BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUPUN CITY EMPLOYEES UNION,
LOCAL 1112, AFSCME, AFL-CIO**

and

CITY OF WAUPUN

Case 57
No. 56608
MA-10349

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street #205, Fond du Lac, Wisconsin 54937, appearing on behalf of Waupun City Employees Union, Local 1112, AFSCME, AFL-CIO, referred to below as the Union.

Mr. James R. Korom, von Briesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of City of Waupun, referred to below as the Employer or as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of four Communication Operators. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 1, 1998, in Waupun, Wisconsin. The hearing was not transcribed. The parties entered their positions at the hearing, and chose not to file written briefs.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The City, contrary to the Union, asserts that the record poses the following threshold issue:

Is the grievance timely?

The parties stipulated the issues posed by the grievance on its merits:

Did the Employer violate the collective bargaining agreement when it changed the shift selections for the Communication Operators in June of 1998, assigning Kim St. George to the day shift and requiring the remaining Communication Operators to select shifts different from those they selected by seniority for the calendar year 1998?

If so, what is the appropriate remedy? 1/

1/ The parties stipulated that if I found a violation of the labor agreement, then the remedy would be to restore the status quo regarding calendar year 1998 shift selection.

RELEVANT CONTRACT PROVISIONS

ARTICLE III
FUNCTIONS OF MANAGEMENT

3.01 Except as hereinafter provided, the management of the work and the direction of the working forces, including, but not limited to, the right to hire, assign work and duties, transfer and promote . . . and the rights to determine the Table of Organization, the number of employees to be assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction are vested exclusively in the Employer. . . .

ARTICLE X
SENIORITY

10.01 It shall be the policy of the Employer to recognize seniority. There shall be separate seniority classification lists for . . . Part-Time Communication Operators, and Full-Time Communication Operators, for the purpose of this article and Article XIII. Seniority shall be by these classifications, and shall consist of the total calendar time elapsed since the date of original employment . . . On a yearly basis, by classification seniority, starting with the senior employee first, Communication Operators shall be

allowed to bump up or down as it relates to changes in shift assignment within their classifications, (i.e., part-time employees may bump other part-time employees, but not the full-time employees). . . .

10.04 Recall . . .

10.05 Seniority Rights – Seniority shall be broken for the following reasons:

(a) If the employee quits.
(b) If the employee is discharged.
(c) If the employee is laid off for a period of more than two (2) years.
(d) If a laid off employee fails to report for work within ten (10) working days after receiving a notice from the Employer by registered mail to return to work. . . .

10.07 Whenever the City decides to employ additional workers either in vacancies or in new positions, the employer shall first fill the vacancy or new position in accordance with Article XIII, Job Posting and Transfers. The remaining vacancies shall be filled by laid off employees in accordance with Article 10.04. . . .

10.09 If a part-time communication operator bids to a full-time position, the communication operator's part-time seniority will transfer as follows: Total all the hours of part-time employment from date of hire and divide by 162.5 hours to determine the equivalent number of full-time months. The part-time communication operator will then be allowed to carry those equivalent full-time months to the full-time seniority list for communication operators. . . .

ARTICLE XII
GRIEVANCE PROCEDURE

12.01 The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Should a grievance arise whether in reference to a question of interpretation of the Agreement or to a question relating to safety and/or other matters, the grieving employee shall first bring the complaint to the steward or Grievance Committee of the Union. If it is determined after investigation by the Union that a grievance does exist, it shall be processed in the manner described below, provided that any grievance must be submitted to a representative of the employer, within twenty (20) working days of the date the grievant knew, or should have known of the event causing the grievance . . .

12.05 . . . The Arbitrator's jurisdiction shall be limited to disputes over the interpretation or application of specific provisions of the Collective Bargaining Agreement. . . .

ARTICLE XIII
JOB POSTING AND TRANSFERS

13.01 A vacancy shall be defined as a job opening not previously existing or a job created by the termination of employment, promotion or transfer of existing personnel, when the need for such job continues to exist.

13.02 All vacancies shall be posted on the bulletin board. . . .

13.03 Employees desiring to apply for such vacancies shall sign the posted notice. Only those applicants who meet the prerequisites for the position shall be considered. The qualified applicant with the longest service record shall be given the first opportunity to qualify for the vacancy. . . .

ARTICLE XV
NORMAL WORKDAY AND WORKEEK OVERTIME
COMMUNICATION OPERATORS

15.01 Work Schedule for the Communication Operators:

a) Workday and Workweek Schedule. The normal workday for communication operators shall be eight (8) consecutive hours. The normal workweek schedule shall be six (6) consecutive duty days followed by three (3) consecutive off days. This cycle shall then be repeated. The standard shift selection shall be by seniority. . . .

15.02 Call In Communication Operators.

(i) If any communication operator on a shift calls in sick, or has scheduled time off, the scheduled off full-time communication operator will be called according to seniority.
(ii) If unable to contact a scheduled off full-time communication operator, then scheduled off part-time communication operators will be called by seniority.
(iii) If neither full-time nor part-time communication operators are available under (i) or (ii), the communication operator scheduled to work the previous or next shift will be asked to work a double shift on a voluntary basis. If that option is not available, the shift will be filled by having the employee on the previous shift work an additional four (4) hours and the employee on the following shift work an additional four (4) hours.

(If no communication operators are available, an officer will be called by seniority from a qualified list of officers). (If these options are not available to fill the shift, the least senior communication operator available shall be called in to fill the shift). . . .

15.05 Work schedules shall be posted for two (2) months in advance. Communication Operators may, upon request, check the work schedules further in advance. If changes in the posted schedules are necessary, Communication Operators shall be notified as far in advance as possible, but in no event less than eight (8) hours in advance except in the case of sickness or emergency. . . .

ARTICLE XVIII
VACATIONS

. . .

18.02 . . . a) Selection of vacation time for the Communication Operators shall be by seniority, (sic) The employees shall commence selecting their vacation preference by seniority on November 1st. Each employee, by seniority, shall have three (3) working days to select his first week of vacation; if the employee does not select his first week of vacation within the three (3) working day period, the employee shall go to the bottom of the seniority list for selection of is (sic) first week of vacation. Selection of additional weeks of vacation shall commence after the least senior employee has had an opportunity to select his first week of vacation. Selection of the second, third and fourth weeks of vacation shall proceed in the same manner as for the first week of vacation. . . .

ARTICLE XXX
LEGAL AGREEMENT

30.01 If any Article or part of this Agreement shall be held invalid or illegal, the same shall not affect the rest of this Agreement which shall continue in force, and the parties shall immediately meet to negotiate a legal settlement of the clause in question.

BACKGROUND

The City employs six Communication Operators: Darlene Vossekuil; Donna Smith; Kim St. George; Mary Beth Cook; Ellen Redecker and Marge Raube. The seniority list for this classification states:

Full-time

Vossekuil	5/15/86
Smith	5/15/86
St. George	6/20/95
Cook	2/24/97

Part-time

Redeker	5/19/85
Raube	2/22/89

On June 25, 1998, the Union filed the grievance as a "Group grievance" listing Vossekuil, Cook, Redecker and Raube as the affected employes. The grievance form states the "applicable violation" thus:

> Employer is in violation of Article X, Seniority and Article XIII, Job Posting and Transfers by displacing employees to accommodate an Americans with Disabilities Act request and creating a new position and filling it w/o following proper posting procedure.

The City denied the grievance, asserting it was untimely and had no merit.

The Requested Accommodation

St. George filed a formal request for an accommodation under the Americans With Disabilities Act (ADA) in a letter dated February 6, 1998. Her letter states:

> . . . I was diagnosed with Multiple Sclerosis in October of 1996. What I am about to request of you is the halt of my premature increase of this disease by accommodating a shift change. I will try to explain to you the reason the symptoms of this disability can be slowed down by changing from the 3rd shift to the 1st shift. First of all, this disease is excellerated (sic) when the quality and quantity of rest is interuppted (sic). The fatigue and stress is also increased. As anyone knows who has worked a 2nd or 3rd shift would understand, sleep is never a full and sound sleep. This causes increased fatigue and excellerates (sic) the disease. What I mean by this is that this disease deals with numbness, fatigue and weakness, especially when the amount of rest is considerably less. The attached letters from my physician also explains (sic) that the best care for my disability would be working on the 1st shift. Then the quality and quantity of rest would be sufficient and would slow down the fatigue. Therefore, the symptoms and the fatigue would be decreased and the disease would slow down significantly. My other symptoms, such as numbness and weakness would also decrease. My physician and I feel the shift change would also improve my quality of work to my employer. We also agree that the change in the schedule from 3rd shift to 1st shift is truly needed because of the disability. As a result of working the 3rd shift and the increase of fatigue, my quality of life has decreased emensely (sic). My days off are spent either in bed or resting on the couch. I have no energy because I feel as though I am "catching up" with my sleep. When I get a normal eight hours of sleep, I feel different, rested, and have energy enough to keep up with my home and family. Changing shifts would be a (sic) extremely positive change for my quality of life. . . .

St. George included with this letter two memos from her physician. One of those memos is dated December 12, 1997, and states:

> This to follow up our discussion of today . . . As you know, you have the diagnosis of multiple sclerosis which can cause excessive fatigue among other symptoms. Regular working schedule with adequate sleep and rest are very important in your condition. I feel that it is medically necessary to do so. . . .

The other memo is dated January 7, 1998, and states:

> This is regarding our conversation on January 7, 1998. The primary symptoms (sic) of your multiple sclerosis is (sic) fatigue. In your case, working the first shift only during the daytime would be most appropriate from a medical point of view. This would enable you to sleep and rest well at night when your children are in bed. As we discussed previously, adequate sleep and rest would improve your fatigue symptoms caused by your multiple sclerosis. . . .

St. George testified that the "fatigue symptoms" include tremors and numbness. She noted that she is the single parent of two children, aged twelve and fourteen.

The Response to the Requested Accommodation

St. George's request was brought to Police Chief Thomas Winscher, shortly after she filed it. Winscher independently researched the disease and the ADA. He discussed the matter with the City Council and with all City department heads. He also consulted the City's legal counsel. These contacts resulted in a determination that St. George was covered by the ADA and that the City was obligated to make a reasonable accommodation for her.

On March 9, 1998, the City and the Union met to brainstorm possible accommodations. A number of proposals were considered, including adding an additional full-time or part-time position to the unit, altering shift structure and moving St. George into another City position. No consensus was reached during this meeting on any of the proposed alternatives. Winscher did approach the City Council to determine if it would be willing to create a position. The City Council was unwilling to do so. Winscher concluded, from discussions with the Union, that even if the City created a position, the parties would dispute whether St. George could be placed in it unless she was the successful bidder following the application of the contractual posting provision.

In a letter to St. George dated April 8, 1998, Winscher stated the City's formal response to her accommodation request thus:

> This is in response to your request for a move to the first shift as an accommodation under the ADA. We have developed a program which we hope will resolve this problem.

> First, there are no present vacant positions. We will continue to keep you apprised of any new positions which may be created throughout the City, and encourage you to apply for them as they arise so we will be aware of your interest in the position as well as be able to make a determination of your qualifications for that position. Please consider any training or skill development which will enhance your qualifications for employment in these other City positions.
>
> Second, as a temporary measure, we will grant your request to move to the first shift until a vacant position within your qualifications, and with comparable wages and benefits, becomes available for you. At that time, you will be given a choice between returning to whatever shift your seniority entitles you to fill, or taking the vacant position. First shift will no longer be an option at that time.
>
> Finally, your Union has indicated they believe such a move would be in violation of the collective bargaining agreement, and therefore is not required under the ADA. We intend to delay your move to first shift until July 1, 1998 to allow the City and the Union to get an arbitration ruling on that legal question. . . .

James R. Korom, the City's legal counsel, advised James E. Miller, the Union's representative, of the City's position in a letter dated April 9, which states:

> . . . The City has decided to move Ms. St. George to the first shift, as she requested, at least on a temporary basis.
>
> Without going into too much detail concerning Ms. St. George's medical condition, some of which has been shared with you, we believe there is no serious debate that Ms. St. George's medical condition meets the definition of a disability under the ADA. Further, her physician has determined that continued employment on the third shift is inconsistent with her physical well-being, and that a move to a different shift is necessary to protect her health. This medical opinion appears to be consistent with the most recent medical thinking on this subject.
>
> The City has considered the various alternatives we discussed in our meeting of March 9, 1998. First, we do not consider creating an additional position for Ms. St. George beyond present staffing levels to be a reasonable accommodation. It is very costly, and the ADA clearly does not require creating such a position. Further, after our meeting, the Chief was informed by the Association that the creation of such a new position would require posting and filling by seniority, thus eliminating the value of creating such a position as an accommodation. Finally, such a position is unnecessary to effectively and efficiently accomplish our present dispatch functions.

> For similar reasons, adding a half-time position on the first shift is not a reasonable accommodation either. We presently have adequate staffing; the problem is deciding when members of that staff will be scheduled to work.
>
> We also have examined the availability of vacant positions elsewhere in the City which Ms. St. George would be qualified to fill. None are anticipated in the near future, but we will continue to inform Ms. St. George of all future vacancies in the City. In the interim, however, we must take some action to reasonably accommodate Ms. St. George under the ADA.
>
> The dilemma, of course, is that moving Ms. St. George to a different shift might violate the seniority provisions of the collective bargaining agreement. If we move Ms. St. George, we face a grievance, but if we do not, we face a potential ADA claim, as well as the knowledge that continuing to employ Ms. St. George on the third shift is harmful to her health.
>
> Facing this dilemma, we have decided to do the following. Ms. St. George will be moved to a full-time position on first shift. The Records Clerk will also remain on the first shift. The remaining shifts will then need to be filled. We are open to any method you want to use to fill them. We could move only the displaced first shift employees to Ms. St. George's third shift hours to minimize the number of employees whose schedule is disrupted, use seniority selection of the remaining shifts unless you suggest a different method. We propose using seniority selection of the remaining shifts unless you suggest a different method.
>
> We understand you believe this move could violate the provisions of the collective bargaining agreement, and you may decide to grieve this decision. To avoid unnecessary disruption of employee schedules, the City intends to delay implementation of this schedule change until July 1, 1998. This will allow the parties ample time to agree on an expedited arbitration procedure, and get a decision from an arbitrator before July 1.
>
> Finally, this schedule change is not intended to be permanent. When another position in the City becomes vacant which is within Ms. St. George's qualifications, and has comparable wages and benefits, Ms. St. George will then be given the option of returning to her former shift, or taking the new vacant position. We do not know when such a vacant position may arise. . . .

Miller responded in a letter dated April 21, which states:

> After careful consideration of the issues involved in the accommodation request made by our member, Kim St. George, under the Americans with Disabilities Act (ADA), the Union has decided not to file a grievance or grievances until the City implements changes in the existing schedules of City of Waupun

> Communications Officers that we determine are violations of their contractual seniority rights. We do not believe that the City of Waupun can involuntarily modify these schedules, which are selected by employees using seniority.
>
> The Union did consider your proposal for a "hypothetical" arbitration, and after discussion both locally and with our Madison office, we decided that it was not how we wanted to handle this issue. Prior to making this decision, we had, of course, also hoped that the City would come up with a way to accommodate Ms. St. George without violating the seniority rights of the other employees.
>
> We understand that our decision may lead the City to implement any schedule changes earlier than was originally intended. In the long run, we believe that getting a clear decision as to whether . . . seniority language has been violated will be best for all parties; for the City, the Union and also for Kim St. George.
>
> . . .

Korom responded with a letter dated April 27, which states:

> . . . I wish to clarify that the City is not suggesting a "hypothetical" arbitration at all.
>
> In fact, this situation is quite real. Ms. St. George has a real medical problem. That medical problem is inconsistent with her present job assignment. She has asked for accommodation under the ADA. The city has analyzed other methods to accommodate her medical condition. And finally, the City has determined that the only accommodation available for the foreseeable future is the schedule change outlined in our previous correspondence. Thus, our announcement to you of our decision was not hypothetical at all, but rather puts you on clear notice of the City's final decision on this matter, as well as the effective date of that decision.
>
> In light of your April 21, 1998 letter, we should clarify an additional point. Under Article 12.01 of the collective bargaining agreement, the parties are in agreement that "prompt (emphasis from text) and just settlement of grievances is of mutual interest and concern". The parties then agreed that grievances must be filed within 20 working days of the date the grievant knew or should have know (sic) of the event causing the grievance.
>
> Because our previous correspondence to you announced a final decision concerning this matter, it is our view the contractual time limits for filing a grievance began running when you received that notice. See, e.g., SQUARE D CO., 25 LA 225 (PRASOW, 1955) AND DETROIT RIVERVIEW HOSPITAL, 96 LA 639 (GLENDON, 1991) AT PAGE 642.

> In light of the fact you may have been proceeding on a different assumption, I want to put you on notice that if no grievance is filed within 20 working days of the date you receive this (emphasis from text) letter, the City will take the position in any subsequent proceedings that any later grievance is untimely. If you believe the City's decision concerning this matter violates the contract, let's proceed to arbitration as promptly as possible to avoid any unnecessary inconvenience to your members. . . .

The parties stipulated that Miller did not receive a copy of the April 27 letter and did not distribute it to the local union. The parties also stipulated that early in the month of April, they discussed their conflicting views on the timeliness of filing a grievance concerning the accommodation proposed by the City in the letter of April 9.

John Belsma is a Captain in the City's police force, and handles the scheduling of police department employes. In an e-mail memo to the Communication Operators dated June 5, 1998, he noted that the department would conduct a meeting on June 16 concerning the alteration of schedules to accommodate St. George. At the June 16 meeting, Belsma distributed a memo which reads thus:

> In order to accodate (sic) a (sic) ADA . . . request the following schedule change has been made necessary.
>
> #1=Comm Supervisor
> #2=Kim St. George
> #3=Full time 3-11 shift
> #4=Full time 11-7 shift
> #5=1/2 time 3-11 shift
> #6=1/2 time 11-7 shift
>
> You will need to select a full time or part time shift by seniority according to your current labor agreement. This selection shall start June 5, 1998 and be completed according to your current labor agreement.
>
> The shift to this revised schedule will take place July 15, 1998 effective with the 7-3 shift.
>
> Note# the shifts that are available for selection are #3, #4, #5 and #6. Slots #1 and #2 are assigned shifts.

In an e-mail memo dated June 23, Belsma confirmed shift selections made by unit employes, and added:

. . .

You need to repick your vacations for that time period that would relate to the new schedule. I have put a copy of the other vacation pick sheet with the revised pick sheet. Some of you have already used vacation prior to 7/15.

If you have posted any holidays check the schedule to see if they are still the day/days you need off or if you want to post new picks. . . .

The Union responded by filing the grievance posed here. The scheduling changes noted above can be summarized thus:

SCHEDULES BEFORE ADA CHANGES

SCHEDULE #	SHIFTS	EMPLOYEE	DESCRIPTION
1	Records (assigned)	Smith	Records (Day Shift) and days off for Shift #2
2	Days/Second Shift	Vossekuil	3 Day Shifts and 3 Second Shifts
3	Night Shift	St. George	6 Night Shifts
4	Second Shift/Nights	Cook	3 Second Shifts and 3 Night Shifts
5	Part-Time	Redecker	Scheduled 3 Day Shifts
6	Part-Time	Raube	Scheduled 3 Second Shifts

SCHEDULES AFTER ADA CHANGES

SCHEDULE #	SHIFTS	EMPLOYEE	DESCRIPTION
1	Records (assigned)	Smith	Records (Day Shift) and days off for Shift #2
2	Full-Time Days	St. George	6 Day Shifts
3	Full-Time Second Shift	Vossekuil	6 Second Shifts
4	Full-Time Night Shift	Cook	6 Night Shifts
5	Part-Time Second Shift	Raube	3 Second Shifts
6	Part-Time Third Shift	Redecker	3 Third Shifts

The "pre-change" schedule had been in effect for roughly three years prior to the implementation of the schedule accommodating St. George's request. The City implemented the schedule changes noted above on July 15.

Evidence of Past Practice and Bargaining History

Redecker testified that collective bargaining negotiations were ongoing while the parties discussed St. George's request. She noted that she took the April letters from the City as negotiation positions, and continued to hope the matter could be resolved. She acknowledged that the Union made no proposals regarding accommodating St. George after mid to late April.

Belsma noted that he staffs both Police Officer and Communication Operator schedules. Scheduling practices regarding shift selection have been constant for at least seventeen years. The Communication Operators used to be included in the bargaining unit with Police Officers. The labor agreement governing the grievance is the first which includes Communication Operators in the overall City Hall bargaining unit. Communication Operators moved to a 6/3 Schedule before the Police Officers did. It is undisputed that contract provisions governing Communication Operator work schedules were brought over, without modification, from the labor agreement governing Police Officers.

Belsma testified that he alters Police Officer work schedules to avoid overtime regarding special assignments such as Halloween, Homecoming, or unanticipated major investigations; Field Training Officer or Inservice programs; the work schedule of the School Liaison Officer; investigations requiring the Canine Officer; and to cover vacancies caused by employe turnover. Such alterations have not, according to Belsma, provoked grievances.

Belsma noted that he alters Communication Operator schedules to cover vacancies caused by employe turnover or training programs, including new employe training. He also noted that Vossekuil missed time due to a surgery. He covered this absence by moving part-time employes to full-time schedules. Absences caused by vacations, holidays or sick leave are covered through the call-in procedure noted above. The amount of such call-in may be significant. Redecker estimated that although she is scheduled at 50 percent of a full-time equivalent (FTE) position, her actual hours worked would be 75 percent of a FTE position. She estimated that she would be ordered to fill in a shift roughly 20 percent of the shifts she works outside of her normal schedule.

Further facts will be set forth in the **DISCUSSION** section below.

THE UNION'S POSITION

The Union argues that the grievance poses a fundamental conflict between St. George's individual rights under the ADA and the unit's collectively bargained rights under the labor agreement. The City's conduct reads the rights of Articles X and XIII out of existence, and the ADA cannot be used to void a contract.

That the City permitted unit employes to select shifts after St. George was permitted to move to the first shift establishes no more than that the City has diminished seniority to its bare minimum. A more realistic assessment of the City's conduct is that it has voided the rights of Section 10.01.

Section 12.05 does not permit an arbitrator to use law outside of the labor agreement to resolve a grievance. That St. George may have individual rights outside of the labor agreement cannot, according to the Union, establish that those rights supersede rights granted under the labor agreement. Article XII focuses arbitral review on the labor agreement and those rights cannot be considered in doubt. Even if external law could be considered at issue, the Union argues that judicial (ECKLES V. CONSOLIDATED RAIL CORPORATION ET. AL., 5 AD CASES 1367 (CA 7, 1996)) and arbitral (IN RE STONE CONTAINER CORPORATION, PLANT NO. 77, 101 LA 943 (FELDMAN, 1993); IN RE CLARK COUNTY SHERIFF'S DEPARTMENT, 102 LA 193 (KINDIG, 1994); and IN RE CONTRACTS, METALS AND WELDING, INC., 110 LA 673 (KLEIN)) precedent dictate the conclusion that the ADA cannot be used to void contract terms.

The Union challenges the City's contention that the grievance was not timely filed. That the City announced its intention to move St. George to the day shift falls short of establishing a grievable event. The parties continually attempted to resolve their differences short of litigation, and the City's announced intent did nothing to establish that those attempts would fail. Not until the City advised unit members that they would have to "re-select" shifts, did a grievable event occur, and the Union filed a timely grievance following that event.

The Union concludes by asking that the grievance be found meritorious and that the shift selections preceding St. George's transfer to the day shift be restored.

THE CITY'S POSITION

The City notes that the grievance poses many potentially vexing issues, none of which need to be addressed because the grievance was not timely filed. In letters to the Union dated April 9 and April 27, 1998, the City made it clear that it was going to move St. George to the first shift and the Union would have to file a grievance if it wished to challenge the City's conduct. Even if the Union did not receive the April 27 letter, it was on notice from the April 9 letter that the accommodation was more than a hypothetical exercise. The grievance was not filed until June 25, well beyond the governing timelines of Section 12.01. The City adds that arbitral precedent supports its position.

Noting that its willingness to argue the merits of the grievance cannot be considered a waiver of its position on timeliness, the City contends that the fundamental premise of the grievance must be rejected. That premise is that seniority under the labor agreement is an absolute right which conflicts with the provisions of the ADA.

To the extent the premise acknowledges City compliance with the ADA, the City does not challenge it. The City determined St. George was covered by the act and then methodically determined a series of possible accommodations. None were reasonable except the one ultimately implemented by the City. The City concludes that the reasonableness of the accommodation it implemented cannot be questioned outside of the provisions of the parties' labor agreement.

Because the grievance presumes an irreconcilable conflict between the labor agreement and the ADA, it must be rejected. The cases cited by the Union deal with a conflict between unqualified seniority rights and the ADA. In this case, the labor agreement does not set forth such unqualified seniority rights. That the parties may not have contemplated ADA compliance when drafting Article X cannot obscure that the parties have created scheduling rights which include a necessity exception. City scheduling regarding training, Canine officer duties, school liaison and other unanticipated events establishes that shift selection rights are not inviolate. That Communication Operators had their schedules rearranged to accommodate Vosskeuil's medical leave underscores this point. St. George's shift change is indistinguishable from City actions taken to cover for Vosskeuil. The assertion that St. George's shift change affected more people ignores that the Union would not agree to limit the impact on unit members, choosing instead to spread the impact throughout the unit.

Even if a conflict between the ADA and the labor agreement exists, IN RE CITY OF DEARBORN HEIGHTS, 101 LA 809 (KANNER, 1993) establishes that the presence of a savings clause can permit an arbitrator to deny enforcement of agreement provisions which conflict with external law. The analysis of that case is scholarly, persuasive and on point to the grievance.

The City concludes that the accommodation it has implemented is required by the ADA and not prohibited by the labor agreement. It follows, according to the City, that the grievance must be denied.

DISCUSSION

The threshold issue is whether the grievance, filed on June 25, is timely under Section 12.01. That section requires that, "after investigation by the Union that a grievance does exist," a grievance "must be submitted . . . within twenty (20) working days of the date the grievant knew, or should have known of the event causing the grievance."

The interpretive issue is whether the "event causing the grievance," which the grievant "knew or should have known of," occurred in April or June of 1998. The Employer's arguments are forceful that Union representatives were aware in April that the schedules would be changed. Those arguments carry the added, if unsuitable, allure of precluding a nettlesome journey into the merits of the grievance.

The Employer's arguments are not, however, a persuasive means to apply Section 12.01. That the Union "knew or should have known" that the City would change the schedules is arguable. This argument rests on making the April 9 letter the precipitating event. Making this the "event" causing the grievance focuses the interpretation on a state of mind rather than the actual events implementing the change. As the Employer points out, there is precedent for this conclusion, and Section 12.01 does call for "prompt" settlement of grievances.

Section 12.01 does make a grievant's awareness of the event precipitating the grievance a relevant issue of fact, but this cannot obscure that the timelines turn on "the event causing the grievance." That event was the implementation of schedule changes, which started with the June 16 meeting. Standing alone, this does not undercut the force of the City's argument, but does highlight that focusing on the grievant's state of mind rather than the precipitating events poses troublesome issues of fact which should be taken up only if there is convincing reason to do so.

The evidence does not manifest such convincing reasons. The "knew or should have known" standard of Section 12.01 is difficult to apply to the evidence posed here. The reference to "knew" avoids injustice where a grievant should not be faulted for not being immediately aware of the event precipitating a grievance. The reference to "should have known" enhances the promptness and finality goals of grievance processing by limiting the time beyond which the "actual" event can be grieved. The difficulty with the City's position is that extending these terms to periods of time prior to the precipitating events raises more factual difficulties than it resolves.

The City contends that the April letters announced a final decision. This point can be granted only in hindsight, and the "knowledge" the City wishes to impute to the grievants must turn on the events as they transpired. The April 9 letter announced an implementation date of July 1, 1998. The actual implementation did not occur until July 15. Nor should the factual imprecision this manifests be understated. Collective bargaining was then ongoing. Discussions on the accommodation itself had yet to be broken off. The City's April 9 letter confirmed the City's willingness to discuss at least the method by which open shifts would be filled. Miller's April 21 reply stops short of acknowledging a City violation of the labor agreement. It declines Union participation in a "hypothetical" arbitration, but does note at least a passing reference to its hope "that the City would come up with" an accommodation "without violating the seniority rights of the other employees." At a minimum, this demonstrates the Union wanted to review the actual changes made to schedules prior to advancing a grievance. This cannot be faulted under Section 12.01, which requires "investigation by the Union that a grievance does exist." Beyond this, Redecker testified that she took the City's April 9 letter as a negotiation position. This perception cannot be dismissed as unreasonable. Against this background, it is impossible to characterize as unreasonable the grieving employes' conclusion that events following the issuance of the City's April letters might preclude the proposed schedule changes.

The scheduling of the June 16 meeting confirms this conclusion. Belsma's e-mail memo of June 5 notifies employes that "(t)he revised schedule . . . will be presented to you at that time." If the schedules were a foregone conclusion traceable to the April letters, it is difficult to understand why the notice for the June 16 meeting states their distribution as a point worth mentioning. Beyond this, the June 5 memo seeks questions from employes and notes that the impact of the accommodation on work schedules would be discussed. If the changes were set in stone in April, it is not apparent what there was to question or to discuss. Against this background, the "event causing the grievance" must be seen as the implementation of the proposed changes, which cannot be persuasively dated to any event prior to the June 16 meeting. Prior to that point, the grievants cannot be reliably implied to have known anything more than that the City was serious in proposing shift changes.

In sum, the June 16 meeting, by re-opening the shift selection process, established that the proposed accommodation was to become reality. The grievance was timely filed, within the meaning of Section 12.01, on June 25.

This conclusion poses the merits of the grievance for resolution. The stipulated issue poses an arguably unresolvable dilemma. As argued by the parties, the issue poses two irreconcilable absolutes. The dilemma is that the facts will not support either of the absolute propositions argued by the parties.

The stipulated issue is contractual. This point is significant, since each party acknowledges the issue has statutory ramifications. The contractual focus is appropriate, however, since there is no reason to consider the ADA if the issue can be resolved as a matter of contract.

A number of contract provisions bear on the grievance, but Sections 10.01 and 15.05 ultimately govern it. The grievance cites Article XIII, but there is no persuasive evidence that the accommodation poses a "vacancy" within the meaning of Section 13.01. Rather, the grievance questions the relationship of the seniority rights and shift selection process of Section 10.01 with the scheduling authority of Section 15.05.

Standing alone, the seniority shift selection process of Section 10.01 does not permit the transfer the City made to move St. George to the day shift. Undoing the shift selection process in June of 1998 violated the terms of that section. Section 10.01, does not, however, stand alone. It is apparent, on the face of Section 15.05, that "changes" in "posted schedules" may be made if "necessary." If this was not the case, there would be no reason for the notice requirements of that section. More significantly here, the City's scheduling practices manifest that alterations in shift schedules occur periodically. Belsma's unrebutted testimony establishes that the City alters Communication Operator schedules to permit training of existing staff and to accommodate the training of new staff. Beyond this, it is apparent that schedules are altered to cover for vacancies due to employe turn-over and to employe absence. Most significantly here, the evidence establishes that the City altered employe schedules to cover for Vossekuil's recovery from surgery. How this change was effected is less than clear, but it is apparent that

part-time operators were used to cover for her full-time position. This would appear incompatible with Section 10.01. Thus, at a minimum, it is apparent that the City altered employe schedules to permit Vossekuil to recuperate sufficiently to return to work.

Thus, the City has proven that the seniority rights of Section 10.01 are not absolute. Beyond this, there would appear to be a strong parallel between Vossekuil's recovery from surgery and St. George's request for relief from a physical infirmity.

The difficulty with the position argued by the Employer is that the right it asserts is absolute. Although the Employer argues St. George's transfer is temporary, and that the unit wide impact of that transfer can be minimized as was done in Vossekuil's case, there is no evidence to indicate the duration of St. George's reassignment. The tension is apparent from the April 9 letter which states that the transfer will be implemented "at least on a temporary basis." This characterization would cover a permanent change. That letter also notes the transfer may last until another position becomes vacant, but adds "(No vacancies) are anticipated in the near future."

The unlimited scope of this reassignment poses contractual difficulty. Section 15.05 may permit changes in schedules as "necessary," but there is no evidence that any change has been made on a permanent basis. The lack of specificity in the evidence compounds this dilemma. There is a parallel between Vossekuil's and St. George's situation, but the strength of the analogy is not apparent. The duration of Vossekuil's absence is not clear. Nor is it clear whether the surgery placed her eventual return to work in doubt, or whether the recuperation period was fixed and routine. Against this background, the assertion of Vossekuil's situation as proof of a limitation on the scope of Section 10.01 seniority rights falls short of establishing an unlimited right of the City to suspend Section 10.01 indefinitely.

Beyond this, the unlimited scope of the reassignment right asserted by the City inevitably poses issues under the ADA. The conclusion that the City can alter schedules on a temporary basis to accommodate an employe's medical condition does no harm to the relationship between Section 10.01 and Section 15.05 since that is what was done with Vossekuil. However, the indefinite alteration of seniority based shift selection is unprecedented. If that alteration is indefinite, it reflects that the medical condition prompting it is long-term. This poses an unprecedented situation, beyond the scope of Section 15.05. Reading the term "necessary" in Section 15.05 to permit the suspension of seniority based shift selection for an indefinite period unpersuasively uses one contract provision to nullify another. Whether a medical disability can warrant the suspension of a collectively bargained right inevitably poses issues under the ADA.

The difficulty this poses is that consideration of the ADA pulls me beyond the stipulated issue, which questions a violation of the collective bargaining agreement. As the parties note, arbitral authority is split on the impact external law should have on the interpretation of a labor agreement. In CITY OF MENASHA, (MA-7361, MA-7362 & MA-7363, MCLAUGHLIN AS PANEL CHAIR, 4/97) I addressed the point thus:

> Arbitration can meaningfully be applied to statutory issues. To be meaningful, however, there must be some assurance that the exercise of contractual jurisdiction over a statutory issue can resolve a dispute. That assurance can come from language in a labor agreement requiring the application of statutory law, or from the bargaining parties' stipulation. In the absence of such assurances, an arbitral foray into external law can only add another level to a dispute.

Section 12.05 establishes that the labor agreement does not incorporate external law. The Employer urges that Section 30.01, in light of DEARBORN HEIGHTS, should be read to bring external law into the contract. I am not persuaded that Article XXX, which is entitled "Legal Agreement" (emphasis added) contemplates the action of an arbitrator. The closing reference to a "legal settlement" at the close of the section underscores this. Similarly, the reference in the first portion of the section to a determination that a part of the Agreement is "invalid or illegal" connotes the act of a statutory, not a contractual forum. Beyond this, I believe that Wisconsin precedent indicates statutory issues should be expressly placed before an arbitrator, not left to arbitral inference. See, JOINT SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 WIS2D. 94 (1977). As noted above, the parties' stipulation focuses on the labor agreement, and it is not apparent the parties mutually want an arbitral interpretation of the ADA. Against this background, the grievance must be resolved as a contractual matter.

In sum, even though the parties assert two conflicting and absolute contractual rights, the evidence will not support an unlimited scope to either. Section 15.05, viewed in light of practice, will permit the City to alter schedules to accommodate, for a limited term, the medical infirmity of a unit employe. That section cannot, however, be read to grant the City the ability to read the seniority and shift selection provisions of Section 10.01 out of existence. The Employer's accommodation of St. George violates the labor agreement to the extent it is an indefinite suspension of the operation of Section 10.01.

This conclusion poses and complicates the determination of an appropriate remedy. The Award entered below addresses the complication through a retention of jurisdiction. An indefinite suspension of Section 10.01 calls for the restoration of the pre-change shift selection. The issue becomes at what point the accommodation passes from a short-term adjustment permitted under Section 15.05 into an indefinite reassignment of shifts which violates Section 10.01. The evidence posed here is insufficient to yield an answer to that question. The details of Vossekuil's recovery from surgery and other past examples of short-term adjustments are sketchy, as noted above. The retention of jurisdiction permits the parties to address this ambiguity first as a bargaining point. If that proves unsuccessful, further hearing may be necessary. To the extent the parties want an arbitral determination of ADA based issues, further hearing will be necessary. Such hearing will come, however, only with the express agreement of both parties.

AWARD

The grievance is timely.

The Employer violated the collective bargaining agreement when it changed the shift selections for the Communication Operators in June of 1998, assigning Kim St. George to the day shift and requiring the remaining Communication Operators to select shifts different from those they selected by seniority for the calendar year 1998. This violation, however, presumes that the assignment was for a term so indefinite that it must be considered permanent.

As the remedy appropriate to this violation, the City shall, upon Union request, meet to determine whether the accommodation made for Kim St. George can be effected for a fixed term not violative of Section 10.01. If agreement on this point cannot be reached, further hearing will be conducted to determine the date for the restoration of the status quo regarding calendar year 1998 shift selection. Hearing on the impact of the ADA on the grievance may be conducted if the parties mutually agree to do so.

Because of the uncertainty inherent in this remedy, I will retain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this Arbitration Award.

Dated at Madison, Wisconsin, this 6th day of October, 1998.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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