

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 OUTAGAMIE COUNTY PROFESSIONAL :
 POLICE ASSOCIATION : Case 202
 : No. 45943
 and : MA-6813
 :
 OUTAGAMIE COUNTY (SHERIFF'S DEPARTMENT) :
 :

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P.O. Box 1015, Green Bay, Wisconsin 54305, appearing on behalf of the Association.
 Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-3101, by Mr Roger E. Walsh, appearing on behalf of the County.

ARBITRATION AWARD

Outagamie County Professional Police Association, hereafter the Association, and Outagamie County (SHERIFF'S DEPARTMENT), hereafter the County or the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the County, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On August 13, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on February 13, 1992, in Appleton, Wisconsin. The hearing was not transcribed and the record was closed on March 24, 1992, upon receipt of posthearing written argument.

ISSUE:

The Union frames the issues as follows:

1. Did the County violate Article XX - "Promotion and Vacancies" by failing to post the vacant Patrol positions?
2. Did the County violate Article IX - "Overtime" by failing to pay Steve Meitner and Dave Spaeth overtime pay for hours worked outside of their normally scheduled hours?

3. Did the County violate Article XXVIII - "Clothing Allowance" by failing to pay Meitner and Spaeth a uniform allowance for traffic uniformed employees?

4. What is the appropriate remedy?

The County frames the issues as follows:

Did the County violate Section 8.01, Work Week, of the collective bargaining agreement by its assignment of work hours to David Spaeth and Steve Meitner between May 1, 1991 and January 24, 1992?

If so, what is the appropriate remedy under the Agreement?

The Arbitrator adopts the following statement of the issue:

Did the County violate Articles VIII, IX, XX, and/or XXVIII in its assignment of uniformed patrol work to the Grievants between May 1, 1991 and January 24, 1992?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I - MANAGEMENT RIGHTS

1.01 - Except as herein otherwise provided, the management of the work, and the direction of the work forces, including the right to hire, promote, transfer, demote, or suspend or discharge or otherwise discipline for proper cause, and the right to relieve employees from duty or to layoff employees is vested exclusively in the Employer, Outagamie County. In keeping with the above, the Employer, Outagamie County, shall adopt and publish reasonable rules which may be reasonably amended from time to time. The County and the Association will cooperate in the enforcement thereof.

. . . .

ARTICLE III - PROBATIONARY PERIOD-SENIORITY

. . .

3.03 - Promoted employees shall have a six (6) month probationary period at the higher position, except that in the event an employee is promoted to any position which requires law enforcement or jail officers training and such employee has not successfully completed such training program, such employees shall have a twelve (12) month probationary period at the higher position....

3.04 - Employees transferred to a new position as a result of a job posting pursuant to Article XX which does not result in an increase in pay shall have a six (6) month probationary period in the new position....

. . .

ARTICLE IV - RULES AND REGULATIONS

4.01 - The rules and regulations of the Outagamie County's Sheriff's Department as established by the County in accordance with the provisions of and pursuant to Chapter 111.70 of the Wisconsin Statutes shall be made a part of this Agreement by reference. The Association shall be given thirty (30) days notice of any new rule or regulation proposed before it becomes effective.

. . .

ARTICLE VIII - HOURS

8.01 - A normal workday for full-time employees, except clerical employees, shall consist of an eight (8) hour shift. The normal work week schedule for full-time Patrolmen will be 6 on - 2 off, 6 on - 2 off and 5 on - 3 off, and in addition, each such Patrolman will receive one (1) personal day off to be taken at a time mutually agreed upon between the department head and the employee. The normal work week for other full-time employees, except clerical employees, shall average forty (40) hours based on a fifty-two (52) week year.

Effective January 1, 1991, this Section 8.01 will be revised to read as follows:

8.01 - Work Week.

A. The normal work week for full-time employees classified as Patrolman, Telecommunicator I and II, Correctional Officer/Cook, Correctional Officer, Head Cook, Cook, and Jail Booking Clerk will be 5 on -2 off, 5 on - 3 off, and the normal work day for such employees shall consist of an eight and one-third (8.33) hour shift. Three groups in each classification will rotate working the various shifts every thirty (30) days. (Note: There is to be no loss or gain or overtime incurred because of the transition to this new work schedule.)

B. The normal workweek for full-time employees, classified as Investigator, Sergeant, Deputy Investigator, Process Server, Assistant Process Server, Prisoner Transporter and Floating Deputy shall average forty (40) hours based on a fifty-two (52) week year. The normal workday for such employees shall consist of an eight (8) hour shift. Such employees shall receive an additional two (2) floating holidays each calendar year, said floating holidays to be scheduled as time off at a time mutually agreed upon between the department head and the employee. Effective at the end of the work day on December 31, 1992, such employees who are scheduled to work a 5 on - 2 off, 5 on - 2 off, 6 on -2 off, 4 on - 2 off work schedule will receive an additional five (5) floating holidays each calendar year instead of an additional two (2) floating holidays each calendar year, (provided, however, that such employees who have at least fifteen (15) years of service in the Outagamie County Sheriff's Department as of January 1, 1991, will receive an additional six (6) floating holidays each calendar year instead of an additional two (2) floating holidays each calendar year), said floating holidays to be scheduled as time off at a time mutually agreed upon between the department head and the employee. [Note: the first year these employees will receive the five (5) or six (6) additional floating holidays instead of the two (2) additional floating holidays will be 1993].

For a floating Deputy the floating holiday will not be granted on the 11:00 p.m. to 7:00 a.m. shift, nor on a day which would result in the payment of overtime to cover the granting of the day off.

Employees hired on or after July 1st of a calendar year are not eligible for any floating holidays during the remainder of the first calendar year of employment. In the event an employee terminates employment without having taken one or more of the floating holidays during the calendar year, such floating holiday(s) shall be canceled and may not be reinstated or paid for. An employee will not be allowed to use a floating holiday(s) after having given a notice of termination.

. . .

ARTICLE IX - OVERTIME

9.01 - Employees will be compensated at the rate of time and one-half (1-1/2) based on their normal rate of pay for all hours worked in excess of their scheduled workday or workweek, provided however, that for clerical employees and part-time employees such rate shall be paid for all hours worked in excess of forty (40) in any workweek.

9.02 - In the event an employee has left work and is called in, the employee shall receive a minimum of two (2) hours pay at the employee's regular straight time rate of pay or overtime pay at the appropriate rate for the actual hours worked, whichever is greater, provided, however, that this provision shall not apply to hours worked that are consecutively prior to or subsequent to the employee's scheduled work hours.

9.03 - Overtime must be authorized and approved by the department head or division head before overtime can be paid.

ARTICLE XXVIII - CLOTHING ALLOWANCE

28.01 - The clothing allowance for employees shall be as follows:

| <u>Initial Allowance</u> <u>Effective</u> | <u>Effective</u> | <u>Effective</u> | <u>Effective</u> |
|--|------------------|------------------|------------------|
| | <u>1-1-90</u> | <u>1-1-91</u> | <u>1-1-</u> |
| <u>92</u> | | | |
| Traffic Uniformed Employees \$325.00 | \$275.00 | \$300.00 | |
| Non-Traffic Uniformed Employees \$225.00 | \$175.00 | \$200.00 | |
| Non-Uniformed Employees \$175.00 | \$125.00 | \$150.00 | |

Annual Allowance

| | | |
|---------------------------------|----------|----------|
| Traffic Uniformed Employees | \$225.00 | \$250.00 |
| \$275.00 | | |
| Non-Traffic Uniformed Employees | \$150.00 | \$175.00 |
| \$200.00 | | |
| Non-Uniformed Employees | \$175.00 | \$200.00 |
| \$225.00 | | |

BACKGROUND

Steve Meitner and Dave Spaeth, hereafter the Grievants, are plain clothes Investigator-Sergeants with the Outagamie County Sheriff's Department. Prior to January 1, 1991, the Grievants worked eight hour shifts of 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, 4 days on - 2 off. This work schedule provided the Grievants with Sundays off. During the rotation through this schedule, the Grievants worked one (1) Saturday.

On May 2, 1991 Grievant Spaeth was assigned to work uniformed patrol. Spaeth continued to work in that capacity until January 24, 1992. From June 10, 1991, through December, 1991, Grievant Meitner also worked uniformed patrol. Except for the June assignment, Meitner worked uniformed patrol on an involuntary basis.

During the period of time that the Grievants worked uniformed patrol, each worked a 5 days on - 2 off, 5 days on - 3 off schedule. Spaeth worked a 8.33 hour shift throughout the time that he worked uniformed patrol. When Meitner began to work uniformed patrol, he worked an eight hour shift, but was eventually assigned a 8.33 hour shift. While working uniformed patrol, the Grievants worked more weekend days than they would have worked if they had worked under their Investigator - Sergeant schedule.

Since April of 1986, the position of Patrol Officer has had the following job description:

CLASS TITLE: Patrol Officer

CLASS FUNCTION: Performs law enforcement and crime prevention work involving the preliminary investigation of offenses of adults and juveniles and the search for fugitives; does related work as required.

EXAMPLE OF DUTIES:

Patrols assigned areas for the protection of life and property; operates a two-way radio unit; enforces county ordinances and federal and state laws; assist local peace officers in their enforcement activities; makes arrests; testifies in court; investigates traffic accidents and administers first aid; makes investigations of criminal violations; photographs accident scenes and takes measurements; makes maps and charts of crimes and accidents; prepares detailed reports of arrests and of reports of investigations; escorts funerals, serves civil process and transports prisoners; performs various related services to the general public.

DESIRABLE QUALIFICATIONS:

Training and Experience - Two year degree in Police Science or equivalent; possess or be eligible for a Wisconsin driver's license; vision corrected to 20/20; Wisconsin Law Enforcement Standards Board certification and previous related experience preferred. Candidate must pass a physical agility test, unless he/she has passed the test within the last year.

Knowledge, Abilities and Skills - knowledge of laws, ordinances, departmental rules and regulations; knowledge of county road and highway systems. Ability to maintain records and prepare reports; ability to use and care for firearms; ability to meet department standards of physical condition. Skill in establishing and maintaining cooperative working relations with fellow officers and the public; driving skill; skill in presenting leadership and sympathy in a wide variety of public crisis; good memory and keen observation; courage and good judgement.

RESPONSIBILITIES:

Careful use of patrol cars and firearms; maintenance of the reputation, efficiency and responsiveness of county law enforcement.

REPORTS TO: Patrol Division Staff Sergeant

Since April of 1986, the position of Investigator - Sergeant has had the following job description:

CLASS TITLE: Investigator - Sergeant

CLASS FUNCTION: Investigates criminal offenses; collects pertinent evidence; apprehends subjects; and does related work as required.

EXAMPLE OF DUTIES:

Visits the scenes of crimes and secures information and evidence for the arrest of persons alleged to have committed crimes; searches for and apprehends suspects; interviews and takes statements from suspects, prisoners, complainants and witnesses; makes specialized juvenile and vice investigations; apprehends violators; appears in court to present evidence and testify against persons accused of crimes; investigates complaints of bad checks and reports of missing persons; maintains surveillance of suspected criminals; executes warrants; serves civil process; transports prisoners; prepares written reports of investigations.

DESIRABLE QUALIFICATIONS:

Training and Experience - Graduation from high school, supplemented by training in scientific methods of crime detections and criminal investigation, and at least three years of experience in law enforcement work, including investigation; or an equivalent combination of training and experience.

Knowledge, Abilities and Skills - Knowledge of modern methods and practices of criminal investigation; knowledge of pertinent federal and state laws and county ordinances; knowledge of criminal law with particular reference to apprehension, arrest, prosecution of persons and the admissibility of evidence; knowledge of criminal law with particular reference to apprehension, arrest, prosecution of persons and the admissibility of evidence; knowledge of department rules and regulations; knowledge of the geography of the county and the location of important buildings. Ability to obtain information through interviews, interrogation and observation; ability to remember names, faces and details of incidents; ability to understand and execute difficult oral and written directions and to prepare clear and comprehensive reports; ability to deal firmly but courteously with the public and to cooperate with other police departments; ability to testify clearly and accurately in court. Skill in the use of firearms; keen sense of observation; skill in interrogating and interviewing practices.

RESPONSIBILITIES: The discovery and efficient employment of information regarding suspects, criminals and criminal actions in Outagamie County. The supervision of criminal investigations.

REPORTS TO: Investigation Division Lieutenant

On May 10, 1991, Attorney Frederick J. Mohr, an Association Representative, sent the following letter to Sheriff Brad Gehring:

Please consider this a grievance on behalf of the Association regarding the recent transfer of some Investigators to patrol work. Again, Section 8.01 of our Labor Contract provides that Investigators or Deputy Investigators work a different schedule than Patrol Officers and that their work days are a different length of time. By transferring the Investigators to these positions, you are violating Section 8.01 of the Labor Agreement. These positions should be posted.

I do understand your desire to create the position of "Enforcement Specialist". As of this time, however, I have received no proposal on the part of the County to create such a position. It would appear to me that your actions are an attempt to unilaterally implement that program. I must object to your doing so because it presently violates the constraints of our Contract.

We would ask that you refrain from further assignments of Investigators to patrol work. If there are vacancies in the patrol ranks, these vacancies should be posted and filled accordingly.

On May 31, 1991, Undersheriff Bosch sent a letter to Association Representative Jan Laitinen, which stated in relevant part as follows:

Investigator's Grievance

We question the timeliness of this grievance. Inasmuch as no reassignments have been ordered, who has been harmed?

The above notwithstanding, Article I, Management Rights, clearly permits such transfers of investigators. Section 8.01 of the Labor Agreement does not speak to the issue of duty assignments for specific job class-ifications.

Thereafter, the grievance was processed through the remaining steps of the grievance procedure and submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Association

Commencing in May of 1991, the Grievants were assigned duties not found within the Investigator job description, but which were identical to those of the Law Enforcement Specialist position (LES) developed by the Sheriff. The Association does not argue that the LES position could not be created without union agreement. The Association does argue that the County could not unilaterally place the Grievants in the de facto LES positions without negotiating with the Association. The County should be ordered to cease and desist from further reassignment of individuals without first negotiating the change in hours and/or substantial change in shift assignments and duties.

Article 8.01 states that the normal work day for Investigators is eight hours per day. Under the provisions of Article 9.01, the twenty extra minutes which the Grievants were required to work when assigned uniformed patrol work must be paid at overtime rates.

Clearly, the parties had an understanding that Investigator - Sergeants would work 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, 4 days on - 2 off. Indeed, such a schedule is referenced in Sec. 8.01. The County's unilateral action in changing Spaeth and Meitner's hours, without negotiating that change, rises to the level of a prohibited labor practice and is contrary to Article XXX - "Amendment Provision" which provides that only a written agreement between the parties may amend or alter or add to the existing agreement.

As a result of the change in schedule, Spaeth and Meitner were required to work weekend days which they would not have worked under their normal Investigator schedule. Under the call-in provisions of the contract, the Grievants are entitled to overtime pay for this weekend work.

Not only was the Sheriff aware of the Grievants' assignment to uniformed patrol, but he actually directed such assignment. Clearly, the Sheriff did authorize and approve overtime.

After being placed in the de facto LES positions, the Grievants were required to wear uniforms during a majority of their working hours. As a result, they should be entitled to the traffic uniformed employes' allowance of \$250 in addition to the allowance they had received as non-uniformed employes. There should be no off set in the uniform allowance since the requirements of each of the specific positions are quite different.

The County does not cite any contractual language differentiating between a temporary and a permanent position. Section 22.03 of the contract provides some enlightenment regarding the understanding of the parties in that it provides higher pay after five weeks in a new position. The Sheriff violated the posting procedures of Article XX when he did not post the de facto LES

positions, but rather, unilaterally assigned the Grievants to these positions.

The remedy for the County's violation of its duty to bargain is to place the Grievants in the position which they would have had but for the County's violation. Accordingly, the Grievants should be awarded overtime hours for all hours worked outside of their regularly scheduled investigative hours.

County

In the spring of 1991, there were five patrol vacancies. As of May 1, 1991, four of these vacancies had been filled and the County was in the process of filling the remaining vacancy from a list of eligible applicants. The new employees were unavailable to fill regular shifts because they were in training programs. The County decided to remedy the temporary shortage of patrol officers by assigning Investigator - Sergeants to perform patrol work. When the employees hired to fill the patrol vacancies were fully trained, the County reassigned the two Investigator - Sergeants back to Investigator work.

The right of the Sheriff to assign employees to various duties and the obligation of the employees to perform those duties is recognized in the Departments' Rules and Regulations which are made part of the collective bargaining agreement under Section 4.01. The Sheriff has the exclusive right to manage the work, direct the working forces and assign work to employees. Given the shortage of personnel in the Patrol Division, the assignment of the two least senior Investigator - Sergeants to the patrol division was not arbitrary, capricious nor discriminatory.

The workload situation justified the lay off of the least senior Investigator-Sergeants and their recall as patrolmen. Under the provisions of Section 3.07, laid-off Investigator - Sergeants could be recalled to perform patrolman work at patrolman wages.

The contract does not require the County to maintain a work schedule of 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, 4 days on - 2 off for Investigator - Sergeants. The contract only provides that the Investigator - Sergeants work week average 40 hours. Since no specific work schedule is mandated in the contract, the Sheriff has the discretion to determine the appropriate work schedule and to change existing work schedules for any or all of the Investigator Sergeants.

The 5 days on - 2 days off, 5 days on - 3 days off work schedule of 8.33 hours per day averages approximately 39 hours per week, which workweek is well within the requirements of Section 8.01 (B). Section 8.01 (B) states that the eight hour shift is the normal work day. The use of the term normal allows for exceptions. The assignment of the Grievants to the 8.33 hour day was a temporary situation.

Section 9.01 does not refer to normally scheduled hours, but rather, refers to any hours worked in excess of the "scheduled work day or work week."

When assigned to the patrol division, the "scheduled" work week for Meitner and Spaeth was 5 days on - 2 days off, 5 days on - 3 days off, and the "scheduled" work day was 8.33 hours. Neither Meitner nor Spaeth were paid any overtime hours worked on this schedule and the contract does not require overtime to be paid for such hours of work. If they had been required to work only an eight hour day, their average weekly work hours would be reduced to 37.4, which is substantially below the 40 hour per week average listed in Section 8.01 (B).

There is no contractual prohibition on working over 40 hours in a week or working on Saturdays or Sundays. Nor is there any contract provision requiring overtime payment for working over 40 hours in any week or for working on Saturdays or Sunday. This case does not involve any situation where the Grievants were called-in to work.

Lieutenant Leatherbury testified that in the past, no overtime was ever paid to an Investigator-Sergeant where the employe shift was changed, even if the shift change was on short notice. Rather, the new shift was considered the employes "scheduled" shift.

Neither the Department Head, nor the Division Head, ever authorized or approved any overtime for the Grievants for their scheduled work hours while assigned to the patrol division. Such authorization and approval is required by Section 9.03 before overtime can be paid.

The Association claims the Grievants are entitled to overtime pay for "all hours worked outside their normally scheduled work week as Investigators and those hours worked in excess of 8 hours per day." There is no contract provision which requires this. Moreover, to provide such a remedy would be to violate Section 7.02, Step 4, which states that "In rendering his decision, the Arbitrator shall neither add to, detract from nor modify any of the provisions of the Agreement."

Investigator-Sergeants are paid either a traffic uniformed employe's allowance or a non-uniformed employe's allowance. Two Investigator-Sergeants receive the traffic uniform employe allowance even though they occasionally work in plain clothes. Neither the contract language, nor the evidence of the parties' practice, indicates that an employe is entitled to receive more than one type of clothing allowance.

During the period of time that Meitner was assigned to work patrol, he worked a majority of his time performing investigative work and was not required to wear a uniform. Meitner, who had most of his full uniform, was required to buy one pair of pants and some T-shirts. There is nothing in the record to indicate that David Spaeth had to make any uniform purchases.

Contrary to the claim of the Association, the County never created a position of Law Enforcement Specialist. The Grievant's were assigned general law enforcement duties which are clearly related to the duties listed for Investigator-Sergeants.

Section 20.01 addresses permanent, rather than temporary, vacancies and promotions. Since the assignment to uniformed patrol was temporary, and the position of Law Enforcement Specialist was never created, the posting requirements of Article XX are not applicable.

This is a grievance arbitration proceeding not a prohibited practice proceeding. Accordingly, the Association does not have a claim for a remedy based on any violation of the Employer's duty to bargain. The Arbitrator's authority is limited to resolving matters "involving the interpretation, application or enforcement of this Agreement." Since the County has not violated the Agreement, the grievances must be dismissed.

DISCUSSION

Effective January 1, 1991, the parties implemented a new work schedule for Patrol Officers. The new schedule created a need for additional Patrol Officers. At various times during the Spring of 1991, the Sheriff's Department was down five to seven Patrol Officer positions. The problems created by the shortage of Patrol Officers was exacerbated by Operation Desert Storm security

requirements, which dictated that the Department assign an officer to the regional airport for 12 hours per day, and the need to honor vacation requests.

At hearing, Lieutenant Leatherbury, who supervises the Department's patrol operation, stated that when the Patrol Division is short-staffed, Patrol Officers normally work overtime to provide the necessary coverage. According to Leatherbury, in 1991, the shortages were so severe that the overtime work created stress and caused complaints by the Patrol Officers. Leatherbury further stated that, after considering the workload of the Investigative Division, which had decreased slightly, Department officials, decided that it was necessary to assign two of the Investigator - Sergeants, i.e., the Grievants, to work uniformed patrol.

Grievant Spaeth, began his uniformed patrol duties on May 2, 1991 and continued to work uniformed patrol until January 24, 1992. During the time that Spaeth worked uniformed patrol, he worked a 5 days on - 2 days off, 5 days on - 3 days off schedule. Each shift was the normal Patrol Officer shift of 8.33 hours.

In June of 1991, management asked Grievant Meitner to work uniformed patrol on a voluntary basis for a few days in June. Meitner agreed to this request. Meitner began his uniformed patrol duties on June 10, 1991. In July, Meitner's assignment to uniformed patrol became an involuntary assignment and continued to be an involuntary assignment until he was returned to his normal Investigator - Sergeant duties during the last week of December, 1991. During the time that Meitner worked uniformed patrol, he worked a 5 days on - 2 days off, 5 days on - 3 days off schedule. Spaeth began his uniformed patrol work with an 8 hour shift, but eventually worked the normal Patrol Officer shift of 8.33 hours.

At the time that Meitner volunteered to work uniformed patrol, the Department had filled all of the patrol vacancies. However, due to the extensive training requirements, not all of the new recruits were available to work as Patrol Officers.

The Association, which also represents Patrol Officers, does not claim that the work performed by the Grievants was required to be assigned to Patrol Officers as overtime work. Nor does the record demonstrate that the uniformed patrol work in dispute could have been performed by existing Patrol Officers without incurring unreasonable amounts of overtime.

The Association argues that the County assigned the two Investigator - Sergeants to work uniformed patrol as punishment for the fact that the Association did not accede to the County's position on the wages, hours and conditions of employment of the proposed LES positions. Crediting the testimony of Lieutenant Leatherbury, the undersigned is persuaded that the Grievants were assigned to work uniformed patrol to meet an emergency situation, i.e., too few patrol officers to perform the necessary patrol work. The record does not demonstrate that the needs of the Patrol Division could have been met in any manner other than by the temporary reassignment of the Grievants.

During the time that the Grievants were assigned to work uniformed patrol, they continued to be paid their Investigative - Sergeant salary. That is, they were compensated for 80 hours bi-weekly at their Investigative - Sergeant rate of pay, which rate of pay is higher than that of Patrol Officer.

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As the Association argues, at the time of the Grievants' reassignment, Investigator - Sergeants worked a different schedule than Patrol Officers. 2/ It is also true that the majority of the Investigator - Sergeants did not wear a uniform when performing their work. 3/ While there may be some overlap between the duties and responsibilities of the Investigator -Sergeant and those of the Patrol Officer 4/, prior to the assignments which gave rise to the instant grievance, Investigator - Sergeants had not been assigned uniformed patrol work.

When the County assigned the Grievants to work uniformed patrol, the County changed the Grievant's work schedule, duties, uniform requirements and length of shift. The Association, contrary to the County, argues that this assignment violates the provisions of the parties' collective bargaining agreement.

As the Association argues, Article XX of the labor contract provides for the posting of vacancies and promotions. Article XX defines a promotion as "a change of job resulting in an increase in pay". The Grievants were assigned the duties of a lower classification and, thus, did not have a change of job which resulted in an increase in pay. Moreover, the Grievants continued to be paid

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- 1/ During the period of time in which the Grievants were assigned uniformed patrol work, Spaeth devoted nearly 100% of his work time to patrol duties. Meitner, however, devoted as much as 60% of his work time to investigative duties.
 - 2/ The normal shift of an Investigator - Sergeants is 8 hours per day. The normal shift of a Patrol Officer is 8.33 hours. Additionally, the Investigator - Sergeants work either a schedule of 5 on - 2 off or a schedule of 5 on - 2 off, 5 on - 2 off, 6 on - 2 off, and 4 on - 2 off. Investigator - Sergeants who work the schedule of 5 on - 2 off have the weekend days off. The other Investigator - Sergeants have Sundays off, but work one Saturday during the rotation. Every three months, the Investigators rotate shifts.
 - 3/ Only two of the eight Investigator - Sergeants were required to have a uniform, i.e., Schuh and Price, for use in school presentations and parades, respectively. These two Investigators received the Traffic Uniformed Employees allowance. The Investigator - Sergeants who were not required to maintain a uniform received the Non-Uniformed allowance.
 - 4/ For example, a Patrol Officer may do some investigative work. Generally, such investigative work does not rise to the level of the investigative work performed by the Investigator - Sergeant.

at their Investigator - Sergeant rate of pay. Accordingly, the undersigned is not persuaded that the Grievants received a promotion within the meaning of Article XX.

Article XX is silent on the question of whether or not the provision covers both permanent and temporary vacancies. Normally, however, such a provision is intended to address permanent, rather than temporary vacancies. As the County argues, the fact that Article III provides a six month probationary period for employes who are promoted or otherwise awarded positions pursuant to Article XX, supports the conclusion that the parties did not intend the provisions of Article XX to govern the temporary vacancies.

In the present case, the Grievants were assigned to work uniformed patrol until such time as the individuals who were hired to fill the vacant Patrol Officer positions were trained and available to assume their Patrol Officer function. The undersigned is persuaded, therefore, that the Grievants were assigned to fill a temporary, rather than a permanent vacancy. Contrary to the argument of the Association, the temporary vacancies occupied by the Grievants were not subject to the requirements of Article XX. Thus, the County did not violate Article XX when it did not post and fill these temporary vacancies in accordance with the requirements of Article XX.

Despite the Association's argument to the contrary, the record does not establish that Investigator - Sergeant postings have identified a specific work schedule. 5/ According to Leatherbury, the Sheriff has determined which Investigator - Sergeant positions would work the 5 days on - 2 days off schedule and which Investigator - Sergeant positions would work 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, and 4 days on - 2 off. Leatherbury does not believe that Investigator - Sergeants have bid for Investigator - Sergeant positions on the basis of work schedule. The record does not demonstrate otherwise.

Section 8.01 (A) of the labor contract expressly recognizes that the "normal work week for full-time employees classified as Patrolman, Telecommunicator I and II, Correctional Officer, Head Cook, Cook, and Jail Building Clerk will be 5 on - 2 off, 5 on - 3 off . . ." Sec. 8.01 (B) of the labor contract provides that the normal work week for Investigator and Sergeant classifications, as well as other classifications which are not in issue herein, "shall average forty (40) hours based on a fifty-two (52) week year. . ." As a comparison of the two provisions reveals, Sec. 8.01 (B), unlike Sec. 8.01 (A), does not define the normal work week in terms of a specific work schedule.

As the Association argues, the 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, and 4 days on - 2 off work schedule is referenced in Sec. 8.01 (B). However, the sentence which contains the reference does not guarantee the Investigator - Sergeant, or any other employe, a 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, and 4 days on - 2 off schedule. Rather, the purpose of the sentence is to clarify that employes who are assigned to the 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, 4 days on - 2 schedule receive a benefit, i.e., floating holidays, which differs from that received by other employes. As the County argues, the language of Sec. 8.01 (B) does not require the County to assign the Grievants, or any other Investigator - Sergeants, to a 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, 4 days on - 2 off work schedule.

5/ Meitner could not recall whether or not his Investigator - Sergeant posting specified a work schedule.

As Lieutenant Leatherbury stated at hearing, the Grievants retained their classification of Investigator - Sergeant during the period of time in which the Grievants performed uniformed patrol work. Under the provisions of Sec. 8.01 (B), employes in the Grievant's classification have a normal work week which averages forty (40) hours over a fifty-two (52) week year. As the Association argues, a 5 days on - 2 days off week at 8.33 hours per day would generate more than forty (40) hours. However, Grievants were not assigned to work only a 5 days on - 2 days off work week. Rather, the Grievants were assigned to work 5 days on - 2 days off, 5 days on - 3 days off. Based on the fifty -two week year, the assignment of a 5 days on - 2 days off, 5 days on - 3 days off schedule of 8.33 hours per shift would not average more than forty hours per week.

As the County argues, a 5 days on - 2 days off, 5 days on - 3 days off schedule of 8.33 hour days averages 39 hours per week over a fifty - two week year. This is less than the forty hour average provided for in Sec. 8.01 (B). The Grievants, however, continued to be paid for 80 hours every two weeks at their normal Investigator - Sergeant rate of pay. Given these circumstances, the undersigned is not persuaded that the County violated the "normal workweek" requirements of Sec. 8.01 (B) when it assigned the Grievants to work uniformed patrol.

Section 8.01 (B) also provides that the "normal workday" for employes in the classification of Investigator - Sergeant "shall consist of an eight (8) hour shift." As the County argues, the use of the term "normal" does indicate that there may be exceptional circumstances which would permit the assignment of a workday which is other than eight hours. It is true that, when Meitner was initially assigned to uniformed patrol, he worked an eight (8) hour shift. It is not evident, however, that Meitner could have continued to provide the necessary patrol coverage by working an eight (8) hour shift, rather than the 8.33 hour shift worked by the regular Patrolman. The undersigned is persuaded that the circumstances which gave rise to the need to use the Grievants to perform uniformed patrol work was an exceptional circumstance which permitted the County to assign the Grievants to an 8.33 hour shift.

While the Grievants were assigned to uniformed patrol, their scheduled work day was 8.33 hours and not eight (8) hours. Accordingly, the undersigned rejects the Associations argument that the Grievants were entitled to be paid overtime for the .33 hours hour difference between the uniformed patrol workday and the investigator work day. As discussed above, the additional .33 hours per shift did not cause the Grievants to work more than the forty hours for which they received their Investigator - Sergeant pay.

At the time that Spaeth was assigned to work uniformed patrol, the Department had posted the Investigative Division work schedule which covered the period of time from May 12, 1991 through September 19, 1991. On this posted work schedule, each of the Grievants had been assigned an investigative shifts of 5 days on - 2 off, 5 days on - 2 off, 6 days on - 2 off, 4 days on - 2 off. 6/ Thus, when the County assigned the Grievants to work uniformed patrol, the County assigned the Grievants to a work schedule which differed from that of the posted schedule.

The Association argues that the Grievants are entitled to overtime pay for all hours worked outside of their posted investigator schedule. The undersigned disagrees. Sec. 9.01 provides, in relevant part, that "Employees 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 their scheduled work day or work week..."

The undersigned does not consider the term "scheduled" to be synonymous with the term "posted." Nor does the evidence of past practice demonstrate otherwise. According to Leatherbury, whose testimony on this point was uncontradicted, if an employe's hours were changed after the schedule was posted, the employe received overtime only if the employe worked more than eight hours.

For the reasons discussed above, under the circumstances presented herein, the County had the right to schedule the Grievants to work 5 days on - 2 days off, 5 days on - 3 days off. For the purposes of Sec. 9.01, hours worked pursuant to this schedule comprised the Grievants scheduled work week. The County is not required to pay the Grievants overtime for any hours which were worked pursuant to the 5 days on - 2 days off, 5 days on - 3 days off schedule. Nor is the County required to pay the Grievants any call-in pay for hours worked pursuant to the 5 days on - 2 days off, 5 days on - 3 days off schedule.

As the County argues, neither the evidence of past practice, nor the contract language requires the County to pay any employe both a uniformed and non-uniformed clothing allowance. However, given the fact that the County chose to assign the Grievants to perform uniformed patrol duties and the Grievants performed these duties in uniform, the Grievants are entitled to the annual allowance for Traffic Uniformed Employees, rather than the annual allowance for Non-uniformed Employees. 7/ Inasmuch as Meitner returned to the Investigative Division at the end of December, 1991, and Spaeth returned to the Investigative Division before the end of January, 1992, the Grievants are entitled to the Traffic Uniformed Employees allowance for 1991, but not for

6/ Spaeth's name was subsequently deleted from this work schedule, but Meitner continued to be listed on the schedule.

7/ Pursuant to the advice of his superiors, Meitner generally wore his uniform when performing investigative duties during the period of time in which he was assigned to uniformed patrol.

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Prior to the assignment of the duties which gave rise to the instant grievance, the Sheriff contemplated the creation of a new position of Law Enforcement Specialist (LES). The Sheriff envisioned that an individual employed in the LES position would have a 5 on - 2 off, 5 on - 3 off schedule and be assigned to work in uniform, performing the duties of a Patrol Officer, or out of uniform, performing the duties of an Investigator - Sergeant, as the Sheriff, or his designee, determined was necessary to meet the demands of the Department workload. The Sheriff met with the Union to discuss the new position. At the time of hearing, the Sheriff and the Union had not reached an agreement on the matters discussed and the position of LES had not been placed in the Department's table of organization.

The Association argues that the Grievants were assigned to a de facto LES position and that, in making this assignment, the County committed prohibited practices by violating its statutory duty to bargain over the wages and hours of the LES position. As the County argues, the Arbitrator's authority is set forth in Article VII, which states in relevant part, that "Only matters involving the interpretation, application or enforcement of this Agreement which may arise between the County and employee (employees) or the County and the Association shall constitute a grievance ...". As the County further argues, the undersigned does not have jurisdiction to determine whether or not the County has violated its statutory duty to bargain, or has otherwise committed any prohibited practices.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate Articles VIII, IX, and/or XX in its assignment of uniformed patrol work to the Grievants between May 1, 1991 and January 24, 1992.
2. The County violated Article XXVIII when it did not provide the Grievants with the annual allowance for Traffic Uniformed Employees for the year 1991.

Dated at Madison, Wisconsin this 10th day of June, 1992.

By _____
Coleen A. Burns, Arbitrator

8/ Since the Grievants are not entitled to both the Traffic Uniformed and the Non-uniformed clothing allowance, the Grievants are entitled to the difference between the amount they should have received as Traffic Uniformed Employees and the amount that they did receive as Non-Uniformed Employees.

