BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION
LOCAL 662, IBT, AFL-CIO

and

CITY OF HUDSON

Case 39
No. 56983
MA-10481

(Overtime Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Ms. Kristine Aubin**, on behalf of General Teamsters Union Local 662, IBT, AFL-CIO.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Mr. Stephen L. Weld**, on behalf of the City of Hudson.

ARBITRATION AWARD

General Teamsters Union Local 662, IBT, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Hudson, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 4, 1999 in Hudson, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by February 19, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issues:

Did the County violate Article 7, Sections 1 and 2 of the Collective Bargaining Agreement when it did not first offer all building maintenance or janitorial overtime to the Grievant? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE 7

MAINTENANCE OF STANDARDS AND MANAGEMENT RIGHTS

Section 1. The Employer agrees that all conditions of employment relating to wages, hours and working conditions shall be maintained at not less than the highest standards in effect in the Employer's unit at the time of the signing of this Agreement. Conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. This shall not apply to inadvertent or bona fide errors made by the Employer if corrected within ninety (90) days of notification by Union to Employer.

Section 2. Nothing shall be deemed a past practice unless it meets each of the following tests:

1. Consistently followed (over a reasonable period of time);

2. Generally known by the parties hereto; and

3. Must not be in opposition to the terms and conditions in this Agreement.

MANAGEMENT RIGHTS

Section 1. Except as expressly modified by other provisions of the contract, the City possesses the sole right to operate the City and all management rights repose in it. These rights include, but are not limited to the following:

A. To direct all operations of the City;

B. To hire, promote, transfer, schedule, and assign (including overtime assignments) employees in positions within the City;

. . .

I. To determine the kinds and amounts of services to be performed as pertains to City operations; and the number and kind of personnel to perform such services;

J. To determine the methods, means and personnel by which City operations are to be conducted.

BACKGROUND

The Union and the City are parties to a collective bargaining agreement covering the employes in the City's Streets Department, Water Utility, Sewer Department, Building Maintenance Department and Parks/Recreation Department. The Grievant, Donald Voorhees, is the only employe in the Building Maintenance Department and in that capacity has performed the janitorial duties in two buildings, the City Hall and Library, for the past ten years, as well as the mowing, watering and shoveling walks. Over time the City Hall has approximately doubled in size and the Library is now in a different building. At the direction of the City Council, in September of 1998 the City's Public Works Superintendent, Steve Adams, implemented scheduled overtime of two hours per day, five days a week, in order to get necessary building maintenance work completed. The Grievant was permitted to select one such week of overtime per month and the remaining weeks were offered to the other employes in the bargaining unit. This is the first time the City has had scheduled overtime in the Building Maintenance Department and the first time it has used a sign-up sheet for building maintenance overtime work.

The instant grievance was filed on Voorhees' behalf, asserting that the City's actions violated a practice of always first offering overtime work to the employes in the department in which it occurs. The parties were unable to resolve their dispute and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the City violated the Agreement by assigning the building maintenance overtime to employes in other departments without first offering it to the Grievant. The Agreement contains no provision specifically addressing the City's ability to

assign overtime, however, it does contain a maintenance of standards clause which clearly prohibits the City from unilaterally changing any conditions of employment which were in existence at the time the Agreement was signed. Thus, the Agreement requires that the City operate in accord with past practice and custom.

Leroy Esanbock, the local steward who has worked for the City for 16 years, testified that the City has always first offered all of the building maintenance overtime to the Grievant, and that employes from different departments would only work building maintenance overtime on the rare occasion when Voorhees either refused the work or was unable to perform it. That testimony was unrebutted. Thus, there can be no dispute that the City's past method of assigning building maintenance overtime meets the contractual definition of a past practice.

The evidence presented regarding overtime assignments in other departments and the reassignment of duties between departments is an effort to sidestep the issue. The issue is not whether other employes may perform building maintenance duties, nor whether the Grievant desires to work overtime in other departments, rather, it is whether building maintenance overtime must first be offered to the Grievant before it is offered to employes in other departments. The attempt to legitimize its actions based upon the Grievant's allegedly increased workload is a similar attempt by the City to avoid the issue. Maintaining the Library has always been the Grievant's responsibility and although the Library was only recently made larger, it was well before the City unilaterally changed its overtime assignment procedure. Further, the Union has not asserted that other City employes cannot perform work in the building maintenance department, and in fact, other employes have done so, however, they were not working on overtime.

If the City wished to change the overtime assignment procedure, it should have addressed the subject in the parties' most recent negotiations. Existing practices dealing with major conditions of employment are to be considered included within the agreement negotiated after the practice has been established. E G & G BACKTEC., 89 LA 1108 (Miller, 1987). If a party wishes to change an existing practice, it can only do so during negotiations for a new agreement. SHEBOYGAN COUNTY, 105 LA 605 (Dichter, 1995). Esanbock was present for every bargaining session during the parties' most recent negotiations and testified that they never discussed the City's ability to assign overtime. Thus, the City is prohibited from now changing the practice. Further, the negotiations of the Management Rights clause in the parties' 1994-95 (sic) agreement negotiations did not end the City's obligations to follow the existing overtime assignment practice. Practices may only be changed by deliberate treatment of the practice in negotiations, followed by specific contract language. DIXIE MACHINE, 88 LA 734 (Baroni, 1987). Again, the subject was not discussed in the negotiations for the 1994-95 agreement, nor did the City ever oppose or challenge the practice. Thus, negotiation of the Management Rights clause in the 1994-95 Agreement did not repudiate the long-standing practice.

Contrary to the City's contentions, the Management Rights clause by itself does not authorize the City to unilaterally change its overtime assignment practice. Such a clause does not "magically dissolve" a practice that has continued unabated and spans six successive contract periods, especially where the contract expressly contemplates and permits the continuation of past practice. CONOCO, INC. 104 LA 1057 (Neigh, 1995). Citing, Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, at p. 449. As previously noted, the Agreement here specifically addresses and allows for the continuation of past practices.

As to remedy, the Union asserts that the appropriate remedy where the employe has been wrongfully denied premium time is a monetary award when the assignment of make-up premium time instead would adversely affect an employe who had been wrongfully denied the premium time. GIANT TIGER SUPERSTORES, INC. 43 LA 1243 (Katz, 1965). Where, as here, the agreement is silent as to the applicable remedy when an employe is found to have been erroneously denied an overtime assignment, arbitrators have held that a monetary award is appropriate. GEORGIA-PACIFIC CORP., 93 LA 4 (Thornell, 1989). Thus, simply awarding make-up overtime to the Grievant would deprive him of future overtime because he was already otherwise entitled to the overtime, and he would not be truly compensated and made whole.

City

The City takes the position that there is no contractual restriction on its right to assign overtime and that therefore, it has not violated the parties' Agreement.

In the negotiations leading to the parties' 1996-97 Agreement, the parties agreed to add a Management Rights clause to Article 7. Paragraph B of that new clause specifically states that the City possesses the "sole right. . .to hire, promote, transfer, schedule and assign (including overtime assignments) employes in positions within the City; . . ." This is the only language in the Agreement which addresses the assignment of overtime. There is no language which requires that overtime be offered first to employes who normally perform the work during regular hours or that it first be offered to employes within the department or division in which the work is needed. Absent a contract clause or statute to the contrary, allocation of overtime is management's right. GRAHAM BROTHERS, 16 LA 83 (Chaney, 1951).

The City also asserts that it has not violated the Agreement's Maintenance of Standards clause in Article 7, Section 1. Arbitrator Morvant, in BORDEN CO., 39 LA 1020, interpreted a very similar clause and opined:

> In this instant case Article 7 attempts to surpass its historic purpose and intent, and while retaining its basic frame work it also seeks to nullify Article 1, Section F, which states in part, 'All rights and privileges which ordinarily are

> vested in the management, except those which are covered separately in this agreement, shall continue to be vested in and be exercised by the Company.' But in the opinion of this Arbiter, Article 7 is too unclear and ambiguous to accomplish this purpose. . .Article 7 exerts no influence over conditions of employment which are not fixed and which have been changed in the past, thus breaking continuity which is the essence of proof of past practice or fixed policy. Third and finally, Article 7 exerts no influence over conditions of employment which are covered in the agreement except to assure compliance to the degree required in the agreement. (Emphasis added).

Similarly, the Union here attempts to nullify the specific management rights clause giving the City the right to assign overtime. The City has not abrogated its right to assign overtime as it sees fit simply because in the past building maintenance overtime has usually been offered to the Grievant, the only employe in that department. In a recent arbitration award involving the same parties, Arbitrator Houlihan rejected a contention similar to that made here by the Union:

> Article 7, Section 1 contains a Maintenance of Standards clause. The language speaks in very broad terms, maintaining 'all conditions of employment relating to wages, hours and working conditions. . ." There is no further definition to the Article. If read as a control on the number of bargaining unit positions that must exist regardless of the availability of work or revenue, the clause is enormously consequential. The size of the workforce may rise or fall as a consequence of workload and/or revenue. The interaction between Article 7, Section 1 and those phenomena is unclear to me. I am not prepared to read Article 7, Section 1 to set an absolute floor on the size of the bargaining unit. Article 7, Section 1 is too general to contravene the more explicit language found in the Management Rights clause.

A similar conclusion is mandated in this case.

The Union also has not met its burden of establishing a binding practice in accord with Article 7, Section 2 of the Agreement. The grievance states that there has been a past practice of first offering overtime to employes within the department or division in which the work is to be performed before offering it to other employes. Article 7, Section 2, defines a "past practice" and the Union has failed to demonstrate a practice which meets that definition. While the Grievant has usually been offered janitorial overtime, that has not always been the case, nor has such a practice been followed in other departments. Adams testified regarding a recent instance in which another employe was offered overtime to paint the City Hall, work normally performed by the Grievant. The Grievant was not offered the work and no grievance was filed. Similarly, Adams testified that snow shoveling around City buildings, previously performed by the Grievant, was now performed by Sewer Department employes, sometimes

on an overtime basis, and there have been no grievances filed. Tasks such as mowing and watering grass, also previously performed by the building maintenance worker, are now assigned to other employes, and some of the tasks are performed on an overtime basis. While overtime in the Water and Sewer Departments are routinely offered only to employes in those departments, that is primarily because DNR certification is required to perform the work. Converesly, overtime in the Streets Department, primarily involving snow removal, is regularly assigned to employes in other departments. Adams also testified that if a Street Department employe is not available for snow plowing, he assigns the route to whomever he chooses. Employes in the Water Department and the Sewer Department having CDL's are regularly called upon to perform Street Department overtime tasks. Esanbock, the only bargaining unit employe in the Parks Department, testified that he and an employe in another department regularly work overtime in the Street Department plowing snow during the winter. Similarly, the City has elected to offer janitorial overtime work to other employes in the unit. As a result of moving to a larger building, the City has transferred some job responsibilities from the building maintenance worker over to employes in other departments, and ordered Adams to schedule janitorial overtime. The overtime postings began in mid-September of 1998, and the Grievant was assigned two weeks in October, two weeks in November and four weeks in December. In fact, the Grievant received approximately 100 hours more overtime than the employes in the Street Department.

Thus, the Union has not established that the City has consistently offered overtime first to employes in the department in which the overtime is available, nor has it demonstrated that said practice is known by the parties to be a binding practice. The only language in the Agreement relating to the assignment of overtime being in the Management Rights clause, the City has the right to decide when to assign overtime, what overtime work is to be assigned, and to whom it is to be assigned. Thus, the City requests that the grievance be denied.

DISCUSSION

First, the undersigned disagrees that the very general language of subsection B of the Management Rights provision, on its face, necessarily precludes the existence of any binding practice regarding the assignment of overtime. The question to be answered then, is whether there is, as the Union asserts, a past practice within the meaning of Article 7, Section 2, of the Agreement, of always first offering overtime work in a department to the employes in that department before offering it to employes in other departments in this bargaining unit. For the following reasons, it is concluded that a practice, as defined in that provision, does not exist in that regard.

The testimony establishes that the Grievant usually was offered the building maintenance overtime work first, except for painting in City Hall, when he apparently had an injured shoulder, and except for snow shoveling, again apparently due to his shoulder problem. At most, this shows that the Grievant has usually been first offered overtime building maintenance work, except as to work that he is unable or does not desire to perform.

As far as "scheduled overtime", the situation in the Waste Water Treatment Department is unique in that DNR certification is required and only those five employes have the requisite certification. Thus, the scheduled weekend overtime in that department is rotated amongst only those employes. While there was testimony that there are some duties in that department that do not require certification, there was no showing that such duties were the work being performed on an overtime basis.

Testimony regarding snow plowing overtime in the Streets Department establishes that the employes in that department are not given first opportunity for all overtime in the department. There are eight employes in the Department and the City has established ten regular plowing routes. Rather than giving Streets employes the opportunity to work more overtime by plowing the two routes after the eight have been completed, the City assigns the overtime to the eight Streets employes and to an employe from Parks and an employe from Waste Water Treatment who also have a CDL (commercial driver's license).

Thus, there are too many exceptions to establish a "consistently followed" practice, as required by Article 7, Section 2, of the Agreement. That being the case, Section 1, B, of the Management Rights provision in Article 7, is the only provision in the Agreement specifically addressing the assignment of overtime and it reserves that right to management. The manner in which the City exercised its right to assign overtime in this case, albeit not in the way the Grievant or the Union desired, was not unreasonable. It is therefore concluded that the City did not violate Article 7, Sections 1 and 2, of the Agreement by not first offering all building maintenance or janitorial overtime to the Grievant.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 19th day of August, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

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