

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2482, AFSCME, AFL-CIO

and

LA CROSSE COUNTY

Case 168
No. 56890
MA-10447

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Robert B. Taunt, Personnel Director, La Crosse County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1998-99 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear a grievance regarding shift differential pay. A hearing was held on January 12, 1999, in La Crosse, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by March 5, 1999.

ISSUE

The issue is:

Did the County violate Section 21.01 of the collective bargaining agreement by failing to pay shift differential to library employees for shifts commencing after 3:00 p.m.? If so, what is the appropriate remedy?

BACKGROUND

There is no dispute over the facts in this case. The Union seeks to have library employees working certain hours to be paid a shift differential under the terms of Section 21.01 of the labor agreement. The County has never paid a shift differential to library employees, even though the language has been in place for many years and successive contracts.

Marcia Matheson has been the Director of the library for over 16 years. The employees who have shifts starting after 3:00 p.m. are all part-time employees in the various branches of the library. Their shifts have several different hours, such as 3:30 p.m. to 8:00 p.m., 4:30 p.m. to 9:00 p.m., and 5:00 p.m. to 9:00 p.m. There are some shifts that start at 3:15 p.m. or 4:15 p.m. and end at 9:15 p.m. The extra 15 minutes was scheduled because the library closes at 9:00 p.m. but the members of the public are not always out of the building at that time.

Matheson prepares the budget for the library but has never put any amount in the budget for shift differential, since it was never paid out in the past.

In 1991, the Union proposed a change to the language of Section 21.01 for the successor contract. The current language states:

Employees under this Agreement who may be scheduled for shift work, such as janitorial services, shall be paid in addition to the base pay, twenty-three (23) cents per hour for shifts commencing after 3:00 P.M., and twenty-eight (28) cents per hour for shifts commencing after 11:00 P.M.

The Union proposed to delete the phrase “such as janitorial services” and add full and part-time employees to the language. It also proposed to delete the word “after” and modify it to read: “shifts commencing at 3:00 P.M. or after and shifts commencing at 11:00 P.M. or after.” During bargaining, the parties talked about the proposal and understood that it would cover library employees, youth care workers, community health aides, or anyone beyond the normal day shift hours. There are library employees who start at 3:00 p.m., as well as those who start after 3:00 p.m. The change to “at or after” would have affected some employees.

Mary Marco has been the Assistant Personnel Director for the County for more than ten years and has served on the County’s bargaining committee. She kept some bargaining notes during the negotiations of 1991, and had notes for December 17 and December 27 of 1991. Marco’s notes show that Sue Pfeifer (formerly Mikkelson), president of the local, was present and served on the Union’s negotiation committee. Jan Vance was a steward for the library and was also present, along with Union Representative Daniel Pfeifer.

During the December 17, 1991, bargaining session, Marco's notes show that the Union continued to propose the shift differential. It proposed to delete the janitorial language, use the "at or after" language, and discussed the fact that library employees would get the shift differential. The County responded with stating that it would maintain the status quo, and that the shift differential only applied to maintenance and youth care workers. During the December 27, 1991, bargaining session, the Union indicated that it wanted its proposed language that included the "at or after" language, as well as 23 and 28 cents, and a discussion about whether library employees would be included in the proposal. The language never was changed since 1991.

Youth care workers were accreted into the bargaining unit and shift differential has been applied to them, even though the contract does not state anything about youth care workers getting shift differential. The Union also proposed language dealing with shift differential for youth care workers as part of its 1991 proposals, but that language was not added to the contract.

THE PARTIES' POSITIONS

The Union

The Union states that the language of Section 21.01 is clear and unambiguous, and it has not waived its right to enforce the language even though it has not previously enforced it. The County has raised the issue of whether a past practice has been established. The Union cites an arbitrator who noted that while past practice is useful to ascertain intentions in cases of ambiguity or indefiniteness, it cannot modify a clear promise. The Union further notes that a party's failure to grieve past violations of a clear contract rule does not bar that party, after notice, from insisting upon compliance with the contract in the future.

The Union objected to the submission of the bargaining history because it was never presented as part of the County's argument throughout the processing of the grievance. However, the Union continues to believe that the clear and unambiguous language should be enforced. It notes that an arbitrator stated that prior acts cannot change the explicit terms of a contract.

During the processing of the grievance, the County told the Union that Section 21.01 did not apply to second shift library employees because they are part-time employees. Section 21.01 refers to "employees under this agreement," and the recognition clause in Section 1.01 includes all regular full-time and regular part-time employees. Therefore, part-time employees are "employees under this agreement." The County also argued that the employees did not work a full seven and one-half hour shift, and therefore were not entitled to the shift differential. The Union contends that the County establishes the hours of operation for the library, and a shift is a scheduled period of work or duty. Library employees have a scheduled period of work or duty, and that time is the work shift, regardless of whether it is from 4:15 p.m. to 9:15 p.m. or 5:00 p.m. to 9:00 p.m.

The Union asks that the County be ordered to pay employees whose shifts commence after 3:00 p.m. at 23 cents per hour. The Union seeks this make whole remedy back to the date of the filing of the grievance on December 22, 1997, the date that the Union gave notice to the County of the alleged violation.

The County

The County maintains that there was no violation of the contract, and that a well-documented and long-standing past practice has been established between the parties and no remedy is appropriate or necessary. While the parties are ordinarily limited to the four corners of the contract, the contract here does not provide guidance, and in fact, creates confusion. Section 21.01 refers to “employees who may be scheduled for shift work, but does not define what “scheduled for shift work” means. The contract gives an example of janitorial services, but library services are not scheduled the same as janitorial services. Youth care workers receive shift differential, and the County asks whether they are like janitorial services? It contends that the intent of the parties cannot be determined from the wording of the contract on its face. Nothing is said about part-time workers receiving shift differential. Thus, it is necessary to look beyond the contract to see what the parties have done in practice.

The Library Director, Marcia Matheson, testified that she has never budgeted for a shift differential for library employees in the 16 years she has been Director, and she has never paid it out. She testified that Jan Vance was a library employee and a Union steward prior to retirement, and was not a timid steward.

The County asserts that it is a well-established arbitral principal that a party should not seek to obtain through grievances what it has not achieved at the bargaining table. The Union previously bargained over the payment of shift differential to library employees and failed to achieve an agreement on that issue.

Assistant Personnel Director Mary Marco testified that she had been on the County’s collective bargaining committee in 1991 when the Union proposed language regarding Section 21.01 which would have given library employees starting after 3:00 p.m. the shift differential. Her notes identified the shift differential as a “library issue” and that the Union sought language for “at or after” 3:00 p.m. Her notes showed also that only maintenance workers and youth care workers currently received shift differential, but that library staff would get it under the Union’s proposal.

The County and the Union have a practice of paying shift differential to youth care workers and a practice of not paying it to library workers, although neither is mentioned in the contract. The status quo was maintained as a result of the 1991 bargaining. The Union cannot now deny knowledge of the practice.

The County concludes by stating that a clear, open and acknowledged practice has been established. Section 21.01 does not define “scheduled shift work” and this ambiguity creates the need to look outside the contract to the practice established over the last 16 years, at least. The Union has acknowledged the non-payment of a shift differential to library workers by its bargaining proposal and the discussions in 1991.

The County argues that the Union should not now be awarded shift differential through this grievance after failing to obtain the proposal through bargaining in 1991. There is no violation of the contract, only a continuation of a long-standing past practice.

DISCUSSION

The parties agreed to waive the time requirements of Section 5.05.3 of the collective bargaining agreement. The dispute centers on the language of Section 21.01, which states:

Employees under this Agreement who may be scheduled for shift work, such as janitorial services, shall be paid in addition to the base pay, twenty-three (23) cents per hour for shifts commencing after 3:00 P.M., and twenty-eight (28) cents per hour for shifts commencing after 11:00 P.M.

This section of the contract clearly gives employees the right to an evening shift differential, either for 23 cents or 28 cents, depending on the hours. The language is not ambiguous, and it does not need clarification by either a past practice or by bargaining history.

Clear contract language prevails over any past practice in conflict with such language. The fact the County has not paid employees in the library a shift differential in the past does not relieve it of the obligation to do so under the contract.

While the County argues that the language is not clear because it does not define what “scheduled for shift work” means, it is clear enough that it means scheduled for shift work. There is nothing difficult or technical about being scheduled to work or working a shift. The fact that the parties used an example of janitorial services does not exclude other employees scheduled to work other shifts. The County knew that the shift differential was being paid to youth care workers, even though those employees were not specifically mentioned in Section 21.01.

The bargaining history does not prevail over the clear language that the parties agreed to and continued to agree to in successive contracts. The Union’s proposal would have clarified the starting time to clearly include shifts that started at 3:00 p.m., as well as those commencing after 3:00 p.m. If the County had agreed to such language, it would have included a few more people who were scheduled to start their shifts at 3:00 p.m. The Union does not claim a shift differential in this grievance for those employees, but it claims the differential for shifts that start at 3:15 p.m. and later. The fact that the library employees who work in the evening hours are part-time employees has no bearing on the merits of this case.

Section 21.01 simply refers to “employees,” and does not limit the shift differential to full-time employees. Part-time employees are included in the bargaining unit and are entitled to the benefits of the contract.

Even if the Union knew or should have known that the library employees were entitled to a shift differential and were not being paid it by the County as early as 1991, it is entitled to enforce the contract now where the language still entitles employees to the shift differential. The Union correctly notes that any remedy including back pay is limited to the time when it filed the grievance. That remedy will be so ordered.

AWARD

The grievance is granted.

The County is ordered to pay a shift differential to all employees whose shifts started after 3:00 p.m., and to make whole any employees who were not paid a shift differential back to the date the grievance was filed on December 22, 1997.

The Arbitrator will hold jurisdiction until April 9, 1999, solely for the purpose of resolving any disputes over the scope and the application of the remedy order.

Dated at Elkhorn, Wisconsin this 11th day of March, 1999.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator