

BUREAU OF MEDIATION SERVICES  
STATE OF MINNESOTA

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In re the arbitration between

Law Enforcement Labor Services, Inc.  
Local 75,

Grievant,

and

BMS Case No.: 09-PA-0178

City of Winona, Minnesota,

Respondent.

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DECISION AND AWARD (Corrected)

BEFORE

Bernice L. Fields, Arbitrator

APPEARANCES:

For: LELS, Inc. Local 75

Isaac Kaufman, General Counsel  
Law Enforcement Labor Services, Inc.  
327 York Avenue  
Saint Paul, Minnesota 55130

For: City of Winona, Minnesota

Brandon M. Fitzsimmons, Attorney  
Flaherty & Hood, P.A.  
525 Park Street, Suite 470  
Saint Paul, Minnesota 55103

Place of Hearing

Winona, Minnesota

Date of Hearing

November 6, 2009

Date of Award

Relevant Contract Provision

Articles 9 (Shift Differential) Article 35 (Grievance  
Procedure)

Contract Year

2008-2009

Type of Grievance

Arbitrability and Contract Interpretation

## I. INTRODUCTION

This matter came on for hearing pursuant to the Collective Bargaining Agreement (CBA) between the parties effective January 1, 2008 - December 31, 2009. A hearing occurred on November 6, 2009 in a conference room in the City Hall of Winona, Minnesota. Mr. Isaac Kaufman, Esq., General Counsel for Law Enforcement Labor Services Inc., represented Local 75 comprised of the Patrol Officers of the Winona Police Department, hereinafter Union. Mr. Brandon M. Fitzsimmons, Esq., Flaherty & Hood, P.A., represented the City of Winona, Minnesota, hereinafter Employer.

The Employer asserts there are substantive and procedural barriers to arbitrability. The Arbitrator took those arguments under advisement. The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the issues. All witnesses testified under oath as administered by the Arbitrator. The advocates fully and fairly represented their respective parties.

The Arbitrator officially closed the hearing on the receipt of briefs from the parties on December 7, 2009.

## II. STATEMENT OF THE FACTS

Article 9, the shift differential clause and primary dispute in this arbitration, made its first appearance in the parties' current, January 1, 2008 – December 31, 2009 contract. The Union attempted to include a shift differential clause in their labor contracts for many years, but the Employer refused to consider the additional financial obligation. However, in October, 2007 the Employer agreed to negotiate shift differential for the current contract year. The parties negotiated in good faith for several months and considered shift differential language from

comparable Minnesota cities, but they were unable to reach agreement. On or about February 2008, the parties entered mediation with the Bureau of Mediation Services.

Subsequent to the mediation, on or about February 18, 2008, the Employer mailed a proposed contract to the Union based on the mediated agreement. The proposed agreement included a shift differential clause as Article 9 with the following language:

ARTICLE 9 – SHIFT DIFFERENTIAL

In addition to an employee's regular compensation as provided in Article 8, a fifty cent (\$.50) per hour shift differential shall be paid to officers each pay period for those regularly scheduled hours worked between the hours of 6:30 p.m. and 6:30 a.m.

This language remained constant through several additional drafts and was adopted into the final agreement.

The parties differ on the interpretation and implementation of Article 9. The Employer's chief negotiator testified the parties' clear agreement during negotiation was to limit shift differential pay to patrol officers working their own regularly assigned third shift hours. Specifically, the Employer's negotiator points to a telephone conversation on March 5, 2008 initiated by the Union to clarify the Union's understanding of "regularly scheduled hours." The Employer's negotiator testified the Union's understanding was identical to the interpretation the Employer has enforced since May, 2008.

Since the Employer believed there was agreement on the scope of Article 9 benefits after the March 5, 2008 telephone conference, the Employer did not alter the language offered in the February 18, 2008 draft. Consequently, later the same day the Employer emailed the Union an updated proposed contract with the current language of Article 9.

The Union negotiator denies any agreement limiting shift differential only to officers working their own third shift hours ever took place. No memorial of the March 5, 2008 meeting

appeared in either negotiators' notes. The Employer seeks to estop the Union's expansive interpretation of Article 9 to include shift differential pay for patrol officers who work third shift hours for unavailable officers normally assigned to third shift.

The Union represents a class of fifty (50) Patrol Officers who have been denied shift differential pay because they worked third shift hours, 6:30 p.m. to 6:30 a.m., for unavailable officers regularly assigned to third shift. The Union Steward testified that during contract negotiations the language "regularly scheduled hours" was added to the contract because former Police Chief Pomeroy wanted to make sure the Employer would not be obligated to pay shift differential for special and sporadic third shift programs such as Safe & Sober, Walking Patrols, Nite Cap, and security at Winona State University athletic events.

The Union interprets "regularly scheduled hours" eligible for shift differential pay as all hours during third shift covered by any officer except those special and sporadic third shift hours specifically excluded during the negotiations. Therefore, the class of affected Patrol Officers who covered shifts regularly assigned to unavailable officers should have received shift differential pay in addition to Overtime/Call Back pay.

Between submission of the proposed agreement to the Union on or about February 18, 2009 and mid-April 2009 when the parties executed the final agreement, the negotiators exchanged numerous emails about the proposed drafts of the agreement. None of their emails discuss Article 9, the shift differential clause.

On March 28 and April 3, 2008, the Employer submitted a final draft of the CBA to the Union which contained the current language of Article 9. The Union executed the agreement on April 11, 2008. The Employer executed the agreement on April 22, 2008.

In May, 2008, the Employer changed the timesheets to record shift differential pay.

During third shift, the Employer maintains a minimum staffing level of three (3) Patrol Officers. When an officer scheduled to work third shift is unavailable because of illness, vacation, training, or any other reason, the Employer maintains the minimum staffing level by assigning another officer to cover the missing officer's shift. Typically, shift coverage is offered to other officers by descending seniority. During the week of May 18, 2008 three officers regularly assigned to third shift were away for training and a fourth was in court most of the week.

Grievant, Officer Nick Quimby, a 2004 hire, the only officer available for shift coverage at that time, was assigned by the duty sergeant to cover hours regularly scheduled for the missing officers on May 19, 20, and 21, 2008. These are days he would otherwise have been off-duty. The Police Chief testified that officers who cover shifts for unavailable officers are paid pursuant to Article 14 – Call Back Hours and compensated at time and a half of regular pay. Officer Quimby expected to receive shift differential pay also since he earned shift differential the night before on his own third shift hours. In addition, Officer Quimby testified and his testimony was confirmed by the Police Chief that he would have been disciplined if he had refused to cover shifts for the missing officers.

Grievant, Officer Richard Koop, a thirteen year veteran, covered shifts for officers regularly assigned to third shift on May 22-23, 2008 and received only Call Back compensation pursuant to Article 14 at time and a half of his regular pay. He also expected shift differential pay. Both officers listed the shift differential hours on their time sheets, but were told by the duty sergeant after consultation with the Chief and Deputy Chief to remove the shift differential hours from their timesheets because the Employer would not pay the shift differential since the officers were paid Call Back, premium pay, for those hours. Consequently, the named

Grievants' June 6, 2008 pay did not include third shift differential pay.

After denial of their request for shift differential by the duty sergeant on or about May 28, 2008, the two officers asked the Union Steward to file a grievance on their behalf. The Steward sent an email on June 3, 2008 to the duty sergeant formally grieving at Stage 1 the denial of shift differential pay on behalf of Officers Quimby and Koop, even though the Employer had already rejected the Grievants' request for shift differential pay.

Here, the Employer raises procedural arbitrability claims about the process of the grievance. Specifically, whether the Union Steward had standing under Article 35 to file this grievance since he was not an aggrieved employee and whether the Union waived its opportunity to grieve this issue because its Step 2 response was received by the Employer one day after the time required by the CBA in Article 35.6.

Since the denial to the two named Grievants, at least fifty (50) other officers have covered third shift for officers regularly assigned to that shift but were denied shift differential pay. At the arbitration hearing, the Police Chief testified it would have been futile for other officers to grieve the denial of shift differential pay after the denial to Officers Koop and Quimby.

### III. STATEMENT OF THE ISSUES

The Arbitrator framed the Issues as follows:

1. ARE THERE SUBSTANTIVE AND/OR PROCEDURAL BARRIERS TO THE ARBITRABILITY OF THE UNION GRIEVANCE? IF SO, WHAT IS THE REMEDY?
2. IF THE GRIEVANCE IS ARBITRABLE, WHETHER THE EMPLOYER VIOLATED ARTICLE 9 OF THE COLLECTIVE BARGAINING AGREEMENT BY DENYING SHIFT DIFFERENTIAL PAY IN THE AMOUNT OF FIFTY-CENTS PER HOUR (\$.50) TO THE NAMED GRIEVANTS AND ALL SIMILARLY SITUATED OFFICERS WHO COVERED SHIFTS FOR UNAVAILABLE OFFICERS SCHEDULED TO

WORK BETWEEN 6:30 P.M. AND 6:30 A.M. AFTER MAY 18, 2008? IF SO, WHAT IS THE APPROPRIATE REMEDY?

IV. RELEVANT CONTRACT PROVISIONS

ARTICLE 9 – SHIFT DIFFERENTIAL In addition to an employee’s regular compensation as provided in Article 8, a fifty cent (\$.50) per hour shift differential shall be paid to officers each pay period for those regularly scheduled hours worked between the hours of 6:30 p.m. and 6:30 a.m.

ARTICLE 11 – HOURS OF WORK

Section 11.1 The normal work year for Patrol Officers during the term of this Agreement shall be the number of scheduled six on three off, 8.5 hour work shifts in a calendar year. The normal work year shall be accounted for by each employee through:

- hours worked on assigned shifts;
- authorized paid leave time; and
- assigned training.

ARTICLE 12 – OVERTIME Employees shall be compensated for each hour worked in excess of the employee’s regularly scheduled work shift at a rate equal to one and one-half (1 ½) times the employee’s Base Rate of pay as defined in Article 8. . . .

ARTICLE 14 – CALL BACK TIME Employees called to duty during their scheduled off-duty time shall be paid at the rate of one and one-half (1½) times their Base Rate, as defined in Article 8, for a minimum of two (2) hours.

ARTICLE 35 – GRIEVANCE PROCEDURE

Section 35.1 – DEFINITION OF A GRIEVANCE

Section 35.1 A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

Section 35.4. PROCEDURE. Grievances shall be resolved in conformance with the following procedure:

Step 1. An employee claiming a violation concerning the interpretation or application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred or within twenty-one (21) calendar days after, through the use of reasonable diligence, the employee should have had knowledge of the occurrence that gave rise to the grievance, present such grievance to the employee’s supervisor as designated by the Employer. The Employer-designated representative will discuss and give an answer to such

Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, and the remedy requested and shall be appealed to Step 2 within ten (10) calendar days after the Employer-designated representative's final Step 1 answer. Any grievance not appealed in writing to Step 2 by the Union within ten (10) calendar days of the date of the Employer's Step 1 answer shall be considered waived.

Section 35.6 – WAIVER If a grievance is not presented within the time limits set forth above, it shall be considered “waived”. . . . If the Employer does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at that Step and immediately appeal the grievance to the next Step.

## V. POSITION OF THE PARTIES

### UNION POSITION

#### Arbitrability

The grievance is arbitrable. The Collective Bargaining Agreement (CBA), in Article 35, specifically authorizes disputes about interpretation or implementation of contract terms. This is a dispute about contract interpretation and implementation, therefore, this grievance is arbitrable. Estoppel is an inappropriate barrier to a determination of the meaning of Article 9.

The Employer presented no evidence of detriment to its ability to mount this case because of the processing of this grievance so its *laches* argument should also fail.

As to the Employer's procedural arbitrability claims, they too should be dismissed. First, it is widely settled that a union has standing to file a group grievance when a significant portion of the bargaining unit is affected. The Union is the exclusive representative of the members; therefore, the grievance was properly filed by the Union Steward. The Employer's other procedural barrier, that the service of the Union's Step 2 appeal was untimely should be waived because the Employer processed the grievance without objection. Both its procedural objections were first raised at the arbitration hearing.

## Merits of the Dispute

Union members are denied the benefit of their bargain by the Employer's interpretation and implementation of Article 9. The Union represents the named Grievants, Officers Koop and Quimby, and a class of fifty (50) similarly situated Patrol Officers who have covered third shift for unavailable officers normally assigned to that shift, but who did not receive the shift differential, an additional fifty-cents (\$.50) per hour.

This matter turns on the interpretation of Article 9. Even though the parties mutually agreed to include Article 9 in the contract, each has reached a different interpretation of a key phrase. Unrebutted testimony established that "regularly scheduled hours" was included at the Employer's request to clarify the parties' intent to exclude from Article 9 shift differential pay "special and sporadic" Overtime hours for specific programs that occur during third shift. This was the meaning the Union attached to the Shift Differential clause at the time of the agreement. There is no evidence the Union knew or had any reason to know of a different meaning attached by the Employer.

## EMPLOYER POSITION

### Arbitrability

This Grievance is barred by estoppel and *laches*. Equitable estoppel arises when one party's acts, representations, or intentional/negligent silence induces another party to act in a matter detrimental to the second party. Estoppel acts as a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. Here, the parties agreed on March 5, 2008 that shift differential pay would be limited to officers working their own assigned schedules during third shift; the Union should not be able to repudiate that agreement in the grievance process. The Patrol Officers are

motivated by the rejection of identical shift differential language by the Sergeant's Union in May 2008.

Requiring the Employer to pay shift differential for shift coverage where employees already receive premium pay would be detrimental because the Employer relied on the March 5, 2008 pre-contract negotiation agreement in agreeing to include a very limited shift differential clause in the contract.

Here, the Union has unreasonably delayed bringing this arbitration. The Union delayed selecting an arbitrator for a year after supplied with a list of arbitrators by the BMS. The delay has prejudiced the Employer because the testimony on bargaining history may have been impacted by the delay and the contract expires in less than 1 month. The resolution of this arbitration will impact negotiation on the new contract. This matter would most properly be resolved through negotiations on a new contract -- not a grievance.

Further, the Union for the first time, one day before the hearing, asserted numerous violations of the shift differential provision for officers other than the named Grievants. The Employer did not have notice to adequately prepare for and defend the Union's assertion by the proposed class of officers denied shift differential. Therefore, the violations of the CBA asserted by the Union at the hearing beyond the alleged violations involving the named Grievants are untimely and therefore waived since these grievances were not presented within 21 calendar days after the violations alleged.

There are also procedural disabilities to arbitrability of this grievance. The Union has not processed the grievance pursuant to Article 35 which details the grievance procedure. First, the arbitration should be dismissed because the Union Steward lacked standing to file the grievance because he was not an aggrieved party under Article 35. In addition, no aggrieved employee

ever discussed the dispute with an Employer representative. Consequently, the grievance is invalid and should be dismissed.

The Union's grievance, if valid, should still be dismissed under Article 35.6 – Waiver. The procedural requirements for filing a Step 2 grievance, filing a written response to the Employer's final Step 1 answer within ten (10) days was not met. The Union's Step 2 request was received one day after the time mandated in the CBA; therefore, the grievance is waived.

Lastly, the Arbitrator has no authority over this dispute if a decision in the Union's favor is awarded because such a decision would modify the terms of the parties' negotiated agreement.

#### Merits of the Dispute

The Employer would be denied the benefit of its bargain for including a shift differential clause in the contract under the Union's proposed interpretation of Article 9. The parties agreed that shift differential pay was to be exclusive to officers working their own third shift hours. An officer cannot receive shift differential pay if he/she covers a shift for an unavailable officer normally assigned to work third shift because the substitute officer receives premium pay under Article 14 – Call Back Hours. Differential pay would represent an unjust windfall not contemplated in the contract.

There is no ambiguity in the meaning of Article 9's language "regularly scheduled hours." Unambiguous language "must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003). The bargaining history of the parties clearly establishes pre-contract negotiations resulted in an agreement on the limitation of shift differential pay to officers working their own third shift hours.

The Union asserts that "regular" overtime hours entitle an officer to a shift differential,

while “special” overtime hours do not entitle an officer to a shift differential. Nothing in the contract or practice of the parties designates overtime as regular or special. As such, this assertion has no merit.

The Union is attempting to get a benefit through arbitration it could not get through negotiations.

## VI. ANALYSIS

### ISSUE ONE

#### WHETHER THERE ARE SUBSTANTIVE AND/OR PROCEDURAL BARRIERS TO THE ARBITRABILITY OF THE UNION GRIEVANCE? IF SO, WHAT IS THE REMEDY?

##### A. The Employer’s Challenges Do Not Overcome the Presumption of Arbitrability.

The Employer raises two substantive and two procedural challenges to arbitrability of this grievance. First, the Employer asserts the grievance should be dismissed based on the doctrine of equitable estoppel. Second, the Employer alleges the doctrine of *laches* should bar the Union’s grievance because the Union did not move to select an arbitrator for nearly a year after receiving a list of arbitrators from the Bureau of Mediation Services. Third, the Employer argues the grievance should be dismissed because the Union Steward did not have standing to raise the grievance at Step 1. Lastly, the Employer asserts the Union’s grievance should be waived because its Step 2 filing was one day late.

##### 1. The Employer Did Not Establish the Minimum Requirements of An Equitable Estoppel Claim.

The Employer asserts the Union took unfair advantage during contract negotiations by inducing the Employer to ratify Article 9 with its present language by agreeing the language “regularly scheduled hours” would limit shift differential pay to Patrol Officers working their own third hours. However, the Employer fails to establish the minimum standards for its claim.

First, the Union denies the March 5, 2008 conversation where the inducement is alleged to have been transmitted ever occurred. No evidence, notes, emails, or third party corroboration provide the scintilla more of evidence needed to support the Employer's assertions, though this is the kind of conversation one would expect to be memorialized.

Second, the Employer fails to enumerate any detriment sustained or prospective injury from the Union's alleged false conduct. The Employer does not explain how it would be harmed if substitute officers receive the shift differential pay the Employer has already contracted to pay regularly scheduled officers who are unavailable. Surprisingly, the Employer does not plead extraordinary pressure on scarce resources although that would only be problematic if new, unforeseen resources were required. Here, the Employer has already budgeted shift differential pay for the minimum staffing of scheduled third shift hours anyway, so there would be no increased demand on scarce resources. That's an important consideration in an equitable estoppel defense.

## 2. The Harms Alleged By the Employer's *Laches* Claim Are Speculative.

The Employer argues the arbitration should be barred by the Union's delay in processing this grievance. However, at the hearing, the Employer pointed to no witnesses or documents unavailable to assist its case because of the passage of time. Instead, it alleges the contract is in its final month, the Union has provided notice of its intent to re-negotiate the contract, and that a decision in this case will impact its contract negotiations with the Sergeants' Union who have rejected identical shift differential language in their own contract. No actual harm by the processing of this grievance was shown.

## 3. Article 35 of the Collective Bargaining Agreement Does Not Require A Grievance To Be Filed By An Aggrieved Employee.

Article 35.4 requires:

Step 1 An employee claiming a violation concerning the interpretation or application of this Agreement... the employee should have had knowledge of the occurrence that gave rise to the grievance... present such grievance to the employee's supervisor as designated by the Employer...

The Union Steward is an employee claiming a violation of the interpretation or application of Article 9 and who has knowledge of the facts giving rise to the grievance. Therefore, no barrier to arbitrability exists in the filing of the grievance.

Nor is there a procedural bar to the class of fifty (50) similarly situated Patrol Officers denied shift differential pay for shifts they covered for unavailable officers regularly assigned to third shifts because they did not individually exhaust the grievance procedure. The Chief of Police testified it would have been futile for officers not regularly assigned to third shift to request shift differential pay for shifts they covered after the denial of shift differential to the named Grievants.

4. If the Union's Step 2 Grievance Was UnTimely, the Employer Has Waived the Claim by Processing the Grievance.

The Employer has acquiesced, that is accepted the Union's Step 2 grievance by its silence, and cannot be heard on untimeliness now after hundreds of hours of processing this claim through the grievance administration.

In addition, the parties conduct much of their communication in the clouds by internet. The parties have not established standards for the transmission and receipt of documents mandated by the contract to be served within fixed timelines. Pursuant to Minnesota Rules of Civil Procedure 4.03, the Employer would have added three (3) calendar days to the calculation of the time for the Union response if the response had been served by U.S. Mail. Here, the Employer urges shortening the time of process to one day for email service, but cites no authority for that calculation.

While the world is moving much of its business communication to the clouds, I am

unwilling to accept service of mandated documents under a CBA by email unless the parties establish that standard in their contract, or until such standards are uniformly recognized.

### Conclusion of Arbitrability

The parties disagree over the interpretation of Article 9 of their labor agreement.

Disagreements over interpretation of contract terms are specifically included in Article 35.1 --

Definition of a Grievance:

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

Consequently, this dispute is arbitrable. The Employer's challenges do not overcome the presumption of arbitrability.

## ISSUE TWO

WHETHER THE EMPLOYER VIOLATED ARTICLE 9 OF THE COLLECTIVE BARGAINING AGREEMENT BY DENYING SHIFT DIFFERENTIAL PAY IN THE AMOUNT OF FIFTY-CENTS PER HOUR (\$.50) TO THE NAMED GRIEVANTS AND ALL SIMILARLY SITUATED OFFICERS WHO COVERED SHIFTS FOR UNAVAILABLE OFFICERS SCHEDULED TO WORK BETWEEN 6:30 P.M. AND 6:30 A.M. AFTER MAY 18, 2008? IF SO, WHAT IS THE APPROPRIATE REMEDY?

### B. The Intent of the Parties Is the Primary Tool for Contract Interpretation.

Although the parties differ on the interpretation and implementation of Article 9, there is no dispute the parties' intent in including a shift differential clause for the first time in their current contract was to incentivize and reward officers working the third shift, 6:30 p.m. to 6:30 a.m., the most undesirable hours of the work day. The scientific reasons supporting shift differential clauses are well-documented in the literature and need not be discussed here. Even though there is agreement on the intent of the clause, the interpretation of "regularly scheduled hours," a key phrase, affecting the implementation of Article 9 is fiercely disputed.

It is possible to ascertain the meaning of the key phrase using standard contract

interpretation rules, standards, and principles borrowed from civil litigation. First, one assumes the parties have used language in the way that reasonable persons ordinarily do. Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating the parties used the words in a different sense, or that the parties intended some special colloquial meaning. Farnsworth, Contracts §7.10, at 467 (3<sup>rd</sup> ed. 1999).

There is no ambiguity in the key phrase. The Employer points to no variant definition or special colloquial meaning that would change the ordinary popularly accepted meaning of the key phrase “regularly scheduled hours.” Regularly scheduled hours are those specified intervals of time which the Employer designates as the work schedule of Patrol Officers. The regularly scheduled hours of third shift run from 6:30 p.m. through 6:30 a.m. That interval would be the ordinary, popularly accepted definition of third shift hours by a reasonable person. No extrinsic evidence, notes, emails, or testimony, demonstrates the parties’ intention that the phrase have another meaning.

In addition, I take arbitral notice of the absence of Patrol Officer timesheets requesting shift differential pay for “special and sporadic” third shift hours for the Safe & Sober, Nite Cap, Walking Patrols, and security at Winona University athletic programs. The absence of requests for shift differential pay for those special programs indicates the parties intended to exclude non-scheduled hours from shift differential pay.

Therefore, the limitation urged by the Employer restricting shift differential pay to Patrol Officers working their own assigned third shift hours is rejected. I find that an ordinary person would construe the key phrase “regularly scheduled hours” in Article 9 eligible for shift differential pay to mean those non-sporadic third shift hours scheduled by the Employer and

assigned to any Patrol Officer.

C. The Employer's Proposed Implementation Is Inconsistent With the Purpose of a Shift Differential Clause.

Limiting shift differential to officers working their own regularly assigned third shift hours ignores the manifest intent of the parties – to reward or incentivize officers working the most undesirable hours of the day. The Employer maintains a minimum staffing level of three officers on the night shift. When an officer is unavailable to work his or her regularly assigned hours, the Employer assigns another officer to cover that shift. The Employer's implementation denies shift differential pay to the substitute officer. Construing the term "regularly scheduled hours" to mean an officer's own assigned hours is an unnatural interpretation that is wholly inconsistent with the purpose of including a shift differential clause in the first place.

The Employer's narrow interpretation produces an unbalanced and harsh result. An interpretation in tune with the purpose of a provision is to be favored over one that conflicts with it. *RESTATEMENT (SECOND) OF CONTRACTS §202, com. d (1981)*. When the Employer denies shift differential to the substitute officer it realizes a marginal financial benefit since it does not have to pay out already budgeted funds. So, shift differential to substitute officers working third shift is not a windfall as the Employer suggests, but instead provides an unexpected savings to the Employer.

Even though the substitute officer receives premium pay for Call Back third shift hours, the Employer's denial of shift differential for working the most undesirable hours creates a great detriment in resentment and discontent among denied officers. It is unclear why the Employer would want resentful, discontented, and armed officers, already stressed by the disruption in their body clocks, patrolling the streets of Winona when predators are the most active.

Specifically illustrative are the facts of Officer Quimby's case. He is an officer regularly assigned to third shift. No other officers from third shift were available to cover their own assigned shifts on May 19, 2008. Officer Quimby was called back on his days off to cover for unavailable officers. The night before, May 18, 2008, he was paid shift differential. The next night, May 19, he was not paid shift differential although doing the same work during the same undesirable hours. Nothing in Article 9 supports the Employer's denial of shift differential to Officer Quimby on May 19, 2008. If the parties had intended to exclude shift differential pay when premium pay was also earned, they should have written that specific language into their contract.

The Grievant class has been unjustly denied the benefit of their bargain by the Employer's unnatural implementation.

D. The Contract as a Whole is Devoid of Language Supporting the Employer's Implementation.

Patrol Officers do not spontaneously show up at 6:30 p.m., the start of third shift, on their own initiative hoping a regularly assigned officer will be unavailable for duty. Prior to the commencement of third shift, the duty sergeant solicits volunteers by seniority to maintain minimum staffing, then the duty sergeant assigns a substitute officer to cover the scheduled third shift hours of the unavailable officer. Those hours then become the substitute officer's assigned scheduled hours.

Reading the contract as a whole, no language supports the Employer's contention that shift differential should be denied the substitute officer scheduled to work for an unavailable officer. The hours of the officers are interchangeable. No officer is more unique than the other. They are all working assigned hours.

Article 11 – Hours of Work

Section 11.1

The normal work year for Patrol Officers during the term of this Agreement shall be the number of scheduled six on three off, 8.5 hour work shifts in a calendar year. The normal work year shall be accounted for by each employee through:

hours worked on assigned shifts...

Assigned third shift hours are those hours already scheduled no matter who works them.

VII. AWARD

After study of the testimony and other evidence produced at the hearing and of the arguments of the parties in post hearing written briefs on that evidence in support of their respective positions and on the basis of the above discussion, summary of the testimony, analysis and conclusions, I make the following award:

1. Article 9 does not exclude shift differential pay for Patrol Officers covering third shift hours for unavailable Patrol Officers regularly assigned to third shift.
2. Within thirty (30) days of the issuance of this Decision and Award, the Employer shall reimburse the named Grievants and all similarly situated Patrol Officers for third shift hours they worked but were not compensated for since May 18, 2008.

Respectfully,

Dated: 12/30/09

/s/  
Bernice L. Fields, Arbitrator