association cited several cases to support its position. Arbitrator Krinsky in The Chilton Schools, stated:[2]

> This arbitrator has said in many prior interest arbitration decisions that in his view major changes in the parties' contracts should be bargained rather than accomplished through arbitration, whenever possible.[3]

Similarly, Arbitrator Kessler in Baraboo School District[4] observed that a party seeking a change must demonstrate that; a need exists, the proposal is supported by the comparables, and that a quid pro quo has been offered. The Association here contends no need has been shown and no quid pro quo has been offered and that the case must fail for these reasons. Are they correct?

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[2] Decision No. 22891-A

[3] The Association also cited Lake Holcombe School District Dec. No. 23836, where Arbitrator Fogelberg noted that where a party "wishes to make a fundamental change in the collective bargaining relationship" it is best left to the "give and take of negotiations."

[4] 31 No. 40897 INT/ARB-4986

The Association in 2005 filed a grievance on behalf of an employee whose schedule was changed to cover the shift of an officer who was off pursuant to the FMLA. The matter was resolved on a non-precedent setting basis. While the Association is correct, that the matter could ultimately be resolved in grievance arbitration, it is not unusual for a party during negotiations to add a proposal that addresses an open issue so as to resolve the unresolved question at the bargaining table. Unfortunately, the parties could not resolve it themselves and the issue has been placed before this Arbitrator. Nevertheless, the need that was identified and addressed by the Village remains.[5] A known unresolved question and a proposal to address that issue can and does demonstrate a need, as the term "need" has been interpreted by Arbitrators who have employed the tests for these types of issues. The first prong of the test is to ascertain whether a need has been shown. Given this history, the Arbitrator finds that it has.

The Association next contends that even if a need were shown, that the proposal fails to meet the next component of the test, the inclusion of a quid pro quo. The Village does not believe one is required in this case. Interestingly, this Arbitrator very recently issued a Decision in City of New Holstein.[6] In that case, the Union sought to change the status quo and offered no quid pro quo to support its proposal. The City there raised arguments similar to those raised by the Association here. The City brought forward many of the same cases and

[5] As has often been said by Arbitrators, they act as an extension to the bargaining process. If the proposal was brought forth at the bargaining table to address a problem or issue, that issue remains open through the interest arbitration proceeding.

[6] Dec. No. 31996-A (Union sought to assure that each officer would have a share of available overtime by guaranteeing each officer eight hours every two months, assuming overtime was available)

principles cited by the Association. This Arbitrator noted in New Holstein that many of the cases cited by the City could be distinguished:

> In Delevan-Darien School District,[7] 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.

This Arbitrator then went on to observe:

> 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.

The proposal of the Union was not found by this Arbitrator in that case to be a significant change to the status quo. It hardly changed it at all, and the proposal was adopted.

The Village here seeks to add FMLA to the exceptions listed in Section 3. The list currently includes sick leave, vacations and emergencies. Neither the State nor the Federal FMLA was enacted when these exceptions were negotiated into the agreement. The Village notes that what it is seeking to add here is consistent with the types of exceptions already included in the list. They are correct, especially here in Wisconsin where the ability and the right to utilize accrued leave to cover the time off are available. It is also important to note in this discussion that absences due to FMLA leave are not a frequent occurrence. The exhibits indicate that over the last five years a total of 1500 hours of FMLA leave has been used. This averages to 300 hours per year. An Officer accrues a minimum of 80 hours and a maximum of 200 hours of vacation per year and 96 hours of sick leave. There are thirteen officers. 300 hours per year for the entire Department is a small fraction of the total time

[7] Dec. No. 27152-A, (Yaffe, 1992)

employees can be off for vacation and sick time, yet both of those are already listed as exceptions to the overtime requirements that would normally be paid when there is an involuntary change of shift. Given the fact that the parties could not have contemplated including FMLA leave when they first sat at the table in the 1980's, the fact that it is in the same vane as those areas that are already exempted, and the fact that there has only been limited use of family leave in the past, this Arbitrator cannot find this change to be so substantial that a quid pro quo is required.

Therefore, this Arbitrator shall use the test noted by Arbitrator Reynolds in Adams County Highway Employees Union, Local 323, AFSCME, AFL-CIO, Dec. No. 25479-A (11/22/88), where he found:

> This arbitrator has subscribed to a three-prong test to be evaluated whether a party desiring to alter contract language has met its burden. Here the burden is upon the County to show:
> 1) That the present contract language has given rise to conditions that require amendment; 2) that the proposed language may reasonably be expected to remedy the situation; and 3) that alteration will not impose an unreasonable burden on the other party.

In that case, Arbitrator Reynolds ruled against the County's attempt to change the health insurance language by adding a co-pay requirement. However, his rationale and his test fully apply to the facts here. This Arbitrator finds that the present language has given rise to a condition that requires amendment and that the proposal reasonably remedies that situation. Finally, though the proposal causes some inconvenience to the officers, the additional burden it imposes is not an unreasonable one. Employees already forego overtime when schedules are changed due to vacation, sick leave, funeral leave and emergencies, as well as for Court Appearances. Adding FMLA to the list does

not impose such an additional burden as to be unreasonable. As noted already, FMLA is used far less than those items that are and have always been incorporated into Section 3.[8] All these facts have swayed the Arbitrator to rule in favor of the Village's proposal.

AWARD

The proposal of the Village together with the tentative agreements is adopted as the agreement of the parties.

Dated: August 31, 2007

Fredric R. Dichter,
Arbitrator

[8] While this Arbitrator passes no judgment as to who was correct in the 2005 grievance, it is worth noting that according to the records introduced over ½ of FMLA leave was paid leave.

LANGUAGE IN COMPARABLES

Village	Contract Language	Exceptions noted in Survey
Everest	Chiefs Discretion on shift	*Training*, sick leave, FMLA or Emergency
Marshfield	OT only for hours over workday	Chief Discretion- No premium unless insufficient notice
Monroe	Chief can change not change days off	Chief discretion to change shift as long as not change days days off
Portage	OT all hours outside reg. shift	Any change in schedule requires overtime pay for officer called
Rothschild	2 hours pay if less than 12 hr Notice	Chief can change with 12 hours notice w/o paying overtime
Stevens Point	OT if work other than reg. sched.	Any change in schedule requires overtime pay for officer called
Waupaca	OT if in excess of work day or wk.	If sick leave or funeral OT paid. If FMLA no OT paid
Wausau	OT if not on scheduled shift unless Traded day	Chief can move lowest in seniority to different shift w/o OT
Wisc. Rapids	Regular shift established and Contract silent on OT if change	Relief shifts can be moved. Officers on reg. shift cannot w/o OT