BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF SUPERIOR

and

SUPERIOR CITY EMPLOYEES UNION
LOCAL NO. 244, AFSCME, AFL-CIO

Case 149
No. 54477
MA-9696

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin 54880, on behalf of the Union.

Ms. Mary Lou Andersen, Human Resources Director, City of Superior, 1407 Hammond Avenue, Room 200, Superior, Wisconsin 54880, on behalf of the City.

ARBITRATION AWARD

On September 25, 1996, Superior City Employees Union Local No. 244, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission requesting the Commission to appoint a Commissioner or a member of its staff to serve as the sole arbitrator to hear and decide two grievances pending between the parties. The matter was subsequently assigned to the undersigned who conducted an evidentiary hearing on June 4, 1997, in Superior, Wisconsin. Briefs have been filed and exchanged.

ISSUE

The parties have agreed that the statement of the issue is:

> Did the Employer violate the terms of the Collective Bargaining Agreement and Past Practice by assigning part-time employees work and thereby depriving senior employees of the opportunity to work overtime?
>
> And, if so, the appropriate remedy is to make the Grievants whole for any and all lost benefits and wages due to this action.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 17

WORK DAY AND WORK WEEK

It is hereby declared to be the policy of the City of Superior to provide hourly rated employees of the Public Works Department, Park and Recreation Department and Equipment Depot forty (40) hours of work each week for fifty-two (52) weeks each year and the City does hereby pledge and promise to do all that is within its power to carry out this policy.

17.01 For all hourly paid employees of the Public Works Department, Equipment Depot and Park and Recreation Department, forty (40) hours shall constitute a normal work week consisting of five (5) eight (8) hour days, Monday through Friday, from 7:00 A.M. to 11:00 A.M. and from 11:30 A.M. to 3:30 P.M., with the following exceptions listed below:

A) Back Shop: 3:30 P.M. to 7:30 P.M.; 8:00 P.M. to 12:00 Midnight; 11:30 P.M. to 3:30 A.M.; 4:00 A.M. to 8:00 A.M.

B) Street Department: 11:30 P.M. to 3:30 A.M. and 4:00 A.M. to 8:00 A.M., November 15 through April 15. This shift shall be limited to no more than (5) employees.

Park and Recreation:

Ball Field: Seasonal and temporary maintenance crew shall be excluded from normal workweek and workday.

Outdoor Municipal Rinks: No shift will end later than 10:30 P.M.

F) Summer hours may be implemented upon mutual agreement between the City and the Union.

G) Alternative Work Schedules: The Department Head and the Union may mutually agree to a pattern of work that deviates from the normal scheduling and overtime practices outlined in this Agreement. The Employer shall retain documentation of the agreement. Either the Employer or the employee may revoke such election by giving written notice to the other party at least five (5) work days prior to the effective dates of revocation.

Employees shall have the opportunity to review an alternative schedule or schedules, prior to volunteering for flexible work hours. Alternative work schedules may include shifts that are less than eight (8) hours or more than eight (8) hours per day.

ARTICLE 18
OVERTIME

It is hereby declared to be the policy of the parties and fully understood and agreed that in the interest of the taxpayer, who must be considered a party to this Agreement, overtime shall be kept to an absolute minimum.

18.01 For all work performed outside the regularly scheduled work day and work week, as defined under the Work Day and Work Week Article, shall be paid for at the rate of one and one-half (1-1/2) times the regular rate of pay.

18.04 All overtime work must be approved by the head of the department and subject to approval by the Mayor and respective committees of the City Council.

18.05 Should it be necessary to require overtime that working day, employees on duty when the decision to work said overtime is made shall be entitled to work said overtime regardless of seniority. In the event that overtime is to be scheduled, employees will be called to work such overtime work according to seniority rights, provided such employees are qualified to perform the work scheduled. Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file grievance to receive pay for the number of hours worked by a junior employee. Said grievance shall be filed before the end of the next working day. An employee who does not answer a telephone call or who answers by a telephone answering machine may be considered unavailable for overtime. The other provisions of this Section notwithstanding, any employee who has worked sixteen (16) continuous hours shall not work or receive pay for the next eight (8) consecutive hours.

BACKGROUND AND FACTS

The City of Superior (City) and the Superior City Employees Union Local No. 244, AFSCME, AFL-CIO (Union) have been signatories to a series of collective bargaining agreements, the relevant terms of which have been set out above. This dispute involves the interpretation of the agreement relative to scheduling work and overtime.

The City employs seasonal workers in its Public Works Department. Some are assigned to the Sign Shop Division and others are assigned to the Parks and Recreation Division. The City sponsors two summer events referred to as a "K-5" race, which in 1996 was held on June 14th and

"Hoe Down Days," which in 1996 started on July 12th. On or about June 13th, the Sign Shop supervisor directed that two of the four temporary Sign Shop employees work from 1:00 p.m. to 9:00 p.m. on the 14th. The other two temporary employees worked the regular hours of 7:00 a.m. to 3:00 p.m. The two regular Sign Shop employees worked from 7:00 a.m. to 9:00 p.m. and received eight hours straight time pay and six hours of pay at overtime rates.

On June 18, 1996, the Union filed a grievance alleging that "part time workers started at 1:00 p.m. to 9:00 p.m. to prevent senior men from working overtime," in violation of Article 18.05 of the collective bargaining agreement. The grievance was denied.

Later that summer, the management of the Public Works Department directed a temporary employee in the Parks and Recreation Division to work from 1:00 p.m. to 9:00 p.m. on July 12th, which was also the beginning of Hoe Down Days. On July 16th, James Barthen filed a grievance stating that "part time workers started approximately 11:00 a.m. - quit at 9:00 p.m., preventing senior men from working overtime" in violation of Article 18.05 of the collective bargaining agreement. This grievance was denied in the same action as the grievance dated June 16, 1996.

POSITIONS OF THE PARTIES

The Union's Position

The Union takes the position that in both instances, the Employer violated not only the language of the contract, but long-standing past practice when it had the temporary employees start an eight hour shift near midday. The Union asserts that in each case, the need for work to be performed outside the regularly scheduled workday was known in advance by the Employer. The work, therefore, should have been scheduled overtime and should have been posted.

Further, the Union contends that before these occurrences, all such foreseeable overtime opportunities were posted.

The Employer's Position

The Employer argues that these cases don't even raise seniority rights because "employees working in one division do not have seniority rights for daily bumping rights over employees in another division," and "that the work accomplished during the regular work week is done by employees in that division."

Relative to posting scheduled overtime, the Employer argues that the only overtime that has ever been posted has been for hours on Saturdays, Sundays and holidays. The Employer points to the Union exhibits in support of that proposition: Union Exhibit No. 1 is an overtime posting for a Saturday morning and Union Exhibit No. 2 is an overtime posting for July 4th. The Employer further argues that another long-standing exception to a literal application of Article 18 is the

scheduling of the temporary seasonal employees; those in the Sign Shop Division have routinely started at 5:00 a.m. to sign streets and the seasonal employees in the Parks and Recreation Division have routinely been shifted early or late depending on the weather.

In addition to the past practice arguments in support of its position, the Employer asserts that several sections of the contract buttress its proposition that there is flexibility expected in scheduling the seasonal workers.

DISCUSSION

One of the matters that the parties agree upon is that this grievance is governed by past practice. It is clear that the parties have developed practices which vary from the terms of the contract. As an example, no claim for overtime pay is made for the seasonal workers who worked outside the regular schedule of hours as defined in Article 17 on these dates, possibly for the reason that the Union agrees with the Employer position that seasonal workers have always worked hours outside the normal schedule without overtime compensation. There seems to be no dispute relative to this past practice.

Thus, no argument has been made here that in general the Employer should be prohibited from working the seasonal employees outside the regular work hours on days other than Saturdays, Sundays and holidays without first offering those hours as posted overtime hours to the rest of the unit. Rather, what is argued here is that the Employer should have posted the non regular hours on the day of the K-5 Race and on the Hoe Down Days because the need for those hours was foreseeable and non normal hours for special events have always been posted.

While the contract is clear that hours worked outside of 7:00 a.m. to 3:30 p.m. will be compensated at time and one-half (which is not in issue in this case), the contract is much less clear regarding the Employer's duty to post overtime hours. The contract provides only that "In the event overtime is to be scheduled employees will be called to work such overtime work according to seniority rights, provided such employees are qualified to perform the work scheduled."

Relative to what constitutes overtime that "is to be scheduled," the Union asserts through testimony that prior to June 13, predictable hours of work for special events outside of the normal schedule that could be predicted were always posted. The Employer asserts through testimony and exhibits, including Union Exhibit No. 1 and Union Exhibit No. 2, that the only overtime ever posted is that which has occurred on Saturdays, Sundays and holidays. While the proof is not sufficient to find that there is an established past practice that overtime has been posted only for Saturdays, Sundays and holidays such that it has become virtually a term of the contract, the evidence in this record would tend to support the Employer's position. On this issue, it would be the Employer's burden and I would expect to see a more complete record including the outcome of any grievances for failure to post overtime during the week. However, a finding on this question is not necessary to resolve this dispute since there is no evidence that any overtime hours had previously been posted for the K-5 Race or the Hoe Down Days, and other evidence of past practice resolves these disputes.

The next item on which there has been evidence of past practice relates to the scheduling of hours of the seasonal employees in the Parks and Recreation Division. The Employer submitted evidence by testimony and exhibit to show that the hours of the seasonal employees in the Parks and

Recreation Division have been routinely moved early or late in the day, typically necessitated by weather, without thereby incurring overtime liability either for payment to the seasonal employees or necessitating posting. That practice has some support in Article 17, Section 17.01(C). This stated past practice was not contested by the Union. Furthermore, John Shepard testified that the work on July 12th was scheduled later because of wet conditions and that the work done that day by the seasonal employee was the same work that the employees would normally perform. I find that there has been a past practice which has become a term of the agreement relative to adjusting the daily start and end times of seasonal employees in the Parks and Recreation Division and that the assignment of July 12th was consistent with that practice.

The Employer asserts that there is a similarly established past practice relative to the scheduling of hours of the seasonal employees in the Sign Shop Division. I am satisfied that the Employer has proven that there is an established past practice relative to starting those employees early - i.e., before 7:00 a.m. - with end times moved up accordingly, typically to paint traffic markings, again without incurring overtime liability for hours worked outside of the normal 7:00 a.m. to 3:30 p.m. schedule and without that practice being contested by the Union.

Regarding starting Sign Shop seasonal workers later in the day, the testimony of Commi Koneczeno is noteworthy. She testified that on or about June 13, 1996, Chuck Miller and Keith Zovin came to her office and asked whether the Employer had the right to change the hours of temporary Sign Shop employees and that she responded by stating, "If we have the right to start them earlier, we would have the right to start them later." She thought that they left in agreement. Chuck Miller testified that he remembers meeting with Connie and believes he doubted the Employer's authority. Kieth Zovin testified that he does not recall the meeting. The fact that Miller and Zovin inquired, together with Ms. Koneczeno's response, persuades me that the hours of the Sign Shop seasonal workers had not previously been shifted to later in the day. The question then becomes whether shifting the hours of the two seasonal employees later in the day on June 14th was a proper continuation of an established past practice of flexibly scheduling seasonal employees, or rather whether the non regular hours should have been posted as overtime. Another way to ask the question is whether the Employer should be prohibited from flexibly scheduling seasonal employees on weekdays that might be deemed "special events" without first offering the hours as overtime hours to the unit at large?

Ultimately the grievance regarding the flexing of the hours of the Sign Shop seasonal employees calls into question the reasonableness of the Employer's use of the flexing practice. Several observations are in order. First, the work done by the Sign Shop seasonal employees, while not the exact same work they might normally perform, was work within the responsibilities of the Sign Shop Division. More importantly, the full-time employees within the Division each received six hours of work at overtime rates for working the same non normal hours as the seasonal employees. Two other Sign Shop seasonal employees worked only the normal hours. Therefore it cannot be said that the only reason for flexing the two seasonal employees was to avoid the payment of overtime to regular employees, because two seasonals were not flexed when the two regular employees received overtime.

Therefore, I find that, while the Employer's flexing of the hours of two seasonal workers on June 14th was a small expansion of an established past practice of working seasonal employees outside of the normal schedule of hours without either paying them overtime or posting the hours,

that it was not an unreasonable expansion of that practice.

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

AWARD

The Employer did not violate the contract and past practice by assigning part-time employees work on June 14, 1996.

The Employer did not violate the contract and past practice by assigning a part-time employee work on July 12, 1996.

The grievances are denied and dismissed.

Dated at Madison, Wisconsin this 18th day of February, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

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