BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FOND DU LAC CITY EMPLOYEES UNION, LOCAL 1366, AFSCME, AFL-CIO

and

CITY OF FOND DU LAC, WISCONSIN

Case 159
No. 58219
MA-10887

Appearances:

Mr. Lee W. Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, appearing on behalf of Fond du Lac City Employees Union, Local 1366, AFSCME, AFL-CIO, referred to below as the Union.

Mr. William G. Bracken, Employment Relations Services Coordinator, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Fond du Lac, Wisconsin, referred to below as the City or as the Employer.

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 Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Al Lietz, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on February 16, 2000, in Fond du Lac, Wisconsin. The hearing was not transcribed. The parties filed briefs by March 28, 2000.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the City violate the Collective Bargaining Agreement by failing to give the Grievant at least twenty-four hours notice of the extension of his work hours for April 20, 1999, and by refusing to pay the Grievant time and one-half for his work from 8:00 a.m. through 4:00 p.m. on that date?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV
WORKDAY AND WORKWEEK

. . .

Section 3 – The work schedule for the Sewage Plant and Water Plant will be by mutual Agreement and the schedules posted.

. . .

Section 7 – In the Water Plant and the Sewage Treatment Plant, due to unusual circumstances, when it is necessary to change the work schedule, twenty-four (24) hours notice shall be given. Hours worked within the notice period or on scheduled days off shall be at the rate of time and one-half the normal rate of pay (base rate plus longevity).

. . .

ARTICLE VIII
OVERTIME AND HOLIDAY PAY

Section 1 – Time and one-half shall be paid for all time worked outside of the employee's regular shift of hours, except as otherwise provided in this Agreement. . . .

Section 2 – For emergency and non-emergency overtime, each division shall post in all other divisions, once a year, or more often if deemed necessary, a list of employees with space for each employee to indicate whether or not he wishes to be called in for regular overtime work. After an employee has indicated that he does not wish to be called in for overtime work, he shall not be called unless that employee is needed due to his specific skills or due to the non-availability of a sufficient number of employees desiring overtime work.

Overtime shall be divided as equally as possible among the qualified employees of the division, then divided as equally as possible among the qualified employees outside the division, except as otherwise provided in this Agreement, who have signed indicating their desire for overtime. The overtime of employees shall be posted. In the event of an emergency, all employees may be required to work overtime, however, those employees who have indicated as desire to work overtime will be called first provided they are capable of performing the available work. . . .

Section 5 – Overtime shall be divided as equally as possible on a calendar year basis among qualified employees in a division. Overtime of employees shall be posted. . . .

ARTICLE XXVII
MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force . . . together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. . . .

APPENDIX A

1999 Wage Rates Effective January 1 – December 31, 1999:	. . .	**12 Mos.**	. . .
. . .			
Influent Pump Operator	. . .	14.51	. . .

BACKGROUND

The grievance form, originally filed on behalf of the Grievant and Gerry Hilt, states the "applicable violation" thus:

Grievant came to work on 4/20 at 8AM. He was notified at that time by the operator he was relieving that his work schedule had changed from 8AM-4PM to 8AM to 8 PM. He was never notified of this change by anyone until he reported to work that morning.

The form seeks that the overtime rate be paid on all of the hours worked by the Grievant on April 20, 1999 (references to dates are to 1999, unless otherwise noted). The Union dropped the grievance regarding Hilt, when it learned that his overtime was traceable to an unanticipated absence of another employe who could not call the absence in to the City until shortly before his shift.

The Grievant has served the City as an Influent Pump Station Operator (IPSO) for roughly two years. He also serves as a Union Steward. The City must operate its Sewage Treatment Plant on a twenty-four hours per day, seven days per week basis. The Plant is governed by State of Wisconsin regulations that mandate continuous staffing by licensed operators. To cover its continuous operation, the City schedules employes on a rotating daily work schedule requiring seven days on, then two days off, followed by seven days on, then two days off, followed by six days on then four days off. The schedule permits employes one scheduled weekend off per month. The work schedule also rotates employe shifts. This work schedule complicates employe planning of non-work time with family.

To balance work and non-work time, the City posts schedules as far in advance as possible. At the close of a calendar year, the City will post a daily work schedule for the following year. Sometime in late December of 1998 or in early January, the City posted a work schedule for 1999. That schedule listed the Grievant working, for April 20, a shift from 8:00 a.m. until 4:00 p.m. Due to anticipated and unanticipated employe absences, the annual schedule is subject to modification throughout the year. In 1999, for example, the schedule covering April 20 was modified on March 1, April 7 and April 19. In the schedule posted on April 19, the Grievant's schedule for April 20 was first modified to reflect that he would work beyond 4:00 p.m.

The 1999 annual schedule became complicated by the termination of an IPSO in January. The City was not able to fill the vacancy thus created until April 26. James Williams is the Director of Operations for the Sewage Treatment Plant, and is responsible for scheduling employes. The loss of the IPSO created a regularly occurring 'hole' in the work schedule, typically falling on a Monday. The City responded to the gap in the schedule and to an arbitration award by issuing, in a memo dated January 15, guidelines for scheduling overtime. That memo reads thus:

> Since we are now operating short a couple of operators the following guidelines will apply for shift vacancies occurring as a result of unforeseen absences.
>
> 1. Attempt to fill the vacancy within the position classification: IPS for IPS, Zimpro for Zimpro, etc.
> 2. Attempt to fill a vacancy with two four-hour assignments. The operator on shift will stay for an additional four hours, and the operator on the shift subsequent . . . will report four hours early.

3. If the vacancy occurs within IPSS, the maintenance helpers are available for overtime assignments, notify them and Rick Meilahn, if they will fill the vacancy.
4. Attempt to fill the vacancy with an operator scheduled off for that day if the two four-hour assignments are not possible. Consult posted OT accumulation list and select lowest OT worked plus OT declined operator for assignment.
5. Schedule an additional eight-hour shift for the operator on duty. This assignment is the last resort. A shift operator is not relieved until his replacement shows up.
6. Document all overtime assignments and contacts on form WPCP-108.
7. I will attempt to equalize overtime by assigning hours to cover vacancies from vacations, terminations, training periods and retirements.
8. If situations arise not covered by this procedure, contact me at home . . .
9. Absences should be reported to OCL on duty or to me whenever possible.

Paul Rawlsky works at the Treatment Plant as an Operations Crew Leader (OCL). On February 17, he submitted a written leave request to Williams, seeking a six-day vacation starting on April 20. Williams granted the request the same day.

Due to the unfilled vacancy and other employe absences, Williams found it difficult to schedule more than one week in advance. On Friday, April 16, he noted that due to Rawlsky's vacation, he was facing a hole in the work schedule for the following Tuesday. He determined he could best fill the hole by having the Grievant extend his shift four hours, and having the IPSO on the following shift report for work four hours before his previously scheduled start. He printed out and posted, on April 19, a shift schedule documenting this change. Williams testified that his normal practice would be to call the Grievant to advise him of this change. He could not, however, specifically recall if he contacted the Grievant at anytime prior to April 20. Williams noted that the Grievant was scheduled for a four-day weekend covering the weekend of April 17-18.

The Grievant testified that he reported for work on April 20, believing he would end his shift at 4:00 p.m. The IPSO then leaving duty informed him, however, that it was unlikely that his relief would report at 4:00 p.m. The Grievant then checked the work schedule. That schedule, posted on April 19, noted that he was expected to work four hours beyond his previously scheduled shift. The Grievant worked twelve hours that day, and reported on his time card that he anticipated receiving twelve hours of overtime under Article IV, Section 7. Williams approved the time card, but reduced the amount of overtime hours from twelve to four. He did not inform the Grievant of this change or of the reason for scheduling the Grievant for twelve hours.

Unit employes can turn down overtime assignments, but if they do so, the rejected hours count against the employe as the City equalizes overtime hours across the unit. The equalization is made over the course of a calendar year. Williams and his supervisor, John Leonhard, testified that they have not paid overtime under Article IV, Section 7. In their view, such payment would require changing an entire shift or calling in an employe on a scheduled day off. The more typical assignment, for a number of years, has been to split a vacant shift between the operators on the preceding and succeeding shifts. Williams and Leonhard assumed, as of April 20, that the Grievant had fewer overtime opportunities than other unit employes, particularly John Gremminger. City time records establish that this assumption was inaccurate.

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

THE PARTIES' POSITIONS

The Union's Brief

The Union states the issues for decision thus:

> Did the City of Fond du Lac violate the Labor Agreement when it failed to pay (the Grievant) premium pay at a rate of time and one-half for all 12 scheduled hours of work he performed in a 24 hour period when the City failed to give him the proper 24 hour notice?
>
> If yes, what is the remedy?

After a review of the evidence, the Union notes that Article III, Section 4 imposes a rotating schedule that makes the "lives of all the employees . . . extremely difficult." That schedule permits employes only one weekend a month to share with their families. It is against this background that the provisions of Article IV must be interpreted.

More specifically, the Union highlights the significance of the twenty-four hour notice requirement of Article IV, Section 7, and the significance of the "penalty for the City not meeting this requirement." The evidence establishes that the City knew when an IPSO left in January that "there would be a 'hole' in the work schedule for in April." The replacement for this vacant position did not report to work until April 26. In addition to this, Williams approved a vacation request, in mid-February, that ensured that the OCL who would normally cover for the yet to be filled IPSO position would not be available. Inexplicably, Williams failed to schedule coverage for the April 20 work shifts until April 19.

Williams ultimately covered the 8-hour hole in the schedule by having the Grievant and Huelsman cover, on overtime, one-half of the vacant shift. The Union contends that in doing so, the City failed to follow its own guidelines in selecting the Grievant for the overtime and failed to give the Grievant the required notice of the change. The Union distinguishes the Grievant's situation from that of Huelsman, who did receive twenty-four hour notice of the change, and from that of Hilt, who was ordered to extend a shift to cover the unanticipated illness of another employe.

Article IV, Section 7 covers a change from an eight to a twelve-hour shift, and the Union does not challenge the City's "right to make these changes in work schedules." However, the Union argues "that right is accompanied by an obligation to make the contractually specified payment to the employee." Thus, even though the change in the Grievant's "work schedule is justified," the City was contractually obligated to give the Grievant twenty-four hours' notice of the change "or, at least, make a reasonable effort to give notice."

As the remedy appropriate to the violation of the agreement, the Union seeks an order sustaining the grievance and requiring the City "to pay (the Grievant) the premium pay for all 12 hours." At the Grievant's then-current pay rate, the required payment would be $58.04.

The City's Brief

The City states the issues for decision thus:

> Did the City violate Article IV, Section 7 – Change in Work Schedule, when it offered overtime to the Grievant pursuant to Article VIII, Overtime and holiday pay? If so, what is the remedy?

The evidence establishes that the City refines its annual operating schedule "on a monthly and even weekly basis as employees request time off." Such changes are continuous, and it is not unusual for Williams to post "the final version only about one week ahead." In this case, the vacant IPSO position created a regular 'hole' that was typically covered by an OCL. Due to a vacation request granted in mid-February, Williams faced a hole on April 20 that could not be covered except through overtime.

Williams responded by following the City's overtime call-in procedure. His action did not include any change to the Grievant's normal shift. Rather, Williams simply offered the Grievant four hours of overtime. This offer complies with Article VIII, is consistent with established past practice, and equitably distributes overtime as required in a recent arbitration award. That an employe can turn down overtime underscores that the Grievant did not have

his schedule changed. Williams' failure to contact the Grievant before April 20 reflects no more than an assumption that the Grievant would not be reachable on his weekend off. To require notice beyond that afforded the Grievant would violate longstanding practice.

Since there was no change in the Grievant's schedule, Article IV, Section 7 is inapplicable. Beyond this, there were no "unusual circumstances" that required a schedule change. It follows, the City concludes, that "Article IV, Section 7, is completely inapplicable to the instant grievance." To conclude otherwise "would lead to a harsh and absurd result," by making every overtime request subject to Article IV, Section 7. Concluding that Article VIII, not Article IV, governs the grievance avoids this. The City contends that the two articles serve different purposes, with Article IV applying only if an employe is called in on a scheduled day off or is ordered to work a different shift than scheduled. That the City has never paid overtime for the type of request posed here underscores the weakness of the Union's case.

The City concludes that the Union has failed to meet its burden of proof, and "requests that the Arbitrator dismiss the grievance in its entirety."

DISCUSSION

The parties' conflicting statements of the issue on the merits of the grievance highlight the interpretive difficulty it poses. The Union argues the grievance as a scheduling issue under Article IV, Section 7 and the City argues the grievance as an overtime assignment issue under Article VIII. The issue I have adopted is broad enough to incorporate both points.

The difficulty posed by the grievance is that Articles IV and VIII must each be applied to the disputed hours. The interpretive difficulty posed is that each provision must be given effect without reading the other out of existence.

The strength of the Union's argument rests on the applicability of Article IV, Section 7 to the grievance. That section mandates "twenty-four (24) hours notice" where "unusual circumstances" make it "necessary to change the work schedule." The City contends that there are no unusual circumstances, and thus that the section is inapplicable to the grievance. The Union's view is, however, persuasive. The reference to "unusual circumstances" reinforces the parties' intent to establish work schedules that are as reliable and as predictable as possible. Sections 2, 3 and 6 underscore this intent. Against this background, the reference to "unusual" in Section 7 underscores that work schedules should be established as far in advance as is reasonably foreseeable. "Unusual" emphasizes that changes to the schedules should be forced on the City by circumstances beyond their control. Reading "unusual" too

narrowly would defeat the notice requirement created in the first sentence of Article IV, Section 7. That the notice requirement is significant is underscored by the second sentence of the section, which, in part, establishes a sanction for a failure to provide appropriate notice.

The employe resignation in January and Rawlsky's vacation request were not within the City's control, but were, by mid-April, known events. This does not, however, invalidate the role of Article IV, Section 7. Williams noted in his testimony that staffing was, from January through April, sufficiently difficult that he could not finalize schedules more than one week in advance. He could not attempt to finalize the schedule including April 20 until the preceding weekend, and could not finalize the schedule including April 20 until April 19. He noted he did not like to schedule in this fashion, but the January vacancy coupled with employe absences offered him no choice. This atypical situation constitutes, in light of this testimony, "unusual circumstances."

Against this background, Article IV, Section 7, imposed a duty on the City to notify the Grievant of the schedule change. The April 19 work schedule was sufficient for employes other than the Grievant. However, the City did not afford the Grievant notice of the changed schedule. Williams noted that his usual practice was to call employes when he became aware of the change. In this case, however, he could not specifically recall doing so. He also stated that he might not have called since it was the Grievant's weekend off. The City's assertion that Williams had no duty to notify the Grievant reads Article IV, Section 7 out of existence.

The interpretive difficulty posed here, however, is that the Union's view of Article IV ignores the provisions of Article VIII. The Union seeks overtime pay for the hours between 8:00 a.m. and 4:00 p.m., in addition to the hours between 4:00 p.m. and 8:00 p.m. on April 20. This view ignores that the 1999 annual schedule, posted no later than January, scheduled the Grievant to work between 8:00 a.m. and 4:00 p.m. on April 20. This fact is fundamental to the labor agreement because those hours are the Grievant's "regular shift of hours." Article VIII, Section 1 addresses "all time worked outside of the employee's regular shift of hours." As the City points out, the Union's view of Article IV, Section 7 could read the provisions of Article VIII, Section 1 out of existence.

The interpretive dilemma is thus to grant meaning to Articles IV and VIII without denying meaning to either of them. To resolve this dilemma, it is necessary to focus the parties' positions as narrowly as possible. The contractual strength of the Union's argument regarding Article IV focuses on notice. The Union highlights the inconvenience of the Grievant's work schedule, and emphasizes the need to provide employes the ability to plan their personal and work lives. There is, however, a tension within this line of argument, if it is taken too broadly. As noted above, Williams' conclusion that he was under no duty to notify the Grievant of the change, even though he knew of it prior to the

posting of the April 19 work schedule, is difficult to reconcile with Article IV, Section 7. It is, however, a reach for the Union to assert working the eight hours scheduled since January inconvenienced the Grievant. Beyond this, the Union's attempt to extend Article IV, Section 7 into his regular schedule ignores that an employe can decline overtime. That doing so counts against the employe in the overtime equalization process is irrelevant to the asserted inconvenience worked against the Grievant.

Apart from the issue of notice, the City persuasively argues that extending the Grievant's shift on April 20 is indistinguishable from typical overtime assignments. The assignment extended his shift four hours, which the County paid, as required by Article VIII, Section 1, at time and one-half. Nothing but the failure to notify the Grievant can be viewed as a violation of contract. He had been scheduled to work from 8:00 a.m. until 4:00 p.m. since January. There is no contention that shift was not properly posted, and the Union's attempt to force overtime payment for those hours arguably violates the scheduling provisions of Article IV as well as the overtime provisions of Article VIII.

Against this background, the sole violation that can be found on these facts is Williams' failure to notify the Grievant of the change. There is no reliable basis to conclude that he sought to contact the Grievant. It is apparent he felt no obligation to do so. This view is irreconcilable to Article IV, Section 7. There is no dispute such notice could have been oral. The Grievant may not have been reachable, but for this to be a defense, the City must at least attempt to contact him. To find no violation of contract here would render the notice requirement of Article IV, Section 7 meaningless.

The issue of remedy raises the same interpretive dilemma posed above. Requiring the eight hours of overtime sought by the Union arguably violates Article IV, since it is undisputed that the Grievant received proper notice for his regular shift. Beyond this, such payment arguably makes appropriate payment of overtime under Article VIII, Section 1 a violation of Article IV, Section 7. The Award entered below addresses this dilemma by stating the contract violation proven here, which is a matter of notice. No payment of overtime for the regularly scheduled hours is stated in the Award. This does not mean such payment could not, on other facts, be ordered. To reconcile Articles IV and VIII, however, such payment should sanction repeated or egregious violations of the notice requirement. This grievance does not pose such facts. Rather, the grievance poses a one-time, good faith disagreement regarding how the provisions of Article IV, Section 7 can be reconciled with the provisions of Article VIII.

Before closing, it is appropriate to tie the conclusions stated above more tightly to the parties' arguments. The City notes that it has never made payments under Article IV, Section 7. This is unremarkable as a matter of contract interpretation, since that provision is, in a sense, designed not to be used. The sanction of paying overtime for all hours worked

within a notice period or on scheduled off days is designed to avoid scheduling within the notice period or on off days. That the provision has yet to prompt payment, however, affords no basis to conclude it is inapplicable. More specifically, the City's assertion that extending a shift can never fall within Article IV, Section 7 has no support in the terms of that section. As noted above, the extension of shifts appears to fit more neatly within Article VIII, Section 1. This falls short, however, of rendering Article IV, Section 7 inapplicable to the extension of shifts. Most importantly here, a conclusion that the second sentence of Article IV, Section 7 is not routinely applicable to the extension of shifts falls short of voiding the notice requirements of the first sentence.

The flaw in the Union's requested remedy is that it can not be concluded that the Grievant actually suffered an out of pocket loss unless it is concluded that the City violated the labor agreement by calling him to work his regular shift. There is no basis for such a conclusion, since the 1999 annual schedule and each of its posted revisions placed him at work for April 20 from 8:00 a.m. until 4:00 p.m. It may be that an egregious or repeated breach of the notice requirement could make such a remedy appropriate. The facts for such a remedy are not, however, posed here.

AWARD

The City did violate the Collective Bargaining Agreement by failing to give the Grievant at least twenty-four hours notice of the extension of his work hours for April 20, 1999. The City did not, however, violate the labor agreement by refusing to pay the Grievant time and one-half for his work from 8:00 a.m. through 4:00 p.m. on that date.

Because the City's extension of his shift for that date was necessitated by unusual circumstances within the meaning of Article IV, Section 7, it was obligated to notify the Grievant of those changes under the terms of that section. Because the Grievant had received appropriate notice, within the meaning of Article IV, Section 7, of his regular shift for April 20, the City was under no obligation to pay overtime for the hours between 8:00 a.m. and 4:00 p.m. on April 20. Since the Grievant received overtime payment under Article VIII, Section 1 for the hours worked on April 20 between 4:00 p.m. and 8:00 p.m., no make-whole payment is required by this Award.

Dated at Madison, Wisconsin, this 25th day of April, 2000.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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