STATE OF WISCONSIN

ARBITRATION AWARD

In the Matter of the Petition of BERLIN PROFESSIONAL POLICEMEN'S ASSOCIATION For final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of CITY OF BERLIN	Case XIV No. 21388 MIA-305 Decision No. 15583-A

Appearances:

Mr. Arthur M. Wiesender, Attorney at Law, appearing for Berlin Professional Policemen's Association.

Mulcahy & Wherry, S.C., Attorneys and Counselors at Law, by Robert M. Hesslink, Jr., appearing for the City of Berlin.

ARBITRATION AWARD:

On July 6, 1977, the undersigned was appointed impartial arbitrator to issue a final and binding arbitration award in the matter of a dispute existing between Berlin Professional Policemen's Association, referred to herein as the Association, and City of Berlin, referred to herein as the Employer. The appointment was made pursuant to Wisconsin Statutes 111.77 (4)(b), which limits the jurisdiction of the Arbitrator to the selection of either the final offer of the Association, or that of the Employer. Hearing was conducted on August 10, 1977, at Berlin, Wisconsin, at which time the parties were present and given full opportunity to present oral and written evidence, and to make relevant argument. A transcript of the proceedings was made, and briefs were filed in the matter, which were exchanged by the Arbitrator on October 17, 1977.

THE ISSUE:

The parties have been able to negotiate terms for all items in their Collective Bargaining Agreement, with the exception of the provisions governing the administration and assignment of overtime. The parties in their prior Collective Bargaining Agreement, which expired on January 1, 1977, had negotiated the following provisions with respect to overtime and overtime administration.

ARTICLE 4 - OVERTIME

Employees shall be compensated at the rate of time and one-half for all hours worked in excess of eight (8) hours per day or forty (40) hours per week. The parties hereto agree that assignment of personnel to overtime hours (full or substantially full shifts) should be made on equitable basis. In recognition thereof the parties have established an experimental policy for the equitable administration of such assignments, which policy is not subject to the grievance procedure of this Agreement or Sec. 111.70 (3)(a) 5 Stat.

POLICY - OVERTIME ADMINISTRATION

All personnel required to perform (beyond their own regularly assigned hours) to fill in for all or substantially all of a work shift where the employee regularly assigned is absent, shall be assigned in accordance with the following:

1. The regular full-time employees who are on their regular scheduled day off shall first be given an opportunity to take the shift.

2. If no one accepts, part-time personnel regularly scheduled off will be offered the opportunity.

3. If no one has accepted, employees who have been, or will be on duty at other times during that day, will next be offered the opportunity.

4. It is understood that at those times when the same two officers are available for overtime duty on successive occasions, the opportunity will be alternated between them as far as is practical.

5. The aforementioned policy will be administered flexibly consistent with the needs of the Department by the Captain.

IT IS AGREED that the above policy will remain in effect, unchanged, during the contract year.

The parties make the following last best offer with respect to administration and assignment of overtime:

ASSOCIATION FINAL OFFER:

AMEND ARTICLE 4 - Overtime to read as follows:

Employees shall be compensated at the rate of time and one-half for all hours worked in excess of eight (8) hours per day or forty (40) hours per week. All personnel required to work (beyond their own regularly assigned hours) to fill in for all or substantially all of a work shift where the employee regularly assigned is absent, shall be assigned in accordance with the following:

1. The regular full-time employees who are on their regular scheduled day off shall first be given an opportunity to take the shift.

2. If no one accepts, part-time personnel regularly scheduled off will be offered the opportunity.

3. If no one has accepted, employees who have been, or will be on duty at other times during that day, will next be offered the opportunity.

4. It is understood that at those times when the same two Officers are available for overtime duty on successive occasions, the opportunity will be alternated between them as far as is practical.

5. When employee's absence for sickness exceeds one week, the employer may fill the absent employee's shift with part-time personnel. When an employee is absent for Court appearances which are scheduled more than one week in advance, the employee's shift may be filled by part-time personnel.

6. In the event overtime duty is available, an employee who otherwise qualifies shall be permitted to work only one of his two off days per week.

7. The aforementioned policy with regard to overtime administration will be administered flexibly consistent with the needs of the Department by the Captain.

EMPLOYER FINAL OFFER:

Delete last two sentences of paragraph 1 of Article 4 and delete the Addendum to the Agreement at page 16 titled Policy - Overtime Administration.

The contract provision in dispute, based on the Employer's final offer would then read at paragraph one of Article 4 as follows:

ARTICLE 4 - OVERTIME

Employees shall be compensated at the rate of time and one-half for all hours worked in excess of eight (8) hours per day or forty (40) hours per week.

POSITION OF THE PARTIES:

POSITION OF THE ASSOCIATION

The Association argues that the incorporation of its final offer with respect to overtime administration incorporates an existing policy into the Collective Bargaining Agreement; and since said policy proved workable it is reasonable to have it a matter of the Agreement and subject to the provisions of the Grievance Procedure.

The Association further argues that the inclusion of the Policy for Overtime Administration would give first preference to such assignments to full time personnel, resulting in better trained officers on the street for such assignments; and providing for full time officers working with full time officers, which would provide for safer working conditions to the full time officers than having to work with part time personnel.

The Association further argues that the inclusion of the overtime policy as a matter of contract would influence the Employer to add more full time personnel.

Lastly, the Association contends that affording overtime assignment preference to full time personnel provides economic advantage to the full time officers, because it creates more earning opportunities for them; and that in the absence of any proof of the City's ability to pay the added cost of the overtime, the Association's offer in this matter should be accepted.

POSITION OF THE EMPLOYER

The Employer makes the following arguments:

1. The City retains the lawful authority to establish staffing priorities within the Police Department and that the stated objective of the Association, to limit that authority, is not a mandatory subject of bargaining.

2. The interests and welfare of the public would be better served by allowing the City Police Department to retain flexibility in the assignment of extra duty hours.

3. The method adopted by the Association in its final offer, which seeks to attempt to limit the employment of part time personnel, would not accomplish that goal.

4. The City's offer is more reasonable when compared to the provisions of collective bargaining agreements with respect to overtime in surrounding counties and communities.

DISCUSSION:

The parties in these proceedings have made no agreement that Form I of the arbitration provision of 111.77 should control, consequently, the undersigned is vested only with the authority to select either the final offer of the Association or the Employer without modification of said offer. Statute 111.77 (6) sets forth statutory criteria which the Arbitrator is to consider in arriving at his decision,

and the undersigned notes that evidence and argument was presented with respect to only certain of the statutory criteria. The Arbitrator will consider only the statutory criteria to which the parties address themselves, which are: 111.77 (6)(a), the lawful authority of the employer; (c) the interest and welfare of the public; (d) comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services; (f) the overall comparison presently received by the employees, including indirect wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received; (h) such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

The Employer in his brief argues that the Arbitrator should consider only the statutory criteria found at 111.77 (6)(a), (c), (d). From the preceding paragraph it is clear that the undersigned intends to consider the statutory provisions found at 111.77 (6) (f) and (h), as well as those criteria argued by the Employer. The Association has argued that their last offer would afford additional overtime earnings to full time personnel, and in view of that argument the undersigned considers that criteria found at 111.77 (6)(f) should be considered, since overtime compensation is certainly a part of overall compensation as provided therein. The Association has further argued that their proposal would incorporate into the Contract what is essentially an existing policy or practice that has been in effect for several years prior to this Agreement. The undersigned also considers that the inclusion of the practice into the Contract falls within the scope of those other factors normally considered in determining wages, hours and conditions of employment as provided for in 111.77 (6)(h); the undersigned will, therefore, consider that statutory provision as well.

THE LAWFUL AUTHORITY OF THE EMPLOYER

The Employer has argued that the Arbitrator should not consider the Association's offer because it is partially motivated as an attempt to pressure the Employer to determine its staffing policy with respect to full time versus part time employees. There is no question in the mind of the Arbitrator that one of the significant reasons the Association is proposing its overtime policy is to persuade the Employer to increase the number of full time officers on his staff and decrease the number of part time officers, because the Association has advanced that argument at hearing. The undersigned will not consider the Association's argument that the policy will induce the Employer to hire more full time personnel because it invades the area of the lawful authority of the Employer. The courts of this State have held that proposals from the Association which deal with the creation of positions are not mandatory subjects of bargaining.[1] In view of the ruling of the courts, this Arbitrator concludes that it would be inappropriate to consider any argument advanced by the Association with respect to the effect that the proposed provision will have with respect to exerting influence on the Employer to create new full time positions. The Arbitrator notes that the Employer has also argued that the Association proposal would not achieve this objective in any event. The undersigned does not consider it necessary to consider this argument of the Employer in view of the foregoing.

While the undersigned has rejected the Association argument with respect to the creation of more full time positions, it is still necessary to examine the proposals in light of the other statutory criteria cited above, since the proposal of the Association has other purposes than to influence the Employer to create new full time positions.

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1) Oak Creek-Franklin Jt. City School District, Decision No. 11827-D (9/74), affd. Oak Creek Education Association, Wisconsin Education Association Council v. WERC, Case No. 144-473, Dane Co. Cir. Ct. (11/75).

THE INTEREST AND WELFARE OF THE PUBLIC

The undersigned notes that the interest and welfare of the public is found at statutory criteria 111.77 (6)(c). The undersigned further notes that 111.77 (6)(c) also provides, in addition to the interest and welfare of the public, a criteria relating to the financial ability of the unit of government to meet these costs. Since there is no evidence in the record nor any argument advanced by the Employer with respect to the inability of the Employer to meet the cost of the proposal, the undersigned will consider only that portion of 111.77 (6)(c) dealing with the interest and welfare of the public.

At hearing the Association advanced evidence intending to show that the interest and welfare of the public would be better served by the Association proposal, because it would result in better trained officers on the street. The undersigned has carefully considered the evidence adduced at hearing, as well as the argument advanced by the Association with respect thereto, and rejects the Association argument. The levels of training required of an officer to serve in a police capacity are set by statute, and the record discloses that all part time officers of the Employer have met minimum standards. In view of the finding that part time officers are qualified, the undersigned considers it inappropriate to substitute his judgment regarding the qualifications of officers on the street, for those of the statute which provides the minimum levels of training. Furthermore, it would be inconsistent to say that the part time officers have sufficient training to serve when full time officers reject overtime; but have insufficient training when full time officers accept overtime assignments. The impact of the Association proposal would have the effect described above. It, therefore, follows, for the reasons stated above that the Association argument with respect to the consideration of law enforcement must be rejected.

COMPARISON OF THE WAGES, HOURS AND CONDITIONS OF EMPLOYMENT OF THE EMPLOYEES INVOLVED IN THE ARBITRATION PROCEEDINGS WITH THE WAGES, HOURS AND CONDITIONS OF EMPLOYMENT OF OTHER EMPLOYEES PERFORMING SIMILAR SERVICES

Evidence was adduced at hearing (Exhibits 18 through 26) which show the overtime provisions of nine Collective Bargaining Agreements for nine other communities with respect to overtime. The communities involved are Shawano, Oshkosh, Clintonville, New London, Ripon, Green Lake County, Adams County, Winnebago County, and Marquette County. In none of the nine exhibits are there provisions for the scheduling of overtime as proposed by the Association in the instant case. Furthermore, there is no evidence advanced from the Association to show that a proposal of the type the Association has advanced in the instant case has been adopted by any other parties. In view of the foregoing, the undersigned concludes that based on the criteria established at 111.77 (6)(d) the Association's offer should be rejected.

The Association has argued in its brief that there is no showing in the record that any of the departments shown in Exhibits 18 through 26 have the same type of problem the Berlin Department has with reference to the Employer's policy relating to the utilization of part time employees. Since the undersigned has earlier in this discussion rejected any Association argument with respect to staffing, it is not necessary when considering this criteria to further consider the Association's urging with respect to the Association's impact on staffing.

OVERALL COMPENSATION PRESENTLY RECEIVED BY THE EMPLOYEES

The Association has argued that their offer will have an impact on the total compensation of full time employees by reason of their being given preference for overtime earnings. The undersigned agrees that this consideration is proper in view of the statutory criteria found at 111.77 (6)(f). The Association has further argued that the wage offer of the Employer, which is acceptable to the Association, does not compensate for overtime earnings that would be lost if the Association offer on overtime were not accepted. The Association argument in this respect has merit. While there is nothing in the record to show specifically the amount of potential income loss the full time officers will experience if the Employer's offer on this issue is adopted, there can be no other reasonable conclusion than that the Employer will avoid overtime costs when possible by assigning part time employees rather than full time employees. Based on this statutory criteria, then, the undersigned would find for the Association position.

OTHER FACTORS

111.77 (6)(h) directs the Arbitrator to consider other factors normally or traditionally taken into consideration. The Association has argued that its proposal embodies a practice that has existed over the past several years. The Arbitrator believes the fact that the practice has existed over several years is a proper factor to consider under 111.77 (6)(h). In considering the Association proposal under this factor, however, the undersigned notes that the Association proposal does not merely incorporate into the Collective Bargaining Agreement the existing practice as it was previously known, but enlarges upon it by the inclusion of two new factors which are.

5. When an employee's absence for sickness exceeds one week, the employer may fill the absent employee's shift with part-time personnel. When an employee is absent for Court appearances which are scheduled more than one week in advance, the employee's shift may be filled by part-time personnel.
6. In the event overtime duty is available, an employee who otherwise qualifies shall be permitted to work only one of his two off days per week.

From the foregoing, the undersigned concludes that the inclusion of additional criteria set forth in the Association proposal for the administration of overtime enlarges upon what had been the prior practice, and militates against finding for the Association by reason of practice.

The Arbitrator is also of the opinion that since the overtime policies previously agreed to by the parties were specifically designated as experimental, the Association argument that the prevailing practice should prevail is diminished. If the undersigned were to find that an experimental policy previously negotiated should now be incorporated into the Agreement because it has become a practice, it would have the effect of discouraging the parties to engage in experimental agreements in future Collective Bargaining Agreements. The Arbitrator believes this to work against the interest of both parties to the negotiations, because it would have the result of chilling the willingness of the parties to engage in experimentation or trying innovative approaches to resolve their disputes. While it is reasonable to make an experimental policy which proves workable a permanent part of the Collective Bargaining Agreement, there is evidence in this case showing administrative problems with the policy. The testimony of Captain Dobson shows that the administration of the experimental policy required twenty to thirty hours of his time each month. Twenty to thirty hours per month represents approximately 12% to 17% of the Captain's time per month. In view of the small size of the department; and in view of the fact that the Captain has responsibility for all administrative problems, as well as law enforcement responsibilities; the Arbitrator considers this policy to create an excessive administrative burden on the Captain and is, therefore, not a policy that has proven workable. It would follow, therefore, that since the provisions which the Association urges should be adopted by reason of their having the stature of prevailing practice, should not be adopted under this set of facts.

The Association has further argues a policy, if it is to be enforced, should have such stature so as to be subject to the Grievance Procedure. The undersigned agrees with the Association in principle in this respect, and if the Association's proposal were to be adopted by the undersigned, certainly the fact that it should be enforceable under the Grievance Procedure is a proper concomitant of that finding. However, whether the provision is grievable is not persuasive in determining which proposal is to be accepted.

SUMMARY

In the foregoing discussion the undersigned has reviewed the statutory criteria with respect to the final proposals of the parties, and based on the evidence adduced at hearing, the arguments of the parties, a consideration of the statutory criteria, the undersigned is of the opinion that the final offer of the Employer is more reasonable for the reasons stated above. The Arbitrator, therefore, makes the following

AWARD

The final offer of the Employer is to be incorporated into the Collective Bargaining Agreement for the year 1977.

Dated at Fond du Lac, Wisconsin, this 28th day of October, 1977.

Jos. B. Kerkman /s/
Jos. B. Kerkman,
Arbitrator

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