BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA CITY HALL AND POLICE SUPPORT STAFF UNION, LOCAL 1035-B, AFSCME, AFL-CIO

and

CITY OF MENASHA

Case 97
No. 57603
MA-10688

Appearances:

Mr. Rick Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney James R. Macy**, appearing on behalf of the City of Menasha.

ARBITRATION AWARD

The City of Menasha (herein the City) and the Menasha City Hall and Police Staff Union, Local 1035-B, AFSCME, AFL-CIO (herein the Union) were, at all times pertinent hereto, parties to a collective bargaining agreement dated January 23, 1998, covering the period from January 1, 1998 – December 31, 2000, and providing for binding arbitration of certain disputes between the parties. On June 3, 1999, the parties filed a joint request with the Wisconsin Employment Relations Commission to initiate grievance arbitration on a working hours issue and requested that Thomas L. Yaeger be designated arbitrator. A hearing was held on June 22, 1999, and a transcript was prepared. Briefs were filed on August 17, 1999, and reply briefs were filed on September 13, 1999.

ISSUE

The parties were unable to stipulate to a statement of the issue, therefore, the arbitrator frames the issue as follows:

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Did the City violate the Collective Bargaining Agreement when it required the Grievant to work the 10-minute overlap provided by Article XVIII, Paragraph 2 without additional compensation?

If so, what is the remedy?

PERTINENT CONTRACT PROVISION

ARTICLE XVIII – HOURS OF WORK

. . .

B. Police Support Staff:

. . .

2. Shift Employees (Complaint Clerks)

The normal workday for shift employees shall be either 6:10 A.M. to 2:20 P.M., 2:10 P.M. to 10:20 P.M., or 10:10 P.M. to 6:20 A.M.

The work schedules shall consist of a cycle of days "on duty" followed by days "off duty" as follows: 5-2, 5-3. Each Complaint Clerk shall receive a twenty (20) minute lunch break during these shifts. For pay purposes, including overtime, this work schedule shall be considered to constitute forty (40) hours per week.

BACKGROUND

The City of Menasha Police Department has four full-time complaint clerks and one part-time complaint clerk, which were previously designated as dispatchers. Since 1976, the full-time complaint clerks have worked a rotating 5/2, 5/3 schedule – 5 days on, 2 days off, then 5 days on, 3 days off, and so on. The position of part-time complaint clerk, which was created in 1990, works a rotating 2/5, 3/5 schedule. Prior to 1981, the complaint clerks worked 8-hour shifts, but in 1981 the shifts were expanded to 8 hours and 20 minutes to provide an overlap period in which the clerks could relay necessary information to the next shift. At the same time, the pay schedule was modified to credit the clerks with a 40-hour workweek regardless of the actual hours worked. In 1987, the overlap period was cut back to 10 minutes. The net effect of this is that the complaint clerks are paid for more time than they

actually work, which is the quid pro quo for requiring the "unpaid" overlap period. The contract makes no direct reference to part-time complaint clerks and creates no distinctions regarding length of shifts. Nevertheless, historically the part-time clerks have not worked the overlap period.

The Grievant was hired as a part-time complaint clerk in July 1996. Previously, she had been a non-bargaining unit relief employe. Relief employes are not required to work the overlap period. Initially, the Grievant did not work the overlap periods, but effective May 6, 1998, she was informed that she was required to work the overlap period set forth in the contract and also, upon inquiring, that the overlap did not carry additional compensation. The Union filed a grievance based on the City's refusal to compensate the Grievant for the overlap period. The grievance was denied at all levels and the matter proceeded to arbitration.

POSITIONS OF THE PARTIES

The Union

Part-time clerks have never worked the 10-minute shift overlap since the position was created in 1990, and their hours of work are not directly addressed in the contract. There is, therefore, no evidence, in practice or in writing, that they are required to work more than an 8-hour shift. The contract language is specifically directed to the hours of full-time clerks, as evidenced by the fact that it also refers to their 5/2, 5/3 shift schedule and the fact that their schedules would be deemed to constitute 40 hours per week. Nothing refers to part-time clerks, even though 4 contracts have been negotiated since the position was created. Under the circumstances, the arbitrator would have to, in effect, reform the contract to create such a requirement, which would violate the terms of the contract and go against arbitral practice.

Furthermore, the operations lieutenant, who never questioned the fact that they were not working the extra 10 minutes, reviews the clerks' time sheets. Given that this was a matter of record, and that the practice had gone on for eight years, as established by the testimony, the lack of protest by the City gives rise to the presumption of a binding past practice of not requiring part-time clerks to work the overlap period. In TEXAS UTILITY GENERATING DIVISION, 92 LA 1308, (MCDERMOTT, 1989), it was held that a well-established practice which is condoned by both parties can control in a situation where the contract is silent. At the very least, the City had constructive notice that the part-time complaint clerks were not working the overlap period and its tacit acceptance of this practice over a period of eight years amounts to condonation.

The City maintains that the part-time clerks receive some type of unspecified benefit in return for the extra 10 minutes of unpaid time, but is unable to identify what that is. Full-time clerks do receive a benefit as a result of the averaging of their pay schedules, but the part-time

clerks are only paid for time actually worked, so there is no quid pro quo as to them. The City is attempting to unilaterally alter the Grievant's "wages, hours and conditions of employment," which it cannot do. Any such changes must be sought at the bargaining table and until then the Grievant must be paid for all time worked.

The City

The contract is clear and unambiguous in its requirement that the part-time complaint clerks work the scheduled shifts, including the overlap period. Under the contract, the City is within its management right to schedule employes to shifts to serve the interests of efficiency and economy. Further, the parties have agreed to clear language establishing an 8-hour and 10-minute schedule for all shift employes, and make no distinction between full- and part-time. When, as here, the language is clear, an arbitrator may not depart from it to add, detract, or give it meaning beyond its literal terms. CONTINENTAL OIL CO., 69 LA 399, (WANN, 1977) Further, clear language eliminates any consideration of past practice, because past practice only becomes relevant where the language is ambiguous. BROWN COUNTY (SHERIFF'S DEPARTMENT), CASE 537, NO. 51483, MA-8625 (YAEGER, 1995)

Even in the event that the contract language was deemed ambiguous, however, the City should still prevail, because there is no established past practice of permitting the part-time clerk to not work the overlap period. There is no evidence that the City was even aware of, much less accepted, a practice of exempting the part-time clerks from the overlap period. Therefore, there is no basis for arguing that any established past practice supports the Grievant's position.

The City's position is further buttressed by the bargaining history between the parties. In the 1980-81 contract, the parties agreed to an 8-hour and 20-minute shift for complaint clerks. In the 1987-88 agreement, this was cut back to 8 hours and 10 minutes. In neither case was any distinction made between the full-time and part-time clerks. Thus, even though their weekly schedules differ, full-time and part-time clerks have always been defined as shift workers and it has always been understood that the shift overlaps applied to both groups. Furthermore, both groups are subject to the same hourly rates and both receive the benefit of having a fixed number of base hours per week for which they are paid, regardless of how many hours they are scheduled to work, so that each group is ultimately paid for more hours than they actually work. The shift schedule, equalized hourly rate, and guaranteed base pay were the quid pro quo for the overlap period and on that basis the grievance should be denied.

Union Reply

The City's contention that the contract language clearly supports its position is mistaken. By referring to a 5/2, 5/3 schedule, and the fact that the work week is deemed to be

40 hours, the clause is obviously specifically addressing full-time complaint clerks, and the purpose of the language is so the City can avoid paying overtime for the weeks in which the clerks work more than 40 hours. Neither of these circumstances applies to the part-time clerk at all. She works a 2/5, 3/5 schedule and is not paid on the basis of a 40-hour week and the contract makes no mention of either her schedule or the method for calculating her pay.

Nor is the City's position supported by the bargaining history. The City contends that full- and part-time complaint clerks have historically been "treated the same" for bargaining purposes, but this is clearly not true. For instance, the part-time clerk's fringe benefits are pro-rated, based on how much she actually works compared to a full-time clerk's regular schedule. If full- and part-time clerks were dealt with the same, as the City suggests, the Grievant would receive full fringe benefits. Also, for over eight years the City never told the part-time clerks they were required to work the overlap and never objected to the fact that they did not do so, which further supports the view that this language was not originally intended to apply to part-time clerks.

Also, the City should not be able to avoid the consequences of this past practice by merely denying knowledge of it. This was an open and obvious practice over a period of eight years, which the City tacitly condoned by accepting time sheets over that period and never questioning the fact that part-time clerks weren't working the shift overlaps. Under the circumstances, the City had a duty to know of the existence of this practice and should be held to have accepted it.

Finally, contrary to the City's assertion, the part-time clerks have never received equalized paychecks, such as the full-time clerks get, or any other benefit, as a trade off for working the shift overlap. The payroll clerk, who is in the best position to know, testified that part-time employes are only paid for time actually worked. Thus, there is no quid pro quo for requiring the part-time clerk to work the overlap. Clearly this undercuts the City's argument that this additional time was bargained for, at least as it relates to the part-time clerk position. Therefore, the City should either be required to pay the part-time clerk for working the overlap period, or it should revert to not requiring the time to be worked.

City Reply

The contract is clear; the normal workday for shift employes is an 8-hour and 10-minute shift. All complaint clerks are shift employes, including the part-time clerk. The language setting forth the normal workday is distinguishable from the language defining the work cycle for full-time clerks. Therefore, the reference to the 5/2, 5/3-shift cycle in the provision cannot be construed to mean that the provision in its entirety applies only to full-time clerks. Because the contract is clear on the question of shift length, the arbitrator should not add to the existing language, as requested by the Union, but should apply the language as it exists.

The Union advances the argument that there is a past practice of allowing the part-time clerk to not work the overlap, but this argument fails for two reasons. First, because the contract language is clear and unambiguous, there is no basis for applying past practice because it is an established arbitral principle that past practice cannot supercede clear language. (cf. BROWN COUNTY, SUPRA; TEXAS UTILITY GENERATING DIVISION, 92 LA 1308 (MCDERMOTT, 1989); ESSO STANDARD OIL, 16 LA 73 (MCCOY, 1951) Second, no past practice has been established. The criteria for finding the existence of a past practice are that it must be: 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. There is no evidence that the City was aware of, much less accepted the practice of the part-time clerk not working the overlap. To the contrary, the City was entitled to believe she was working her scheduled hours. The Union, therefore, has not met its burden that any past practice existed.

Further, since the contract is clear regarding the length of shifts, it is not necessary for the City to bargain with the Union over a change in hours because the part-time clerk's schedule is already fixed. Also, since the part-time clerk receives an equalized base pay rate, just as the full-time clerks do, she receives a benefit in return for working the 10-minute shift overlap and no additional compensation is required. For all the foregoing reasons the grievance should be denied.

DISCUSSION

In this case there is no question that the collective bargaining agreement requires the full-time complaint clerks to work 8 hour and 10 minute shifts, or that the clerks are paid on the basis of 40 hours per week, in part to compensate them for the extra 10 minutes per shift. Consequently, over the course of a year, the full-time clerks receive in excess of two weeks' pay over and above the time they actually work during their 5/2, 5/3 work schedule rotation. However, the parties in this case are in wide disagreement over whether the contract requires the Grievant, who is a part-time complaint clerk, to work the same 8-hour and 10-minute shifts required of the full-time clerks, or whether she receives a commensurate benefit for doing so.

The City argues persuasively that the contract clearly requires the part-time clerk to work the same daily schedule as the full-time clerks. All complaint clerks are classified as shift employes, and all shift employes are assigned a normal workday of 8 hours and 10 minutes.

> The normal work day for shift employees shall be either 6:10 A.M. to 2:20 P.M., 2:10 P.M. to 10:20 P.M., or 10:10 P.M. to 6:20 A.M.

> The work schedules shall consist of a cycle of days "on duty" followed by days "off duty" as follows: 5-2, 5-3. Each Complaint Clerk shall receive a twenty (20) minute lunch break during these shifts. For pay purposes, including overtime, this work schedule shall be considered to constitute forty (40) hours per week.

Nothing in the contract directly or indirectly suggests that the part-time clerk is to be exempted from this requirement and permitted to work a shorter day than the full-time clerks, nor is there reference to any employe working an 8-hour shift, since the relief clerks, who apparently do work 8-hour shifts, are not part of the bargaining unit. Thus, there is simply no basis in the contract from which to conclude that it was the parties' intent that the part-time clerk work anything other than an 8-hour and 10-minute shift. Since the contract language is dispositive, the arbitrator need not address the issue of whether there has been a past practice of requiring the part-time clerk to work only an 8-hour shift. The contract language being clear, the City is entitled to require the part-time clerk to work the standard 8-hour and 10-minute shift.

To reach a contrary conclusion could lead to an absurd and nonsensical result, i.e. the full-time clerk's replacement is not required to work the 10-minute overlap despite the fact that operationally the need has not been diminished or eliminated by the mere presence of the part-time relief clerk in the absence of the scheduled off full-time clerk. Consequently, the City did not violate the collective bargaining agreement when in May, 1998, it required the grievant to work the additional 10-minute overlap period each shift.

This still leaves unresolved, however, the question of whether the Grievant is entitled to be compensated for the additional 10 minutes she is now required to work. It is established that the full-time clerks have a unique scheduling arrangement, which is set out in the contract. They work an 8-hour and 10-minute shift and a 5/2, 5/3 schedule. For pay purposes, however, they are deemed to work a 40-hour week across the board. Over the course of a year, therefore, the full-time clerks will actually work 1992 hours and 40 minutes, but will be paid for 2080 hours. According to testimony offered by both sides, the rationale for the additional 87+ hours of pay was to compensate the clerks for the longer workday and also to simplify the payroll system.

The City maintains that the part-time clerk position is handled in the same fashion. That is, regardless of how many hours she actually works, the Grievant is paid for a straight 20 hours per week, with the commensurate result that over the course of a year she will be paid for substantially more hours than she actually works, and this, too, was intended as a quid pro quo for the longer workday. The Union asserts, however, that she is only paid for actual time worked and, therefore, to require an additional 10 minutes per day without compensation is inequitable and a breach of the contract.

The contract does not refer to the schedule of the part-time clerk, which is a mirror image of the full-time schedule – 2/5, 3/5. Neither does it specify that the part-time clerk's pay is to be standardized based on a 20-hour workweek, in the same manner as the full-time clerks. However, the City Attorney testified it has always been the City's intent and, in his opinion, the practice that part-time clerks receive a level weekly salary to compensate them for the extra 10-minute per shift, just like the full-time clerks. Reality is that even though that was the City's intent, it did not occur in the Grievant's case. Office clerk, Mary Griesbach, who is responsible for handling the payroll for the City and actually computes the payroll and writes the checks, has, in the arbitrator's view, the most direct and reliable knowledge of how the part-time clerk was actually paid. She testified that the full-time clerks are paid for a straight 80 hours every two weeks, without calculating how many hours they actually work, whereas the part-time clerk is paid only for the hours that are actually recorded on her time card. (Tr. 77-78)

While the City contends the Grievant received an equalized base pay rate, it is clear from the record that the Grievant was not paid in that manner. She was paid for hours actually worked, and did not receive any reciprocal benefit as though she had worked the additional 10 minutes per shift, prior to May 6, 1998, unlike the full-time clerks. Because she was not required to work the 10-minute overlap period each shift, she was not entitled to any reciprocal benefit. However, once she was required by the City to work the 10-minute overlap each shift, she became entitled to the reciprocal benefit. The City does not dispute this inasmuch as it believed she had been receiving it all along, even though in fact she had not. The reciprocal benefit for full-time clerks equates to the difference between 1992.67 scheduled hours on a 5/2, 5/3 work schedule and 2080 hours, or 87.33 hours of additional pay. The equivalent reciprocal benefit to a part-time clerk would be the difference between 996.33 scheduled hours on a 2/5, 3/5 work schedule and 1040 hours, or 43.67 hours of additional pay. Because the Grievant began working the 10-minute overlap period on May 6, 1998, she is entitled to 43.67 hours of back pay, at her straight time hourly rate in effect for the 12-month period ending May 5, 1999. Using the same methodology, the Grievant is also entitled to receive, as additional back pay, the reciprocal benefit payments from May 1, 1999, until the City began, or begins, regularly paying the reciprocal amount. The record evidence established that the City had not made any reciprocal benefit payments up to the date of hearing in this matter, and it is unknown if the City has begun making such payments subsequent to the hearing. Because there may be questions and/or confusion on how the remedial relief is to be implemented, I will retain jurisdiction in this matter for ninety (90) days from the date of my award to assist the parties in resolving any issues that may arise in that regard.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The City did not violate the collective bargaining agreement when in May, 1998, it began requiring the Grievant to work an additional 10 minutes overlap per shift, but it did violate the collective bargaining agreement by requiring Grievant LaChey to work an additional 10 minutes overlap per shift without compensation. Accordingly, the City is directed to pay the Grievant back pay in accordance with the above discussion. Further, in the future, the City shall pay the part-time clerk the appropriate reciprocal benefit for working the additional 10-minute overlap.

Dated at Madison, Wisconsin, this 24th day of November, 1999.

Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

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