BEFORE THE ARBITRATOR

In the Matter of an Arbitration of a Dispute Between

LOCAL 60, AFSCME, AFL-CIO

and

CITY OF MADISON

Case 199
No. 55850
MA-10108

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 944, Waukesha, Wisconsin 53187-0944, appearing on behalf of the Union.

Mr. Michael G. Deiters, Labor Relations Manager, City of Madison, City-County Building, Room 502, 210 Martin Luther King, Jr. Boulevard., Madison, Wisconsin 53710, appearing on behalf of the City.

ARBITRATION AWARD

The Union and City named above are parties to a 1996-97 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned arbitrator to hear and resolve a dispute involving working during inclement weather. A hearing was held on April 9, 1998 in Madison, Wisconsin, at which time the parties presented their evidence and arguments. The parties completed filing briefs by June 29, 1998.

ISSUE

The parties ask:

Did the City violate the labor agreement when it refused to provide an alternate work site for Richard Belz, Julia Lamp and James Johnson on January 16 and 17, 1997? If so, what is the appropriate remedy?

BACKGROUND

On January 16 and 17, 1997, the temperatures in Madison dipped into the sub-zero range, going down to minus 11 at one point on the 17th, and the winds were between six and 23 miles per hour, reaching the higher speeds consistently on the 16th and creating severe wind chill temperatures of many degrees below zero, up to minus 35 or 40.

On March 11, 1991, Mayor Paul Soglin signed an administrative procedure memorandum No. 2-44 (called APM 2-44 here) regarding inclement weather, following a major snow storm that created some havoc in the City, with some employees staying home and some coming to work. The memorandum states:

> The City of Madison will not close its facilities because of inclement weather. As a result, employees are expected to report to work on bad weather days.
>
> If, in some unforeseen circumstance, a particular work location cannot be accessed, employees will be assigned an alternate worksite. Department/division heads are responsible for designating an alternative worksite.
>
> If an employee cannot report to work at his/her assigned start time, that employee will be given the following alternatives:
>
> 1) Charge accrued vacation or compensatory time.
> 2) Make up the time lost, with permission of the Department or division head. All time must be made up within five working days or the end of the pay period, whichever is longer. Department and division heads are responsible for ensuring that the time is made up without incurring overtime. If the time cannot be made up without incurring overtime, this option will not be made available to employees.
> 3) Charge the time lost as absence without penalty.
>
> There will be no deviation from this Administrative Procedure Memorandum.

The Grievants are water meter readers with the City's water utility. They use their own cars to work on their routes and are reimbursed for mileage plus a monthly stipend for the use of their cars. When this grievance arose in early 1997, the meter readers were using hand-held electronic instruments to read the meters. The three of them – Julia Lamp, James Johnson and Richard Belz – read all of the meters in the City, both residential and business areas.

All three of them reported for work at the main office at 523 East Main Street on January 16, 1997, between 7:30 and 7:45 a.m. They asked their lead worker, Edward Green, if there was any work inside in the office for them to do, due to the severe cold. Kenneth Key, the Customer Service Supervisor, told Green that morning that if anyone did not want to work outside that day, he or she could take paid or unpaid time off, using vacation leave or compensatory time.

Green told the meter readers that there was nothing available indoors for them to do. This was the first time that anyone asked Green for an alternative work assignment during his eight years as a lead worker before he retired in January of 1998. He did not have the authority to grant time off or vacation time without Key's approval.

Lamp left the office on January 16th shortly after 8:00 a.m. and went to the area of Diamond and Jade where she had to finish reading a couple of meters from the day before. Then she went to her route on Meadowlark and read 42 meters between 10:00 a.m. and noon that day. She came back to her car to warm up during her route and felt that her productivity would be low for the time spent. On January 17th, Lamp worked a little longer and read 111 meters. The City did not complain about the lack of productivity during these days, although there have been concerns in the past about productivity, according to Lamp.

Lamp worked for four and one-half hours on January 16th and five and one-half on the 17th. She took three and one-quarter hours of vacation on the 16th and two and one-quarter hours vacation on the 17th. She tried to work but felt too uncomfortable, with her skin stinging from the cold. She was in pain, afraid that she would get frostbite or hypothermia, and could not stand the cold, so she took parts of the days as vacation.

James Johnson had scheduled January 17th as a vacation day before the cold weather problem arose. He worked a full day on January 16th, and does not seek any compensation as part of this grievance. He recalled that Green told the meter readers on the 16th that there was nothing available for them to do inside, that they were to go out and work as long as they could stand it, and when they could not stand the cold anymore, they should come in and use vacation time to cover the balance of the day. Johnson had worked in colder weather before, and he felt that being able to withstand inclement weather was a prerequisite of the job. He left his car running most of the day to help keep him warmer and tried to come back to the car more often than he would have on his normal route. Johnson was concerned about his car in such weather, and it eventually quit running.

Johnson recalled working on January 20, 1994, when the temperature dipped to minus 27 and the wind chill was even worse – "80 below" – something he would never forget. He did not ask for an alternative work site that day.

Belz worked four and a half hours on January 16, 1997 and took three and one-quarter hours vacation, and took a full vacation day on January 17, 1997.

Employees fill out position descriptions which include physical requirements for their jobs. Lamp wrote on her description, "Endurance for extremes of weather for sustained periods of time to ensure a large number of meters will be read for complete billing cycle." Belz wrote: "Ability to work under adverse weather conditions for extended periods and sustain a pace sufficient for reading an acceptable number of meters per day." Johnson wrote: "General good

health, strong legs and feet, stamina." Most of the routes require walking a ways from a vehicle, up to six or eight blocks away from the vehicle at a time before returning to move the vehicle to another location.

No one else in the water utility asked for alternative work sites on January 16 and 17, 1997. There are about 125 employees in the water utility, and a majority of them work out in the field. The City offers some winter clothing to meter readers, such as a parka, and insulated coveralls. Employees have the discretion on whether to wear the items provided by the City.

Nickolas Malacara is a maintenance worker for the water utility and is a vice-president executive board member for Local 60, AFSCME. The issue of the water meter readers working in inclement weather first came to his attention in March of 1996. Malacara had a meeting with Key and sent him a letter on March 27, 1996 indicating that he expected Key to submit a proposal to deal with foul weather assignments to the Safety Committee. There were other issues involving the meter readers which are not part of this grievance.

Key sent a memo back on April 3, 1996, stating that it was the policy for many years to let the meter readers use their own judgment as to how much time they should spend outdoors in severe weather conditions.

The Water Utility Manager, David Denig-Chakroff, was involved in trying to resolve the present grievance. The issue was taken to the Safety Committee, which recommended that situations like this should be worked out on a case-by-case basis between an employee and his or her immediate supervisor. That recommendation is the same policy as was in effect when this incident arose.

Other City employees, such as parking meter readers, have the option to ask for some relief from inclement weather. Sergeant Susan Pirocanac, in charge of parking monitors for the Police Department, testified that the practice in the Department was that when employees could not walk around to check parking meters, they have been allowed to stay inside and do other work. On the day of the hearing, it was raining off and on and the temperatures were in the 40's, with gusting winds making the day feel much colder. And on that day, a parking monitor named David Lopez asked if he could use a Jeep instead of walking a route. Pirocanac said that it was standard procedure to switch to riding instead of walking when there was ongoing rain. During her four years as a supervisor, employees have always been given alternative work in bad weather.

However, the employees who collect money from the meters do not appear to get any relief from working in bad weather. Karen Stults is the parking revenue supervisor for the Madison Parking Utility, and she supervises about 35 employees who collect money from meters on the street and the cashiers who collect money in the ramps. The employees collecting money from meters on the streets use a van and a collection cart. No one has asked her for an alternative work site during bad weather. Stults testified that it is part of the job to collect the money, no matter how bad the weather is.

THE PARTIES' POSITIONS

The Union

The Union states that on January 16, 1997, the three Grievants approached their lead supervisor, Green, and asked that they be given alternate work sites due to the inclement weather. While Green's recollection of this event is not clear, the Grievants' recollection is uniform and consistent. They recalled that there were told by Green that they should go out and work as long as they could stand it, and when they couldn't stand it anymore, they should come in and just use vacation time to cover the balance of the day. While the City has denied that the request for an alternate work site was made by employees, it had not raised this matter as a factor through the third step of the grievance process.

The Union points to Section 16.03 of the labor agreement as well as an administrative policy regarding inclement weather for employees that states: "If, in some unforeseen circumstance, a particular work location cannot be accessed, employees will be assigned an alternate worksite."

In March of 1996, Union steward Malacara met with Key to discuss issues relevant to the meter reads at the Utility. Key clarified his understanding of the procedure for meter readers working in inclement weather, and indicated in his April 3, 1996 memo that the policy has been to let them use their own good judgment as to how much time, if any, should be spent outdoors.

The Union asserts that there is no evidence whatsoever that the employees who requested an alternate work site abused their discretion in this area even minimally. The Grievants were all reading meters in residential areas with their own vehicles. The temperature on January 16th was in the low single digits with a wind chill of 40 degrees below zero. It was even colder on January 17th, though the wind was not as much of a factor.

The Union notes that on the day of the hearing in this matter, the temperature in Madison was in the 40's with a slight rain. Pirocanac testified that an employee had requested and been given an alternate work site on that day, and that in the four years or more that she has been in charge of parking monitors, she has never denied an employee's request for an alternate work site.

The Union states that with the exception of the instant matter, the City and the Local have had no problem working out such matters on a case-by-case basis between employees and their immediate supervisors. Section 16.03 and APM 2-44 have provided some guidance, and the parties have resolved such matters efficiently, with this exception. Key's testimony speaks well of the relationship between the parties over the years on this matter, and he admitted that he has never run into a situation where an employee's request was unreasonable. This is in stark contrast to the City's belief that it would have a riot on its hands if the Union were to prevail in this case.

The Union asserts that the Grievants provided specific rationale to request alternate work sites for the days in question. Their jobs are unique among Water Utility positions, and expose them to more direct and consistent weather elements than other positions. The fact that they do not have access to heated areas on residential meter routes leaves them more at risk during inclement weather. There is no evidence that the Grievants or any other Union members have abused or have any intent to abuse their discretion regarding requests for alternate work sites.

The Union asks that the Grievants be made whole and that the City be ordered to cease and desist from its unreasonable denial of requests for alternate work sites on inclement weather days.

The City

The City argues that the operative words in the policy APM 2-44 are, "If, for some unforeseen circumstances, a particular worksite cannot be accessed . . ." On January 16th, Johnson accessed enough meters to record information on 86 of them. Lamp accessed at least 44 meters. On January 17th, Lamp was the only meter reader working and she accessed enough meters to record information on 111 meters. Since the work sites were accessed, the City asks, how did it violate APM 2-44?

The Union has claimed that the City failed to honor requests from the meter readers for alternate work sites, but no meter reader ever made a request of Key for an alternative work site on the days in question. Green did not recall whether they made such a request and he did not have the authority to grant it anyway. If someone asked him, he would have gone to Key, but Key testified that no one approached him about an alternate work site. The City questions Lamp's credibility in other respects, such as her recall about the type of recording instrument being used and the time of her first meter reading.

The City argues that the Union's request to make Lamp and Belz whole for the time that they used as vacation on January 16th and 17th is unjustified. Johnson worked the entire day. Lamp and Belz would end up being paid double time for the time that they were on vacation. And what is the City to pay Johnson for working all day? What should it pay all other personnel who worked outside on those days? This is the situation that occurred in 1991 that caused the APM in question to be created. The Union's position places the City in jeopardy of establishing a practice of letting individual employees select under what conditions they will or will not work, in conflict with its management rights under the labor contract. If the Union were to prevail here, employees would have the discretion to decide whether or not it was too cold, too hot, too wet, too loud, too sunny, or too windy to do their jobs.

The APM does not give employees discretion to determine if it is safe to work on any particular day. It states that employees are expected to report to work on bad weather days, and the policy does not state what will or will not transpire once an employee reports for work. It only explains what happens if an employee cannot access her or his regular work site.

The City notes that the Union has questioned the consistent implementation of APM 2-44. Stults testified that no one ever asked for an alternative work site and people collect meter money, no matter what the weather. Pirocanac testified that a walker had volunteered to answer phones in the Traffic Bureau, and a Union steward said that was not appropriate work for a parking monitor.

The City states that the overwhelming evidence shows that the work sites were accessed and the City did not violate APM 2-44 or the contract. Lamp and Belz were granted vacation time off at their request, and there is no need to repay them for this time.

In replying to the Union's brief, the City states that the Union has failed to demonstrate that APM 2-44 gives employees the discretion to determine if it is safe to work on any particular day. Also, Belz asked for a vacation day on January 17th to prepare for a vacation starting the weekend, and it would be preposterous to reimburse him for the time he took to prepare for a vacation trip.

DISCUSSION

The parties agree that the policy called APM 2-44 is an important part of this case in determining what rights employees have in inclement weather. The policy refers to accessing a particular work location. It seems only common sense that the policy was probably written with the majority of employees in mind, those who could not reach their offices or park due to heavy snow, etc. One can say that the Grievants' work location is the headquarters – the Main Street address where they report for work – or it is their routes where they go to read the meters, where they actually perform their jobs. Or one could say that it is both locations, both the headquarters as well as the routes. It makes no difference to the outcome in this case, because the Grievants were able to physically get to (or access, as they say here) their headquarters and their routes.

Not surprisingly, since it was a snow storm that resulted in the policy in the first place, the policy is concerned with whether or not employees can get to their work sites. APM 2-44 does not address what happens after they get there. Accordingly, any claim that employees should be reimbursed under the policy APM 2-44 does not apply. The policy clearly states that employees will be assigned alternate work sites if their work locations cannot be accessed, and since the grievants could access their work locations, the policy does not give them the right to alternate work sites.

The question is, then, whether there is an existing employee benefit to an alternate work site under Section 16.03 of the contract. The collective bargaining agreement provides in Section 16.03 the following:

> The Employer intends to continue other authorized existing employee benefits not specifically referred to or modified in this Agreement. It is agreed by the Union that bad or unreasonable habits that may develop among employees do not constitute "past practice" rights or employee benefits. The existing employee

benefits referred to in this section are those that are mandatory subjects of bargaining primarily related to wages, hours and other conditions of employment.

The first question is whether the claimed benefit in this case (the right to an alternative work site) is a mandatory subject of bargaining primarily related to wages, hours and other conditions of employment. It certainly seems that the working in inclement weather falls within the phrase "other conditions of employment." The City states in APM 2-44 that employees are expected to report to work on bad weather days. This is a condition of employment for the meter readers, as Johnson noted in his testimony. The job descriptions also show that working in adverse conditions is a condition of employment for their job of meter reader. Thus, it meets the first test of being a mandatory subject of bargaining related to other conditions of employment.

The next question is whether there is an existing employee benefit under Section 16.03. In this case, the question is whether there is an existing benefit of being given an alternate work site when requested due to inclement weather conditions. To find an existing benefit, the past practice of the City would be helpful – but for the fact that the past practice is so mixed that one cannot say there is an existing benefit of being given an alternate work site during inclement weather. In some cases, arrangements have been made, such as allowing employees who walk to ride to perform their jobs. That happened on the day of the hearing, when the weather was rainy and cold but well above zero, and a parking monitor was allowed to use a Jeep instead of walk his route. However, other employees have to continue to go out in the bad weather, such as employees who collect money from meters.

Without a clear past practice, there is no existing employee benefit of being given an alternate work site when requested due to inclement weather conditions. It is always admirable when an employer is able to arrange for better and safer working conditions, and it improves employee-employer relationships when these matters are resolved to their mutual satisfaction. It would behoove the parties to continue to try to work out the problems caused by the extreme weather conditions in Wisconsin. However, there is no contract violation and the grievance will be denied and dismissed.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 5th day of August, 1998.

Karen J. Mawhinney, Arbitrator

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