

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

THE NEW LONDON POLICE ASSOCIATION

and

THE CITY OF NEW LONDON

Case 16
No. 46634
MA-7025

(Work Schedule)

Appearances:

Mohr Law Offices, Post Office Box 1015, Green Bay, WI 54305 by Mr. Frederick J. Mohr, appearing on behalf of the New London Police Association.
von Briesen & Purtell, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53202 by Mr. James Korom, joined on the brief by Ms. Jennifer S. Walther, appearing on behalf of the City of New London.

ARBITRATION AWARD

Pursuant to an agreement between the parties, the New London Police Association (hereinafter referred to as the Association) and the City of New London (hereinafter referred to as the City) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning a change in the work schedule of officers on the City's Police Department. The undersigned was so designated. A hearing was held on January 22, 1992 at City Hall in New London, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No stenographic record was made of the hearing. The parties submitted post-hearing briefs which were exchanged through the undersigned on March 3, 1992 whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following award.

ISSUE

The parties were unable to agree upon a statement of the issue, and agreed that the undersigned should frame the issue in his Award. The issues may be fairly stated as follow:

1. Is the grievance timely? If so,

2. Did the City violate the collective bargaining agreement by deciding to institute a straight three shift rotation work schedule? If so,
3. What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 - VESTED RIGHTS OF MANAGEMENT

C. The Police and Fire Commission shall have the exclusive right to determine the hours of employment and make changes in details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Police Department, subject again to the restrictions imposed by this agreement, and the Association and the members agree to cooperate with the Board and/or its representatives in all respects to promote the efficient operation of the Police Department.

ARTICLE 4 - HOURS AND SHIFTS

A. The current City's practice concerning the employee's shifts are herein incorporated. The hours of employment shall be based upon a work week of six days on duty, two days off duty, six days on duty, three days off duty, six days on duty and three days off duty. Shifts will begin and end on the hour.

B. The Association recognizes the City's rights under Wisconsin Collective Bargaining Laws to establish and/or revise performance standards or norms notwithstanding the existence of prior performance levels, norms or standards. Such standards, developed by usual work measurement procedures may be used to determine acceptable performance levels, prepare work schedules and to measure the performance of each employee or group of employees the Association may assert to the City or the Wisconsin Employment Relations Commission during the terms of this agreement. The City will give the Association prior notice of the establishment and/or revision of performance of norms hereunder.

C. Employees who work at less than acceptable levels of performance may be subject to disciplinary measure in accordance with applicable laws.

ARTICLE 10 - NIGHT SHIFT PREMIUM

A. Officers designated to work the hours of 10:00 p.m. to 6:00 a.m. shall receive an additional \$.40 per hour for each of the hours worked. The amount so paid shall be in addition to other benefits granted herein.

ARTICLE 11 - AFTERNOON SHIFT PREMIUM

A. Officers designated to work the hours of 2:00 p.m. to 10:00 p.m. shall receive an additional \$.25 per hour for each of the hours worked. The amount so paid shall be in addition to other benefits granted herein.

BACKGROUND

The City is a municipal employer, providing general governmental services to the people of New London, Wisconsin. Among the services provided is police protection. The Association is the exclusive bargaining representative of the non-supervisory police officers employed by the City.

The City and the Association have been parties to a series of collective bargaining agreements. Prior to the 1987 contract, the City maintained a three shift schedule, with officers rotating through each shift. In the Fall of 1986, the Association proposed a permanent night shift, with the other shifts remaining on a rotation. The retiring Chief of Police agreed to the change.

The incoming chief, David Neumann, was also approached about the change. Neumann, who then a member of the bargaining unit, gave his approval, because he was aware that three experienced officers had volunteered to serve on the permanent night shift. The agreement on the schedule change was summarized in a letter dated November 24, 1986 from Association spokesman Gerald Lienhard to City Attorney Earl Luaders:

Earl Luaders
City Attorney
110 N. Water Street
New London, Wisc. 54961

Dear Earl:

In regards to the proposed schedule change in the 1987 Police contract, this is how it will work. Three officers in the Association have agreed to work the steady night shift along with Officer Klinzing remaining on the 9-5 A.M. shift. The remainder of the officers in the Association will then rotate on the 6-2 shift and

the 2-10 shift.

The vacation schedule will be worked as it is presently worked by Officer Lienhard. He will continue to work or cover on the 6:00 A.M., 10,00 (sic) A.M., 2:00 P.M., and 6:00 P.M. shift. He will also agree to the 10:00 P.M. shift only at such times that two of the night men would be on vacation at the same time.

One of the nightshift men will also drop off of the nightshift to help cover on the vacation schedule at such times that two men are on vacation at the same time. The senior man on the night shift will be offered this shift and each senior man thereafter and if they don't want the shift then the 9-5 man will then continue to work that shift.

These steps were all o'kd (sic) at the association meeting and have the approval of the Chief of Police as long as this first year is an experimental year. If it is decided at the end of that year this schedule didn't work out then we would revert back to working the schedule that was in effect prior to this one.

/s/ Gerald Lienhard
Gerald K. Lienhard
New London
Police Association

Approved 11-24-86
/s/ Jack Algiers
Chief of Police

Lauders returned the letter with the notation "Approved by City" and his signature. The following language was included in the 1987 collective bargaining agreement under the "Hours and Shifts" provision:

"The current City's practice concerning the employee's shifts are herein incorporated...."

Neumann took over as Chief of Police on March 1, 1987. Thereafter, he posted shifts for selection based upon the permanent night shift. In 1989, the shift selection memo stated, in part:

"11. If in the future it appears as if any shift will be imbalanced with inexperienced officers, the Administration will make changes as necessary to correct the problem.

12. If other unforeseen difficulties arise, the Administration reserves the right to inform the Dept. of this and what steps will subsequently be taken to correct the

matter.

13. If this approach to the schedule is not satisfactory and creates problems, there is only one alternative. That alternative is to return to a 3 shift rotation since there everyone works "exactly" the same as everyone else."

In 1989, he advised the Association that he intended to discontinue the 12 p.m. to 8 a.m. shift in 1990, and the Association made no objection. In the 1990 and 1991 shift scheduling memos, paragraphs 11 and 12 from the 1989 memo were essentially repeated, while paragraph 13 was replaced with a statement to the effect that "If morale or scheduling problems, or other problems arise because of this process of shift selection, the administration will make the necessary changes."

In 1991, the Chief became concerned because he had no response to a request for experienced officers to volunteer for the night shift in 1992. This, he feared, would result in the least senior officers being grouped together on that shift. Moreover, he felt that there were difficulties with evaluating night shift officers, and that some tensions existed between the shifts, because of first shift officers being required to do investigations for night shift arrests. He also heard concerns expressed by night shift officers about the detrimental effect of permanent night shift work on their marriages. In response to these concerns, he proposed to eliminate the permanent night shift. On September 13, 1991, he sent a memo to Darrell Brennecke, President of the Association, advising him that the schedule would be changed, and suggesting seven options for a new schedule base. He asked for input and additional suggestions from the Association. The Association made no response.

On October 10th, the Chief sent a memo to all officers, informing them that the Department would return to a rotation schedule in 1992. The Association responded by letter dated October 31st:

Chief Neumann,

In reference to the working schedule that you presented for 1992. The Association has conferred with legal council (sic) and it is the Associations (sic) opinion that our present 1992 working schedule is protected by contract. The Association voted to object to the changing of the work schedule/hours/conditions of the present contract and status quo.

If you intend to proceed with your proposed schedule for 1992 the Association will grieve it and ask the arbitrator for overtime for any time worked outside of the present working schedule.

If necessary, the New London Police Association would be willing to negotiate a

schedule for 1993.

Sincerely,

/s/ Darrell F. Brennecke
Darrell F. Brennecke
President/New London Police Association

The Chief wrote back on November 5th, rejecting the Association's view and reiterating his decision to implement a new schedule in 1992. He continued:

"However, the City is also willing and ready to submit this question to an arbitrator before the end of the year. We are willing to forego the usual grievance procedure in order to expedite the decision of the arbitrator."

On November 16th, the Association agreed to forego the grievance procedure and submit the question of whether the work schedule was protected by the contract to an arbitrator for a declaratory ruling. The parties agreed that no change would be made until a ruling was received in this proceeding.

Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Association

The Association takes the position that the City has no right to unilaterally change the shift schedule. Hours of work are, the Association argues, a mandatory topic of bargaining, and any attempt to act unilaterally in this area is a per se prohibited practice under Wisconsin law. Furthermore, under the specific language of this contract, the parties have agreed to maintain the existing shifts. The City has not bargained any reservations or exceptions into the contract, and in signing the 1990-92 agreement without such reservations, has waived any right it may otherwise have had to revert to the pre-1987 rotating shift schedule.

The Association notes that the Chief offered five reasons for proposing the change in shift schedules:

1. No officer expressed an interest in working the straight night shift.
2. It is difficult to evaluate officers on the straight night shift.
3. Animosity has developed between the night shift and day shift because the night shift leaves investigative work for the day shift to complete.
4. The marital lives of night shift officers suffer because of the schedule.

5. Less experienced officers may be grouped together on the straight night shift.

On review, the Association asserts, none of these reasons is valid. The Chief did not post a night shift schedule for 1992, so he has no basis for believing that no one would work the shift.

Testimony from Association witnesses indicated that there were experienced officers willing to work the shift. As to the difficulty in evaluating officers, the Association points out that the supervisory officers who perform evaluations work hours controlled by the Chief. Currently the supervisors do not work during an eight hour period including half of the night shift and half of the day shift. If he wished to match the supervisor's schedule with the schedules worked by the night shift officers, a more thorough evaluation could be realized.

Turning to the supposed animosity between the night shift and the day shift flowing from the night shift's leaving investigative work for day shift officers to perform, the Association argues that the Chief can simply order the night shift to complete their own investigations. On the issue of marital discord among night shift officers, the Association characterizes this concern as admirable but misplaced and inappropriate. The private lives and personal welfare of officers are more the concern of the Association than the City.

Finally, the Chief's worry over junior officers being grouped together on the night shift is purely speculative, since it has never happened. The Association has indicated a willingness to help alleviate this problem if it ever actually arises.

Thus the City has no right under either Wisconsin law or the contract to make unilateral changes in the work schedule. Further, there is no legitimate operational reason for the change proposed by the City. For these reasons, the Association asks that the grievance be sustained and the current work schedule preserved.

The Position of the City

The City takes the position that the Association failed to make a timely protest to the Chief's unequivocal statement of intent to change the work schedule, and thus waived its rights under the contract. On October 10, 1991 the Chief issued a memo making clear his decision to terminate the permanent night shift. The Association made no response until October 31st. The grievance procedure requires that grievances be submitted "within five (5) days of the incident." Thus the grievance is untimely and should be barred.

Turning to the merits, the City asserts that the contract gives it the right to return to the pre-1987 rotating shift schedule. The contract requires only that the "current practice" be maintained. The practice of the City has been to allow a permanent night shift only when there were sufficient experienced officers to man the shift (i.e., 1987-91). The change was to be

experimental, and if it proved unworkable, the schedule was to revert to the rotating shifts. It is axiomatic that a given practice may only be enforced so long as the reasons underlying it continue.

Here the lack of experienced officers willing to work the third shift changes a critical reason for allowing the permanent night shift in the first place, and triggers the City's right to alter the schedule.

The City vehemently denies that the letter from Officer Lienhard to City Attorney Lauders in any way waives its right to return to the three shift rotation. Waivers must be clear and explicit, and the Chief's continuing practice of reserving his right to change the schedule in the annual posting memo plainly refutes any suggestion of a waiver. The Union failed to object to this reservation of rights and must be held to have acquiesced in the Chief's view that he retained control over the schedule. Had the Union made a timely objection during 1987, the City argues, the Chief could have cancelled the new schedule and returned to the rotating shifts. The equitable doctrine of laches should prevent the Union from complaining at this late date. Allowing the Union to sandbag the Chief on this scheduling issue by remaining silent in the face of his reservation of rights would do serious damage to the parties' long term relationship.

The contract does not guarantee the permanent night shift. Even if the arbitrator were to determine that the "current practice" of the parties did not expressly reserve the City's right to change schedules, the City reiterates the customary right of parties to change practices where the circumstances giving rise to those practices have changed. Again, the lack of experienced volunteers for the night shift and the specter of junior officers being bunched together on that very difficult shift is a fundamental change in circumstances, and the City should be allowed to alter the practice to take account of this change. In addition to the problem of junior officers staffing the hardest and most dangerous shift, other changes include a growing animosity between the night shift and the day shift and the evident strain the night shift placed on officers' marriages. These buttress the City's arguments for making changes in the current scheduling practice.

The contract grants the Police and Fire Commission the right to determine hours of employment. It recognizes the right of the City to develop work standards for use in preparing work schedule, and the right to designate which officers will work on particular shifts. The past practice cited by the Association cannot operate to defeat these express contractual rights, particularly since the factual predicate for the practice is no valid. Thus reading the contract as a whole leads to the conclusion that the Chief has an inherent right to schedule officers as he deems necessary.

For all of the foregoing reasons, the City asks that the grievance be denied.

DISCUSSION

Procedural Arbitrability

The City claims that the grievance is untimely, since the Chief announced his intention to change the work schedule on October 10th and no grievance was filed within five days of the announcement. The undersigned disagrees. It is debatable whether the Chief's memo of October 10th constituted the only grievable "incident" related to the shift change. The announcement did not change any condition of employment under the contract -- officers continued to work under the existing schedule. The Association notified the Chief that it would grieve any change if and when the change was instituted. The actual implementation of the change would have been a second "incident" for the filing of a grievance. 1/ This grievable incident did not take place, however, because, at the City's suggestion 2/, the parties agreed to forego the normal grievance procedure and submit the question directly to arbitration. As part of this agreement, the status quo was to be maintained pending the outcome of the arbitration.

The City induced the Association to proceed directly to arbitration for a declaratory ruling prior to any actual change in work schedules. In so doing, it never raised any question about timeliness. But for the City's assertion that it was "ready and willing to submit this question to an arbitrator" and to "forego the usual grievance procedure" the Association could have waited for the actual implementation of the new schedule to file a grievance. Under these circumstances, the City can hardly assert the time limits of the grievance procedure it promised to forego, or question the jurisdiction of the arbitrator to whom it sought to submit the issue. The undersigned therefore concludes that the City has waived its right to challenge the timeliness of the instant grievance.

The Merits - "Current Practice"

The critical question in resolving this grievance is what the parties meant by the phrase "the current City's practice concerning the employee's shifts" when they negotiated the language of Article 4 into the 1987 contract. Granting both the Association's point that hours are a mandatory topic of bargaining and the City's argument that unwritten past practices may be changed when the underlying circumstances change, the fact is that the parties have already bargained over hours and defined their agreement in terms of the practice agreed upon in the 1987 negotiations. The contract is not silent on the point, merely very ambiguous. Thus neither the statutory duty to bargain nor the rules concerning extra-contractual past practices come into play in

1/ In this regard, see Elkouri & Elkouri, HOW ARBITRATION WORKS, (BNA, 4th Ed.) at page 196 and cases cited therein.

2/ See Chief Neumann's November 5th letter to the Association: "However, the City is also willing and ready to submit this question to an arbitrator before the end of the year. We are willing to forego the usual grievance procedure in order to expedite the decision of the arbitrator." (emphasis added)

this case.

While the contract language itself is ambiguous, there is no question what the negotiators had in mind in the Fall of 1986 when they bargained a shift change. The letter from Association representative Lienhard to City Attorney Luaders went into a good deal of detail on how the permanent night shift would be implemented. In addressing whether the change was to be experimental or permanent, the letter concluded:

These steps were all o'kd (sic) at the association meeting and have the approval of the Chief of Police as long as this first year is an experimental year. If it is decided at the end of that year this schedule didn't work out then we would revert back to working the schedule that was in effect prior to this one.

This letter was countersigned and approved by the Chief of Police and, later, by the City Attorney. The language leaves no doubt that, unless changed by the end of 1987, the steady night shift was to be permanent. No reasonable reading of the letter can allow the additional condition suggested by the City -- that the schedule would only continue so long as there were experienced officers willing to volunteer for the night shift. On the basis of this bilateral document, the undersigned concludes that when the negotiators defined the shifts by reference to the "current City's practice concerning the employee's shifts" they did not contemplate a unilateral right on the City's part to restore the rotating shifts after the experimental year ended in 1987.

The Merits - Equitable Considerations

There remains the City's argument that the Association should be estopped from challenging the Chief's right to revert to rotating shifts because they failed to object to his assertion of this right in a 1987 memo posting the shifts for bidding. The City alleges that the Chief included the following paragraph in his 1987 memo posting shifts for the following year:

13. If this approach to the schedule is not satisfactory and creates problems, there is only one alternative. That alternative is to return to a 3 shift rotation since there everyone works "exactly" the same as everyone else."

The City complains that the Association's failure to grieve the memo in 1987 misled the Chief into allowing the experimental year to lapse, and that the doctrine of laches should prevent them from now challenging his right to restore the pre-1987 rotation.

The 1987 version of this memo does not appear in the record as an exhibit, and the undersigned finds no reference to such a memo in his notes of the hearing. Assuming, however, that the Chief's testimony was that he used this wording in 1987, the ability of such a unilateral statement to modify the contractual rights of the parties is open to question. The mere making of the statement does not equate with a contract violation necessitating a response from the

Association in order to preserve its rights. Association President Darrell Brennecke testified that the Union never grieved any of the Chief's scheduling memos because he never actually took any action to change the schedule. The right to maintain the permanent night shift flows from the mutually agreed language of Article 4 as fleshed out by the bilateral agreement in the letter from Lienhard to Luaders. The Chief can no more amend that agreement through a repeated unilateral statement than he could change the negotiated amount of shift premium pay by the same means. In the absence of some concrete action taken to carry out the Chief's intent, and acceptance of that action without complaint by the Association, the Association's silence cannot be held out as proof of acquiescence.

As for the City's claim that the Association's silence misled the Chief into not terminating the new schedule in 1987, there are two difficulties with this theory. The first is that the Chief's reliance on the Association's silence was not reasonable in the face of the clearly understood limitation on the City's right to modify or terminate the steady night shift. As discussed above, the Lienhard letter is very clear on this point, and the Chief testified that he'd read the letter at the time it was exchanged between the Association and the City. The second problem with the City's theory is that the Chief never testified that he would have exercised his right to terminate the new schedule in 1987 had he known that the Association disagreed with his view of the agreement. Contrary to the assertion in the City's brief, it is not at all clear from the record that the Chief relied to his detriment on the Association's silence in not terminating the new third shift arrangement. Such reliance is purely speculative on this record, and if it took place, was unreasonable given the clear agreement of the parties that he would not have a continuing right to revert to the old system.

CONCLUSION

While the concerns raised by the Chief are certainly legitimate, the right to unilaterally implement a work schedule to meet those concerns is constrained by Article 4. Negotiating history, in the form of the bilateral letter of agreement between Lienhard, the then-Chief of Police and the City Attorney, established that the agreement of the parties to maintain the "current City's practice" on shifts was intended by the negotiators to limit the City's right to unilaterally revert to a system of rotating shifts to the first year of the 1987-89 contract. Thereafter no such unilateral right was vested in either party. The current Chief was aware of this limitation on the City's right to make changes, and his contrary unilateral statements in memos accompanying the annual shift selection bid sheets do not operate to amend the negotiated rights of the parties under the contract.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1. The grievance was timely filed.

2. The City violated the collective bargaining agreement by deciding to institute a straight three shift rotation work schedule.
3. The appropriate remedy is an order directing the City to maintain the current work schedule for the balance of the contract term.

Signed this 12th day of April, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator