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**State of Wisconsin
Wisconsin Employment Relations Commission**

July 7, 2008

Mr. Larry O'Brien
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City of Madison
City-County Building, Room 401
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Mr. Andrew Schauer
Staff Attorney
Wisconsin Professional Police
Association/LEER Division
340 Coyier Lane
Madison, WI 53713

Re: City of Madison (Police Department)
Case 261 No. 67197 MA-13798
(Grievance 07-305)

Gentlemen:

Please find enclosed a copy of the Arbitration Award issued by the undersigned in the above-entitled matter.

Very truly yours,


Raleigh Jones
Arbitrator

REJ/gjc
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Enclosure

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BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MADISON PROFESSIONAL POLICE OFFICERS ASSOCIATION,
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

CITY OF MADISON (POLICE DEPARTMENT)

Case 261
No. 67197
MA-13798

(Grievance 07-305)

Appearances:

Andrew Schauer, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, appeared on behalf of the Association.

Larry O'Brien, Assistant City Attorney, City of Madison, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53703-3345, appeared on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and City or Employer, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. The above-captioned grievance was appealed to arbitration in August, 2007. Afterwards, at the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide that grievance. A hearing was held on December 5, 2007 in Madison, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs on January 14, 2008, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the relevant contract language and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided herein. The Association framed the issue as follows:

Did the City violate the collective bargaining agreement by requiring officers to come in on their Regular Day Off (RDO) and giving them a replacement day not at the officer's choosing instead of paying overtime for the call-in shift?

The City framed the issue as follows:

Does Article IX, C authorize the department to change an officer's RDO upon 72 hours notice?

I have not adopted either side's wording of the issue. Instead, my wording of the issue is as follows:

Did the City violate the collective bargaining agreement when it paid the patrol officers who were "ordered-in" to work on their RDO at straight time? If so, what is the appropriate remedy?

My rationale for this wording is explained in my discussion.

PERTINENT CONTRACT PROVISIONS

The parties' 2006-07 collective bargaining agreement contained the following pertinent provisions:

ARTICLE VIII PAY POLICY

...

B. OVERTIME:

Overtime shall be defined as any authorized work performed in excess of the employee's regular eight (8) hour work day exclusive of the fifteen (15) minute early report requirement, or any authorized work performed in excess of the employee's regular work schedule. . .

...

F. SHIFT ADJUSTMENT PREMIUM:

Employees shall be paid at the rate of time-and-one-half (1-1/2) the employee's regular rate of pay for hours worked outside of their regularly scheduled shift when said shift is temporarily adjusted in accordance with the provisions of Article IX, D.

...

ARTICLE IX
HOURS OF WORK & DUTY ASSIGNMENTS

...

B. WORK SHIFTS:

The Chief of Police shall establish, publish, and assign employees to such permanent work shifts as he/she may designate in accordance with the provisions of paragraph A., 1. and 2. and 3. and paragraph H. below.

C. PERMANENT SHIFTS:

Permanent regular work shifts established by the Chief of Police or his/her designee may be changed with seventy-two (72) hours notice to the affected employees.

D. TEMPORARY SHIFT ADJUSTMENTS:

The Chief of Police may adjust individual work shifts on a temporary basis, without the advance notice required in paragraph C. above, provided the employee so affected shall be paid the shift adjustment premium specified in Article VIII, F., for those hours worked outside of the employee's permanent regular shift.

...

G. ADJUSTMENT OF HOURS:

Hours of work shall not be adjusted if the avoidance of overtime is the one and only purpose for such an adjustment.

H. HOURS OF WORK AND DUTY ASSIGNMENTS:

1. At least once a year, assignments to Patrol and Community Policing Teams will be open for bidding with selection based upon classification seniority.

...

BACKGROUND

The City operates a Police Department which provides 24 hour police services and public safety protection to the community. The Association is the certified bargaining representative for the Department's patrol officers, detectives and sergeants. Only patrol officers are involved in this case.

Patrol officers work a 6 on/3 off schedule. Late in the year, patrol officers bid by seniority for their regular shift (i.e. first, second, third, etc.) for the next calendar year. They also bid for their set of regular days off (known in the Department as RDOs). RDOs are identified on a color coded calendar which is known as the RDO schedule. Once a patrol officer's shift and RDO schedule are set, that constitutes their normal work schedule. While they can still be called into work outside their normal work schedule, they plan their lives around their normal work schedule and RDOs. The record indicates that officers only get a Saturday as an RDO once every four to six weeks, so it is uncommon to be off on a Saturday. As a result, it is not inconsequential when an officer loses a Saturday as an RDO, and is given an alternative day – say a Wednesday – as a replacement. That's what happened here.

FACTS

An event is held annually in Madison which is known as the Mifflin Street Block Party. It is a non-sponsored student party held outside in the Mifflin Street neighborhood. It is traditionally held on the first Saturday in May. In 2007, that event was held May 5.

That event requires a large police presence, so essentially all patrol officers work that day. As a result, patrol officers are not allowed to take vacation on the date of the Mifflin Street Block Party.

When the Department needs extra staff to meet the needs of a particular situation – such as the Mifflin Street Block Party – there are at least three ways that the Department can ensure that it has sufficient staff working. One option is to seek volunteers for the situation. Another option is to “order-in” the officers needed. Another option is to reschedule an officer's RDO for a different date. The last option just mentioned is what is involved in this case.

On March 21, 2007, the Department notified 26 officers who were scheduled to be on their RDO on Saturday, May 5, that they were being “ordered-in” to work that day (i.e. Saturday, May 5, 2007) due to the Mifflin Street Block Party. The officers complied with the directive and worked that day (which, as just noted, was an RDO for all of them). They were paid at straight time for the day. Since they all worked on their RDO, they were given another day off. The affected officers did not get to choose their replacement day off; it was chosen for them.

The Association subsequently filed a grievance which sought overtime for the employees who were “ordered-in” to work on their RDO and were paid at straight time for same. The grievance was appealed to arbitration.

...

At the hearing, the parties agreed that the arbitrator's finding in this case would also apply to another pending grievance identified in the record as Joint Exhibit 3. That grievance involves patrol officers who were "ordered-in" to work on their RDO on Halloween weekend, 2007, and were paid at straight time for same.

...

Prior to 2003, when the Employer "ordered-in" an employee to work on their RDO, they were paid overtime. When that happened on Halloween, 2003, though, they were paid at straight time. The Association grieved that payment, and the grievance was subsequently settled via a Memorandum of Understanding (MOU) entitled "Employer Directed Changes of Day Off Schedules". That MOU was very detailed and need not be summarized in its entirety here. What is summarized though is the following: first, the Employer agreed to limit "Employer directed RDO changes" to three dates per year; second, the Employer agreed that in the event an officer was required to work on their RDO on one of the aforementioned dates, they would be given "4 hours of leave time." This MOU was in effect through December 31, 2005. It was not renewed.

POSITIONS OF THE PARTIES

Association

The Association's position is that the City violated the collective bargaining agreement when it required officers to come in on their RDO and later gave them a replacement day not at the officer's choosing. Additionally, the Association contends that the City violated the collective bargaining agreement when it failed to pay overtime to those officers who were called-in to work on their RDO. It elaborates on these contentions as follows.

The Association avers at the outset that "this grievance has absolutely nothing to do with the Department's ability to call in people needed for certain events, or keeping the public safe." Thus, as the Association sees it, no question of public safety is involved herein. It asserts in this regard that all the employees involved could have been "ordered-in" on their day off (with overtime paid), as was brought in through the rescheduled RDOs. The Association submits that "both solutions would have provided the City with the ability to have a certain number of police on the street for these celebrations." The Association further opines that both solutions could "be done in a timely manner which would allow for the flexibility needed in these types of situations."

Next, the Association comments as follows on the facts. It avers that what happened here is that the Department made the affected officers come in and work on their normal day off (i.e. their RDO), and then take another day off later. According to the Association, that amounted to a forced trade/shift change. Building on that premise, it's the Association's view that what the Chief did here was to throw the color-coded RDO schedule "out the window".

The Association believes that under these circumstances, overtime is owed to the affected officers. Here's why. First, the Association avers that the City's only motivation for not paying the officers overtime was to save money. It maintains that motive violated the contract because Article IX, G, provides thus: "Hours of work shall not be adjusted if the avoidance of overtime is the one and only purpose for such an adjustment." The Association reads the phrase "hours of work" to refer to the officers' RDO schedule. The Association acknowledges the City's argument "that there were other reasons for the changes made in the two situations underscored in the grievances, and that there will be other reasons for every similar situation", but it's the Association's view that "the City wants to read the term 'one and only purpose' so harshly as to read the whole section out of existence." According to the Association, such a broad reading of that phrase runs contrary to the contract axiom that interpretations are to be avoided which lead to harsh, absurd or nonsensical results. The Association contends that "the 'one and only purpose' language should instead be read to include an unplanned emergency, such as a terrorist attack, a natural disaster, or other public safety calamity, which would constitute a reason other than the avoidance of overtime to move schedules." The Association avers that the City should not count Mifflin Street days or Halloween (i.e. special events that they know of in advance) as a reason other than the avoidance of overtime because the City has the ability to call employees in for these days if it has not scheduled enough staff. It submits that the RDO calendar could have taken those events into account and provided more than one color to work on such days. Second, with regard to the contract language which the Employer relies on (i.e. Article IX, C, which says that "Permanent regular work shifts established by the Chief of Police or his/her designee may be changed with seventy-two (72) hours notice to the affected employees"), the Association asserts that the phrase "permanent regular work shifts" refers to the employee's hours of work (i.e. their shift) and allows the Employer to change the employee's shift and/or hours of work on their regularly-scheduled work day (i.e. to come in earlier or stay later in the normal shift). The Association submits that "limiting the use of Section IX, C to adjusting a person's hours on their normal work day makes logical sense, since this is the most common use of the (term) 'shift". It argues that "for the City to rely on Section IX, C to change a person's RDO simply does not make sense, since the RDO schedule (Joint Exhibit 6) does not contain the word 'shift', only the terms 'Patrol Color Day Off Rotation Calendar.'"

Next, the Association addresses the parties' MOU and its impact here. According to the Association, its existence "only strengthens the Association's position, since it is a tacit admission that the City needed to make concessions to allow them to do these forced trades to provide for proper staffing when the Department did not plan properly for events it knew (or should have known) it needed a larger police presence." Building on the foregoing, the Association avers that by not paying overtime here, the City "is attempting to get something (the ability to force trades of officers' RDOs) for nothing, and that should be anathema under any reasonable understanding of the collective bargaining process."

In sum then, the Association asks that its proposed issue be answered in the affirmative. As a remedy, it asks that the officers listed on Joint Exhibit 5, as well as any officers similarly affected on the day referenced in the new grievance, be paid four (4) hours of straight time

wages, which is the difference of pay between the eight (8) hours of straight time they were paid on such day and the eight (8) hours at time-and-one-half that they should have been paid. The Association also requests that the arbitrator "enforce the parties' agreement that the ruling apply to any future incidents where an employee's RDO is changed unless and until new contractual language is adopted by the parties."

Employer

The Employer's position is that the instant grievance should be denied. It elaborates on this contention as follows.

The Employer notes at the outset that the Police Chief is contractually empowered to determine staffing levels. It further notes that one of the methods which it uses to meet staffing levels is to sometimes reschedule officers' RDOs. According to the Employer, it has the right to change RDOs without restriction. It sees the instant grievance as challenging the Chief's authority to reschedule officers' RDOs to meet staffing levels. It asks the arbitrator to reject that challenge.

The Employer begins its argument by noting that there are three methods that the Department uses to ensure that it has adequate staffing levels available. One way is to seek volunteers; another is to "order-in" officers; and another is to reschedule officers' RDOs. This case involves the last method, which the Employer characterizes as a "valuable tool" to meet staffing levels. According to the Employer, it has long rescheduled officers' RDOs and "all officers know full well that their . . . RDO schedules may be changed."

Before focusing on the RDO rescheduling at issue though, the Employer acknowledges that the parties previously had an MOU that dealt with that topic. As the Employer sees it, "that MOU did not in any way prohibit the entire exercise of the Chief's authority"; instead, "it merely limits it in the expressed ways and addresses other administrative issues." Aside from that, the Employer emphasizes that the MOU has expired, so its terms are not controlling anymore.

The Employer contends that the RDO rescheduling at issue here did not violate the collective bargaining agreement for the following reasons. First, it avers that Article IX, C authorizes the Department to change an officers' RDO upon 72 hours notice. It maintains that it complied with that notice requirement since it gave the officers far more than three days advance notice that it was rescheduling their RDO. Second, the Employer emphasizes that when it notified the affected officers that their RDOs were being changed, it told them that if they had a conflict with that date, they could work out an RDO trade with a more senior officer. According to the Employer, this essentially made it a win-win situation because the Department's staffing need was met and the affected officer was not "unnecessarily inconvenienced." The Employer characterizes the Association's assertion that the rescheduling of the officer's RDO to another time disrupted their family life as "meritless". As the Employer sees it, the disruption which the rescheduling caused was not significant. Third, the

Employer submits that the Association offered no evidence that any officer was impeded or hurt by the RDO change. Fourth, the Employer disputes the Association's assertion that the Employer rescheduled the officers' RDOs just to avoid paying them overtime. The Employer maintains that the Association did not prove that paying overtime was the "one and only purpose" for rescheduling the officers' RDOs.

In the Employer's view, the Association's grievance essentially seeks to prohibit the Employer from rescheduling officers' RDOs, and force them to only use volunteers and call-ins (both of which require overtime) to meet its staffing needs. According to the Employer, that is not an adequate staffing solution. The Employer argues it is already difficult to get the Department's staffing needs filled even when it pays overtime to volunteers and call-ins. It avers that relying on volunteers and call-ins assumes that a sufficient number of officers can timely be reached and will report for duty. It maintains that assumption is dubious for the following reasons. First, it notes that the Department does not require officers to provide cell phone numbers, and even if it did, there is the potential that officers may not have their cell phone turned on or that they would not answer a call. Second, it notes that off-duty officers are not "on call" and therefore are not required to respond to a call. Third, it notes that there is no prohibition against officers consuming alcohol while off-duty. Fourth, it notes that officers may not be available to take a land-line phone call or may choose not to answer it. Fifth, it notes that when it orders-in an officer on very short notice, this can admittedly cause disruption to the officer's schedule and reduce their willingness to respond.

In sum then, the Employer believes no contract violation occurred when it rescheduled the officers' RDOs and paid them at straight time for working May 5, 2007. It therefore asks that the grievance be denied.

DISCUSSION

Since there is no stipulated issue in this case, I will address that topic first and determine what issue is going to be decided herein. In my view, the logical starting point for making this call is to review the grievance. As was noted in the FACTS, the grievance which was filed herein sought overtime for the employees who were "ordered-in" to work on their RDO and were paid at straight time for same. Thus, the grievance was essentially framed as an overtime dispute. On its face, the grievance did not challenge the Employer's right to order-in officers or the Employer's right to reschedule officers' RDOs. While neither of these matters were raised or referenced in the grievance, both were essentially referenced in the issue which the Association proposed at the hearing. Here's why. The first part of the Association's proposed issue was as follows: "Did the City violate the collective bargaining agreement by requiring officers to come in on their Regular Day Off (RDO) and giving them a replacement day not at the officer's choosing. . ." After raising that rhetorical question, the Association then went on to reference overtime in the next part of their proposed issue (i.e. the part which said: "instead of paying overtime for the call-in shift"). I did not adopt the Association's proposed issue because it unnecessarily linked what I see as two separate matters. In my view, the first question posed by the Association's proposed issue is this: can

the City require officers to come in on their RDO and pick a replacement day off for them? I see the second question posed as this: assuming that the answer to the first question is "yes", are the employees to be paid at straight time or overtime for being called in on their RDO? Notwithstanding the fact that the Association referenced the first question in their framing of the issue, and the fact that the City then addressed that question in their brief (i.e. claiming that the Association was seeking to prohibit the Chief from rescheduling officers' RDOs), I do not read the Association's brief to seriously challenge the Employer's right to reschedule officers' RDOs when the need arises. Instead, I see the focus of the Association's brief as their claim that overtime is owed to those officers who are called-in to work on their RDO. That being so, I have framed the issue herein to just address what I previously characterized above as the second part of the Association's proposed issue (i.e. the overtime matter). In my view, framing the issue narrowly in that fashion should not disrupt the City's ability to schedule employees and staff events as it sees fit. Thus, for the purpose of discussion herein, it is assumed that the City can reschedule officers' RDOs when the need arises. Said another way, it is assumed herein that the City can direct officers to come in and work on their RDO and then pick a replacement day off for them. Thus, the question which will be answered herein is once that happens (i.e. once patrol officers are called-in on their RDO), are they to be paid at straight time or overtime. The Employer contends it's the former, while the Association argues it's the latter.

Based on the analysis which follows, I find that those employees are to be paid overtime.

...

I begin my discussion on this matter with the following preliminary comments.

First, the parties previously had an MOU that dealt with the topic involved here and supplemented their collective bargaining agreement. However, by its express terms, that MOU has expired and was not renewed by the parties. That being so, its terms will not be used as a basis for deciding the instant contract dispute and no further comments will be made about it.

Second, in some contract interpretation cases, the parties offer evidence external to the agreement to help the arbitrator interpret the applicable contract language. I'm referring, of course, to the parties' past practice. While there was some evidence in this case which was purported to identify the parties' past practice, I found that evidence to be an insufficient basis for interpreting the contract language. Consequently, the outcome herein is going to be based exclusively on the contract language - not an alleged past practice.

Before I review the contract language cited by the parties though, I've decided to note at the outset that the parties have some very detailed language in their collective bargaining agreement dealing with overtime, duty assignments and shift adjustments. Given that level of specificity, it would be nice if there was a section in the collective bargaining agreement

entitled "Changing RDOs to Accommodate Employer's Staffing Needs", which then clearly specified whether employees who were called-in to work on their RDO to accommodate the Employer's staffing needs were to be paid at straight time or overtime. However, no such provision exists. To paraphrase the Chief's testimony on this matter, that's why this case went to arbitration. Not surprisingly, the parties herein do what parties usually do when the existing contract language is not directly on point – they look to the provisions that do exist in their collective bargaining agreement and argue about what provision best applies to the factual situation involved.

As noted above, the Association contends that overtime is owed to the affected officers. The general overtime provision is found in Article VIII, B and provides in pertinent part that overtime is "defined as. . .any authorized work performed in excess of the employee's regular work schedule. . ." Since the Association believes overtime is owed, it is implicit in the Association's argument that the work which the affected officers performed on Saturday, May 5, 2007 was "authorized work performed in excess of [their] regular work schedule. . ." The Association maintains that if payment of straight time to the affected officers stands, the Employer will have gotten something of value (i.e. having the affected officers come in and work on their RDO) without paying anything extra to the officers for this forced change in their RDO schedule (and the forced trade of a Saturday RDO for another day off). While the contract language which the Employer relies on has yet to be reviewed, my initial inference is that since the affected officers all performed work "in excess of [their] regular work schedule" when they were called-in to work on their RDO for the Employer's convenience and benefit (as opposed to the employee's convenience and benefit), overtime is owed to the employees pursuant to that provision.

The Employer contends that the language of Article IX, C allows the Employer to pay the employees at straight time when it calls them into work on their RDO so long as it gives them at least 72 hours advance notice. The language which the Employer relies on to support this premise says that "permanent regular work shifts. . .may be changed with seventy-two (72) hours notice to the affected employee." I find that the Employer's proposed interpretation lacks a sound contractual basis. Here's why. The first part of this sentence refers to "work shifts". Usually in labor relations, the word "shift" refers to the time of day when the employee works – such as first, second or third shift – on their regular work day. Say an employee is scheduled to work second shift on their regular work day. This language allows the Employer to change that employee's "shift" on their regular workday to, say, third shift, so long as it gives the employee 72 hours notice. Here, though, that's not what happened. The Employer did not change the affected employee's shift or work hours on their workday. Instead, the Employer changed their entire workday (because they were all scheduled to be off work on Saturday, May 5, 2007 and they were all directed to come into work that day). That's a completely separate matter and is not what Article IX, C addresses. As just noted, Article IX, C only addresses the changing of a "work shift", and that did not happen here. That being so, I find that Article IX, C does not give the Employer the authority to pay employees at straight time when it calls them into work on their RDO with more than 72 hours notice. The Employer's reliance on that section to justify that proposition is misplaced.

Having addressed the only contract provision which the Employer relied on to support its view that it can pay employees at straight time when it calls them into work on their RDO, and found that it (i.e. Article IX, C) does not support the Employer's position, the next question is whether I need to address the other contract provision which the Association relies on (namely Article IX, G). I find it unnecessary to do so to decide this case. Given that finding, no other comments will be made about the meaning of Article IX, G and its application herein.

In sum then, it is held that under the instant circumstances – where the affected officers were called into work on their RDO for the Employer's convenience and benefit – they should have been paid overtime for that day pursuant to the general overtime provision (Article VIII, B). Since that did not happen, the Employer violated the collective bargaining agreement in that respect. In order to remedy this contract violation, I find that the affected officers are each to be paid four (4) hours of straight time wages. This number reflects the difference in pay between the eight (8) hours of straight time they were already paid for working Saturday, May 5, 2007 and the eight (8) hours at time-and-one-half that that should have been paid.

Those arguments not addressed in my discussion were considered but were deemed unnecessary to decide this matter.

In light of the above, it is my

AWARD

That the City violated the collective bargaining agreement when it paid the patrol officers who were "ordered-in" to work on their RDO at straight time. They should have been paid overtime. In order to remedy this contract violation, the City shall pay the affected officers four (4) hours of straight time wages.

Dated at Madison, Wisconsin, this 7th day of July, 2008.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

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