

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**RHINELANDER CITY EMPLOYEES
LOCAL #178, WPPA/LEER**

and

CITY OF RHINELANDER

Case 88
No. 57668
MA-10715

(Overtime Grievance)

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association/LEER Division, on behalf of the Association.

Mr. Philip I. Parkinson, City Attorney, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "City", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Rhineland, Wisconsin, on January 18, 2000. The hearing was not transcribed and the parties there agreed I should retain my jurisdiction if the grievance is sustained. Both parties filed briefs and the Association filed a reply brief that was received by April 4, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have jointly agreed to the following issue:

Did the City violate the contract when it changed grievant Heidi McGill's shift and failed to pay her the contractual overtime rate for the hours she worked on October 16, 24 and 25, 1998, and November 17 and 18, 1998, and, if so, what is the appropriate remedy?

BACKGROUND

The Radio Dispatchers in the City's Police Department work the same 40-hour 7-2, 7-2, 6-4 schedule that is worked by the City's police officers, with shifts running from 7:00 a.m. – 3:00 p.m., 3:00 p.m. – 11:00 p.m., and 11:00 p.m. – 7:00 a.m. This is a rotating schedule which means that employees on a given shift such as the 7:00 a.m. – 3:00 p.m. shift thereafter work the 3:00 p.m. – 11:00 p.m. shift the following week, the 11:00 p.m. – 7:00 a.m. shift the following week, and then back to the 7:00 a.m. – 3:00 p.m. shift.

In October-November, 1998 (unless otherwise stated, all dates herein refer to 1998), the City on five separate occasions assigned grievant Heidi McGill to different shifts from the ones she originally was scheduled to work. Hence, her schedule was as follows:

<i>Originally Scheduled For:</i>	<i>Moved To:</i>	<i>Hours Worked:</i>
October 16 – Second Shift	First Shift	8 hours
October 24 – First Shift	Second Shift	8 hours
October 25 – First Shift	Second Shift	8 hours
November 17 – Second Shift	Third Shift	8 hours
November 18 – Second Shift	Third Shift	8 hours

Dispatcher McGill testified that notices of shift changes are given anywhere between 2 weeks – to 2 days ahead of time “as long as I’ve been here”; that the regular schedules are posted two months ahead of time on an eraser board; and that shift changes are very inconvenient because they adversely affect child care and scheduled appointments and because they often result in employees working two consecutive shifts, thereby preventing employees from having 16 hours off between shifts. She also said that police officers are sometimes assigned to Dispatcher duties “much more frequent than when I started” and that is beneficial to the Dispatchers because it allows them to work their regularly-scheduled shifts without performing additional overtime.

On cross-examination, she said she was not told about such shift changes at the time of her hire; that once she started working, it was “common knowledge” that such changes occurred; and that the City's policy has been followed from at least the time of her 1997 hire.

She also stated that every Friday has an open 7:00 a.m. – 3:00 p.m. shift built into the schedule which police officers are now filling; that she does not know why she was assigned to different shifts on certain days; and that she at other times was rescheduled because of Dispatcher absences caused by vacations, training, and sick leave.

Dispatcher Karen Piasecki testified that notices of shift changes sometimes come between 2 weeks to 2 days before being assigned to different shifts; that “I didn’t remember switching so often in the past”; that shift changes have been more frequent ever since Lieutenant Dan Johnson became responsible for the Dispatcher’s schedule; and that shift changes cause her a hardship in taking care of her mother-in-law.

On cross-examination, she said that while she had been switched in the past, she recently had been switched much more frequently. She also said that sick leave generates extra hours that must be worked at the overtime rate and that more vacancies are caused when Dispatchers use up their comp time.

Association Business Representative Thomas Bahr testified that in his opinion Article 6, Section 2, of the contract only identifies the work day and that grievant McGill here worked outside her regular work day, thereby necessitating the payment of overtime. On cross-examination, he stated that Article 6, Section 3, paragraph 3, only refers to extra hours and not a change in hours, and that if an employe is scheduled to work a 7-2 work week and then is given a different shift, that does not represent an excess.

Captain Glenn Parmeter, who was formerly in charge of scheduling the Dispatchers, testified that the City since at least 1978 has had a practice of changing the Dispatcher’s shifts and that the City has never paid overtime for changing them on the same day. He added that rescheduling is caused by the Dispatchers who are absent from work because of comp time, sick leave, vacations, and training; that police officers are regularly assigned Dispatcher duties to fill in for absent Dispatchers and to thereby lessen the need to assign more overtime to Dispatchers; and that part-time Dispatchers also have been used for that purpose. He explained that the City has experienced great difficulty in trying to hire more Dispatchers because of the rotating work schedule and that a recent hire will be used to fill holes in the schedule and to work the Friday 7:00 a.m. – 3:00 p.m. shift. He also claimed it would be a “nightmare” if the grievance is sustained and if the switching of shifts is no longer allowed.

On cross-examination, he said that Dispatchers sometimes rearrange their own schedules and that that often generates overtime.

Lieutenant Dan Johnson is responsible for scheduling Police Department employes, including the Dispatchers. He said that it sometimes is necessary to switch the Dispatchers’ schedule to avoid overtime, to avoid having employes work 16 hours at a time and thereby get

burned out, and because part-time Dispatchers have not worked out for the City, as attested to by the fact that about 5-10 have been hired only to have left shortly thereafter. He also said that vacancies caused by sick leave are a “major problem”; that most overtime is caused by comp time; and that the City has unsuccessfully tried to negotiate a new fixed work schedule with the Association, but to no avail.

Johnson discussed past practice by stating that Dispatchers had their shifts switched seven times without being paid overtime in 1997; 18 times in 1998; and 20 times in 1999. He explained that the City has been operating on minimum staffing; that overtime is paid only if employes work in excess of 8 hours a day or 40 hours a week; and that the phrase “outside their normal work schedule” in Article 6, Section 3, always has been construed to mean different hours outside of the three shifts referenced therein. He also said that police officers have their shifts switched without receiving overtime.

On cross-examination, he said that reducing overtime is one of the factors which causes shifts to be switched; that three employes have signed up for the newly-created fixed shift that has not been agreed to by the Association; and that the Association has grieved the new work schedule.

POSITIONS OF THE PARTIES

The Association contends that the City violated Article 6, Section 2, of the contract when it changed grievant McGill’s normal work schedule because such changes “constitute violations of her contractually established normal work week schedule”. The Association also argues that the City violated the overtime language in Article 6, Section 3, because she “worked outside her normal work schedule.” As a remedy, it asks that the City be ordered to pay McGill four hours overtime for each eight-hour shift she worked outside her normal work schedule, and that the City also be ordered to cease and desist from unilaterally changing a Dispatchers’ normal work schedule.

The City, in turn, maintains that it did not violate the contract because the grievant “continued to work the 7-2, 7-2, 6-4 schedule”; because it did not “create any change of days or change of shifts, but only moved . . .the grievant from one spot in the schedule to another”; and because overtime is to be paid “only when [Dispatchers] work in excess of the normal tour of duty or work period”, which is eight hours. (Emphasis in original). The City also maintains that a 20-year past practice supports its claim.

DISCUSSION

This case turns in part on Article 5, Section 6, of the contract entitled “Subcontracting”, which states, *inter alia*:

. . .

Section 6 – Management Rights – Subcontracting

It is agreed that the management of the City and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes but is not limited to the following: the right to plan, direct, control and supervise the operation of the work force, to hire, to layoff, to demote, suspend, discipline or discharge for just cause, to introduce new or improved methods or facilities, to establish and enforce reasonable rules of conduct, to determine and uniformly enforce minimum standards of performance. All of the above shall be in compliance with and subject to the terms and provisions of this Agreement, and with state and federal laws and provided nothing contained herein shall be used by management to discriminate against any employee. The Association shall have the right to appeal through the grievance procedure for any unreasonable exercise or application of any of the foregoing. (Emphasis added).

. . .

As correctly pointed out by the City, this language gives it the right to “plan, direct, control. . .” the work force, which can be construed to include the scheduling of employees. However, any such right is not unlimited because Section 6 also states that the exercise of any such rights must “be in compliance with and subject to the terms and provisions of this Agreement. . .”

Elsewhere, Article 6 of the contract, entitled “Pay Procedures and Hours”, states in pertinent part:

. . .

Section 2 – Work Day and Work Week. City Hall employee hours are Monday through Friday, 8:00 a.m. to 12:00 noon, and 1:00 p.m. to 4:30 p.m.

The hours for the Police Secretary shall be from 6:30 a.m. to 3:00 p.m. on Monday, and from 8:00 a.m. to 4:30 p.m. Tuesday through Friday, with a one-hour unpaid lunch to be taken between 11:00 a.m. and 2:00 p.m., with the exact time to be determined by the Department Head.

The hours for the Data Entry Operator shall be from 8:00 a.m. to 4:30 p.m., Monday through Friday, with a one-hour unpaid lunch to be taken between 11:00 a.m. and 2:00 p.m., with the exact time to be determined by the Department Head.

The hours for the Meter Maintenance Person shall be fifteen (15) hours per week, with the weekly work schedule to be determined by the Department Head.

The hours for the Meter Monitor shall be from 8:30 a.m. to 4:30 p.m., Monday through Friday, with a one-half (1/2) hour unpaid lunch.

The hours for the Animal Shelter Operator shall be from 11:00 a.m. to 4:00 p.m., Monday through Friday.

The hours for the police dispatchers shall be eight (8) hours per day and the shifts shall remain 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. The work week shall consist of the following rotation of work days from the dispatchers: Seven (7) consecutive shifts on 11:00 p.m. to 7:00 a.m., two (2) days off; seven (7) consecutive shifts on 3:00 p.m. to 11:00 p.m., two (2) days off; six (6) consecutive shifts on 7:00 a.m. to 3:00 p.m., four (4) days off. The shift differential for police dispatchers shall be \$1.00 per day for second shift and \$1.50 per day for third shift. Twice during each eight (8) hour shift, the dispatcher shall be entitled to a fifteen (15) minute break away from the desk, at which time they shall make arrangements with either their sergeant, a police officer or other qualified employee to take the dispatching position for a fifteen (15) minute period. In the event there is an emergency where the officer is required back on the street, the fifteen (15) minute break can be terminated immediately and can resume for the remaining minutes when convenient.

The work week for City Hall and Police Department custodian shall be twenty (20) hours per week, Monday through Friday, 4:00 a.m. to 8:00 a.m.

Section 3 – Overtime. Regular full-time employees shall be paid at time and one-half (1 ½) their regular rate for all work performed outside their normal work schedule, except as specified below.

Regular part-time clerical employees shall be paid at time and one-half (1 ½) their regular rate for all work that exceed thirty-seven and one-half (37 ½) hours per week.

Regular part-time dispatchers will be paid time and one-half (1 ½) their regular rate for all work that exceeds eight (8) hours per day, and for all work that exceeds forty (40) hours per week.

Full-time police dispatchers shall receive overtime upon approval of the Chief of Police when the dispatcher is required to work in excess of his/her normal tour of duty or work period as set out in Article 6, Section 2. A rotation sheet, listed by an employee's name, will be kept for the purpose of allocating scheduled overtime. This rotational sheet will only apply to overtime hours scheduled at least twenty-four hours in advance of the event which requires the utilization of overtime and to those hours not assigned to part-time dispatchers. The overtime rotation sheet will be maintained and updated by the on-duty dispatcher. Overtime sign-up opportunities will be allocated to the employees on the list and will continue to rotate through the classification in which the need for overtime occurs. Full-time dispatchers will be granted time one and one-half (1½) the normal rate of pay for every hour worked in excess of the normal tour of duty or work period. In the event extra duty pay is not approved, such disapproval will be made in writing by the Chief or his designate within fourteen (14) calendar days of the submitted request. The Chief shall not unreasonably disapprove overtime. (Emphasis added).

The key terms in Section 3 are “normal work schedule” and “normal tour of duty or work period” with the Association contending, and the City denying, that they mean the regular, set shift assigned to Dispatchers and that, as a result, they are entitled to overtime pay “when moved” to another shift. That is why the Association argues in its Reply Brief that Article 6, Section 3, “primarily establishes an overtime distribution procedure that obligates the City to maintain a rotation sheet to determine overtime allocation among full-time dispatchers who work in excess of their normal tour of duty.” The Association also points out that Article 6, Section 2, mandates that “shifts shall remain 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m.”

This latter proviso, however, is not as clear as the Association contends since it does not expressly state that employees are to receive overtime when they do not remain on those shifts. Moreover, the terms “normal work schedule” and “normal tour of duty or work period” also are ambiguous because they do not clearly indicate whether they refer to the 40-hour 7-2, 7-2, 6-4 work week schedule as contended by the City, or the daily shifts as contended by the Association.

In further support of its claim, the Association cites UNITED CARBON CO., 39 LA 310 (1962), wherein Arbitrator E. E. Hale ruled that the company violated the contract when it changed the regular Monday-Friday work week to a Monday, Tuesday, Wednesday, Saturday,

Sunday work week, with Thursday and Friday off. Arbitrator Hale found that the contract provided for a “regular schedule” and “regular scheduled shifts” and that the company violated these provisions when it in effect created two separate “regular schedules” by scheduling employees to first work Monday-Wednesday and then to work Saturday-Sunday.

Here, by contrast, we are not dealing with whether the City can alter the regular 7-2, 7-2, 6-4 work week schedule. Instead, this case turns on whether – *within* that weekly schedule – the City can change an employee’s daily shift assignment. This latter issue was never addressed in UNITED CARBON CO., SUPRA, which is why that case is inapposite.

This case is also distinguishable for another, more important reason: here, there is a well-established past practice showing that the City for years has changed employee shifts the way it did here without any protest or grievance by the Association. Thus, grievant McGill herself testified that such changes have been made “as long as I’ve been here” – a point corroborated by Dispatcher Piasecki, Captain Parmeter, and Lieutenant Johnson.

Given the contract’s failure to expressly state whether daily shifts can be changed within the parameters of the regularly-scheduled 7-2, 7-2, 6-4 work week, I find that this past practice – which according to Captain Parmeter’s undisputed testimony dates back to at least 1978 – is dispositive because it shows how this language has been applied in the past. That is why the City did not violate the contract when it changed McGill’s shifts and failed to pay her overtime when it did so.

In so finding, I am well aware of the Association’s complaint that such changes are very disruptive to an employee’s private life, as both McGill and Piasecki testified to that effect. Nothing herein is meant to downplay or ignore their legitimate concerns. However, my role herein is limited to applying the contract, which in this case means upholding the 20-year past practice of allowing such shift changes without paying overtime. If employees want this practice to end, they must change it at the bargaining table.

In light of the above, it therefore is my

AWARD

1. That the City did not violate the contract when it changed grievant Heidi McGill's shift and failed to pay her the contractual overtime rate for the hours she worked on October 16, 24 and 25, 1998 and November 17 and 18, 1998.

2. The grievance is therefore denied.

Dated at Madison, Wisconsin this 18th day of April, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

