

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 WISCONSIN RAPIDS PROFESSIONAL :
 POLICEMEN'S ASSOCIATION :
 :
 : Case 104
 : No. 46450
 and : MA-6984
 :
 CITY OF WISCONSIN RAPIDS :
 (POLICE DEPARTMENT) :
 :

Appearances:

Lawton & Cates, S.C., Attorneys, by Mr. Richard V. Graylow, appearing on
Mr. James R. Jansky, Director of Employee Relations, appearing on behalf

behalf
of the

ARBITRATION AWARD

The Employer and Union above are parties to a 1990-92 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance by Bruce Smolarek on behalf of all Detectives and the Safety Officer, concerning holiday work.

The undersigned was appointed and held a hearing on January 16, 1992 in Wisconsin Rapids, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs and reply briefs, and the record was closed on March 6, 1992.

STIPULATED ISSUES:

1. Did the City violate one or more of the following Articles by its memorandum of June 18, 1991: Article 1, 5, 34, 3, 6, 12, 30, 32; or past practice?
2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 1
PURPOSE OF AGREEMENT

It is the intent and purpose of the parties hereto that this Agreement shall promote and improve working conditions between the City and the Wisconsin Rapids Professional Policemen's Association, hereinafter referred to as the Association, and to set forth herein rates of pay, hours of work, and other terms and conditions of employment to be observed by the parties hereto.

The City agrees to insure a policy of equal employment opportunity in all of its policies affecting recruiting, hiring, transfers, promotions, compensation, in-service education, layoff and recall practices, and all other benefits. These shall be administered without regard to race, creed, color, national origin, ancestry, handicap, sex or age, except where sex or age is a bona fide occupational qualification.

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ARTICLE 3
RESERVATION OF RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the labor agreement. These rights, which are normally exercised by the Chief of Police, include, but are not limited to, the following:

- A. To direct all operations of City government.
- B. To hire, promote, transfer, assign and retain officers in positions with the City and to suspend, demote, discharge and take other disciplinary action against officers, pursuant to the authority and under the rules and regulations of the Department and the Wisconsin Rapids Police and Fire Commission. No officer shall be disciplined or discharged without just cause and without the right to proceed under Article 24 (Grievance Procedure) of this Agreement.
- C. To lay off officers from their duties because of lack of work or for other legitimate reasons (subject to 62.13(5)).
- D. To maintain efficiency of City government operations entrusted to it.
- E. To introduce new or improved methods or facilities.
- F. To change existing methods or facilities.

- G. To determine the methods, means, equipment and personnel by which such operations are to be conducted.
- H. To take whatever action which must be necessary to carry out the functions of the City in situations of emergency.
- I. To take whatever action is necessary to comply with State of Federal law.
- J. To establish reasonable work rules, policies, regulations, and job duties consistent with the labor agreement.
- K. To establish schedules of work consistent with the labor agreement.
- L. To determine the number, structure and location of departments and divisions within the Police Department; the kinds and amounts of service to be performed by the Police Department, and the number and kind of positions and job classifications needed to perform such services.
- M. Any policy or procedure which affects wages, hours, and conditions of employment will be negotiated.
- N. No right reserved by this Article shall be exercised in a manner inconsistent with any other provision of this contract.

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ARTICLE 5
HOURS

A normal workday shall consist of an eight (8) hour shift. The normal workweek shall average 39.43 hours, based on a fifty-two-week year. All employees shall be entitled to one rest break of 15 minutes and a meal period of 30 minutes during each eight (8) hour tour of duty.

The parties have agreed that officers will be present fifteen (15) minutes prior to the start of each shift for briefing. No call-in or other overtime pay will be requested for this time in addition to the regular scheduled hours of the shift. All officers agree to give the City three (3) pay-back days for in-service training as provided in Article 21 of this Agreement.

Officers shall be scheduled to work fixed shifts which shall be determined by seniority on an annual basis. All officers shall notify the Lieutenant in charge of scheduling of their shift preference by

November 1st of each year. The City will then post shift assignments for the upcoming year by November 15th of the current year.

Officers will be allowed to change shifts and/or days off with one another, subject to the approval of the Shift Commander and/or the Chief of Police. There will be no set limit to the number of times an officer may trade, but the officer agreeing to the trade will be responsible for being present for his tour of duty.

Failure for an officer trading shifts to be present for his tour of duty will be cause for the City to deduct from said officer's pay, the cost to the City for filling his tour of duty. Cost in this case will include two hours call time plus compensation at the rate of time and one-half the hourly rate. If an officer reports for duty late, the amount of compensation paid to the officer remaining on duty for said officer shall be deducted from their pay.

ARTICLE 6
OVERTIME

Officers will be compensated at the rate of time and one-half, based on their normal rate of pay, for all hours worked in excess of eight (8) hours of work per day, or 39.43 hours per workweek, but not both. Overtime compensation may be either by pay or time off, the choice to be determined by the officers, with the approval of the Chief of Police.

Overtime rates shall be computed by dividing the annual salary, as provided in Article 39, Pay Plan (WRPPA), by 2,043 hours.

All overtime must be approved by one of the following: Chief, Inspector, or Shift Commander

ARTICLE 12
PAID HOLIDAYS

Paid holidays included in this Agreement are:

New Year's Day	Thanksgiving Day
Easter Sunday	December 24th
Memorial Day	December 25th (Christmas)
Independence Day (July 4th)	1 Floating Holiday (Paid)
Labor Day	1 Floating Holiday (8 hrs. time off)

The paid floating holiday shall be taken as pay only. Pay for this floating holiday shall be two (2) days' pay in addition to the officer's regular salary. Officers shall request payment through the appropriate department employee not later than the Friday preceding the Thursday payday on which payment for the one floating holiday is desired.

Officers will not have their compensatory time

accounts deducted when time off is taken on any contract-recognized holiday.

If an officer is off on a paid holiday, he/she shall receive one (1) day's pay in addition to his/her salary.

If an officer is required to work on a paid holiday, he/she shall receive two (2) days' pay in addition to his/her salary.

If an officer is called in on emergency duty on a holiday, he/she shall receive call time, plus double time, for the actual time worked, in addition to the compensation for a paid holiday.

If an officer is required to work more than eight (8) hours on a holiday, he/she shall receive double time for the actual time worked in excess of eight (8) hours, in addition to his salary.

Except for employees whose regularly scheduled workweek includes Saturday and/or Sunday, holidays which fall on a Saturday will be observed the day before, on Friday; holidays which fall on a Sunday will be observed on the day after, on Monday.

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ARTICLE 30
AMENDMENT PROVISION

This Agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Association where mutually agreeable.

The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

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ARTICLE 32
NO OTHER AGREEMENT

The employer agrees not to enter into any other Agreement, written or verbal with any individual covered by this Agreement individually or collectively which in any way conflicts with the provisions of this Agreement.

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ARTICLE 34
SCHEDULING

The parties have agreed to a 5-2, 5-3 work schedule, to commence in January of 1979.

The Detective, Crime Prevention Officer and the

Safety Officer will continue to work a 5-2 work schedule.

- A. Detectives, the Crime Prevention Officer and the Safety Officer, when working a forty (40) hour week annually, shall have 4 1/2 days as gained by the Patrol, due to their 5-2, 5-3 work schedule credited to their compensatory account.
- B. Association members will be allowed to convert a maximum of fifty (50) hours of their overtime as compensatory time. Members will be allowed to carry only 50 hours into the following year as compensatory time. Any additional time in excess of the fifty (50) hours must be authorized by the Division Commander and/or the Chief of Police. Payment of compensatory banks will be made under the FLSA rules which allow for a three (3) year averaging of wages.
- C. Management personnel do not affect time off for vacation, compensatory time, or personal time.

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FACTS:

The facts are essentially undisputed. Detectives, 1/ unlike patrol officers, work a "5/2" schedule, which normally means from Monday to Friday with weekends off. This has been the case for many years, during which it is undisputed that detectives were permitted to work holidays. The grievant, Bruce Smolarek, has been a detective since 1985, and testified without contradiction that detectives were given the choice as to whether to work holidays, and generally chose not to work Christmas but to work on all other holidays. Smolarek had admitted that he himself did not work all holidays, but stated that the inspector would ask him if he was coming in, and that he was never told he had to work on a given holiday. Edgar Heiser, a retired inspector for the Department, testified that he had decided whether employes would work holidays or not, but that this included a determination as to whether the employe involved agreed to work. Heiser testified that the practice of detectives having the option to work had existed since 1961. Heiser did admit that he had had occasion to order a detective to work on a holiday when that detective was reluctant, and that the detective did comply with the order.

The Union introduced testimony and a supporting exhibit from the current inspector, Ed Kreckler. This was a letter supporting the detectives' claim on the ground that the practice of allowing detectives to work at their option had existed for many years, and served the Department's interests because the volume of work was such that working on holidays made it possible to catch up on paperwork and other matters which tended to get behind.

1/ Including the Safety Officer.

The Employer presented no witnesses, but the parties jointly introduced documents indicating that the Chief of Police had supported the employes' claim that their work on holidays was necessary, but that upon being ordered to cease that practice by the mayor he had issued a memo on June 18, 1991 to the detectives, as well as safety officer Arneson, to cease the practice. The memo contained the exception that "if a detective is required to investigate an incident, call time and overtime will be required".

THE UNION'S POSITION:

The Union identifies in its brief Articles 1, 5, and 34, as well as past practice, as allegedly violated by the City's decision to cease the "detectives work holidays" practice effective with the July 4, 1991 holiday. The Union first contends that Article 5, by using the phrase, "work fixed shifts", supports the Union's claim that the establishment of the 5/2 schedule means that a fixed 5/2 schedule throughout the year is applicable, including holidays. Article 34, the Union argues, supports this by its explicit reference to a 5/2 work schedule. The Union notes that the City called no witnesses to demonstrate the operational need for change, and that the testimony unambiguously supports the fact that a past practice allowing detectives to work holidays was consistent.

In its reply brief the Union contends that the City admitted the practice, and contends that Articles 5 and 34, being specific contract language governing hours, outweigh any contrary interpretation from the Management Rights clause. The Union reiterates that the City offered no evidence to justify the change, contending that scheduled changes, as well as other personnel transactions, cannot be made arbitrarily or capriciously. The Union argues that the Employer must offer bona fide operational reasons for such changes.

The Union requests that the practice of working holidays in the detective bureau be reinstated.

THE EMPLOYER'S POSITION:

The Employer contends first that subsection K. of Article 3 allows the City to establish schedules of work, consistent with the labor agreement. The City contends that the normal work week is "5/2" for detectives, but that Article 12 of the agreement provides for ten paid holidays, and that the definition of a holiday means a day of freedom from labor, and similar meanings indicating that the employe does not actually perform work on a holiday. The City contends that Article 12 demonstrates that detectives can be scheduled to be off-duty on paid holidays, and that Article 3 allows the City to establish work schedules consistent with that requirement. The City points to testimony by Smolarek that he did not work on all holidays, and that no one worked on Christmas unless absolutely necessary, as demonstrating that even in the Union's terms the 5/2 "practice" was not consistent. The City also contends that the two inspectors who testified both stated that they had made out the schedules indicating who would work, and that retired inspector Heiser had clearly demonstrated that he was able to require an employe to work who did not wish to do so. The City contends that if any past practice exists, it cannot be binding because Article 32 of the agreement prohibits the City from entering into any other agreements even those listed in the contract. In its reply brief, the City distinguishes this case from the Madison vs. AFSCME, AFL-CIO, Local 60 2/, case cited by the Union, on the grounds that in Madison the

management changed an obligation which was already in the contract, which was that employes were required to work on holidays unless they requested off. In the present case, the City argues, the contract requires employes to be off-duty unless they are scheduled to work. The City argues, therefore, that in this instance it is now requiring strict compliance with the contract, not violating it. The City further contends that the phrase "is required" in Article 12 clearly implies that the City is not obligated to give employes the opportunity to work.

The City requests that the grievance be denied.

DISCUSSION

While there may indeed be operational reasons justifying, in objective terms, the routine performance of work by detectives on holidays, I am unable to find in this agreement any language supporting the Union's position here. I agree with the City that Article 12 implies that the normal condition of an employe on a holiday is that the employe is not working. That is consistent with the traditional meaning of the word "holiday", and the fact that employes work fixed shifts under Article 5, and that the shift is a 5/2 shift for detectives under Article 34, does not conflict with this interpretation. It is generally understood in labor relations that the fact that a shift is identified in the contract, or that normal hours of work are established, does not constitute a guarantee of such hours without more specific language clearly outlining the nature of the guarantee. 3/

Here, the Union is asserting that the existence of the 5/2 schedule for detectives mandates their working on holidays. This is countered by three separate factors. First, Article 12's reference to employes being "required" to work on a holiday would have no meaning if the scheduling language dictated that all employes automatically worked on the holiday. Second, there is an inconsistency between the Union's claim that 5/2 means a rigid schedule in which employes work all holidays, and the Union's claim that employes were permitted to choose whether to work the holiday or not, so that most chose not to work Christmas. Third, if the 5/2 schedule were a fixed entity for detectives and the Safety Officer with no right remaining to the City to determine whether or not holidays should be worked, the 5/2, 5/3 schedule would be likewise for other employes, and the reservation of rights referring to scheduling work in Item K of Article 3 would be superfluous language.

The controlling phrase, however, which is clearly more specifically addressed to holidays than any other language applicable, is the phrase "if an officer is required to work on a paid holiday, he/she shall receive two days pay in addition to his/her salary" in Article 12. This clearly connotes the possibility, or even assumption, that the employe will normally have a holiday off in conformance with the generally understood meaning of that term. Here, the City has for its own reasons allowed detectives a great deal of freedom to determine when work needed to be performed for many years. Such a past practice, however, cannot override clear contract language when the Employer proposes only to apply the contract language prospectively. In this instance, due notice was given, and the Employer did not seek a retroactive application.

3/ See, for instance, Triangle Conduit & Cable Co., 33 LA 610, 613 (Arbitrator Howard Gamser) and New York Herald Tribune, 36 LA 753, 761 (Arbitrator Daniel L. Cole).

The Employer is therefore entitled to rely on Article 12's reference to required work, and to choose not to require such work.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the City did not violate the collective bargaining agreement by ordering officers in the detective bureau and the Safety Officer not to work holidays unless specifically instructed.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 9th day of April, 1992.

By _____
Christopher Honeyman, Arbitrator