BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 71, AFSCME, AFL-CIO

and

CITY OF KENOSHA

Case 190
No. 58661
MA-11025

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Roger E. Walsh, Attorney at Law, Davis & Kuelthau, S.C., appearing on behalf of the City.

ARBITRATION AWARD

The parties named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of John Yunker regarding a change of working hours. The undersigned was appointed and held a hearing in Kenosha, Wisconsin, on July 13, 2000, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by October 16, 2000.

ISSUE

The issue to be decided is:

> Did the City violate the collective bargaining agreement when it changed the hours of work of John Yunker from 7:00 a.m. to 3:30 p.m. on Mondays, Wednesdays and Fridays and 8:00 a.m. to 4:30 p.m. on Tuesdays and Thursdays to 11:00 a.m. to 7:00 p.m. Mondays through Fridays between April 26, 1999 and October 31, 1999? If so, what is the appropriate remedy?

BACKGROUND

This dispute centers around contract provisions regarding hours of work and the bargaining history for a new provision, Section 27.03, which states:

> An annual or seasonal flexible starting time work schedule may be utilized in those City departments/divisions where the parties mutually agree. Such flexible starting time work schedule may vary by not more than one hour from the starting time hours in accordance with Appendix B of the labor agreement. Such flexible starting time work schedule agreement may be withdrawn by either party with a minimum of five (5) days notice.

Also in the contract, in Appendix B, is a list of department work schedules in effect on October 15, 1998, followed by this statement:

> It is mutually understood that the above schedules are those in effect on March 25, 1999 and that they are subject to change upon proper notification being given by the City.

The City has considered a two-week notice to be a proper notification in accordance with the above language, and the Union has not objected. Also in Appendix B – the hours stated for Meter Reading and Meter Test Employees calls for "flex hours depending on day light hours."

There are five employees who are Water Meter Maintainers. In order of seniority, they are Willard Puckett, Mark Young, John Yunker, Joseph Rivera and John Oscar. All of them worked the same hours of 7:00 a.m. to 3:30 p.m. and 8:00 a.m. to 4:30 p.m. until Oscar and Yunker were assigned to 11:00 a.m. to 7:00 p.m. to test meters in homes between April and November in 1999. Rivera filled in when either Oscar or Yunker were absent and took some later hours. Yunker and Oscar filed grievances. Oscar's grievance was withdrawn, and Yunker's grievance is the one considered in this award.

The Public Service Commission requires the City to test all meters for accuracy. Residential meters have to be tested every ten years. Large meters are tested more often, and those tests are only run in the spring, summer and fall when water running through the meters would not freeze. Schools are also done in the summer. The City needed to test 3,600 residential water meters in 1999 and was far behind schedule. When employees went door to door during their regular working hours, about 85 percent of their attempts to get into homes were unsuccessful. Residents wanted appointments for customer service for late afternoons or Saturdays.

Yunker and Oscar were doing the residential testing as of January in 1999. Yunker had a weight restriction on lifting more than 20 pounds, and Oscar had a 30-pound restriction which was removed in April of 1999. These employees could not work on the large water

meter testing due to their lifting restrictions. The commercial and industrial meters run from 19 pounds up to 250 pounds, with some weighing even more. The meter testing equipment for the larger meters weighs over 100 pounds. The residential meters weigh between 5 and 12 pounds.

On March 25, 1999, Ed St. Peter notified Union President Cecil Garner of a meeting to discuss possible changes in the operation of the meter services division of the Utility. The Union and management met on April 1, 1999, to discuss the change in hours for testing residential meters. The Union brought up concerns about the contractual hours in that meeting. St. Peter suggested having three Water Meter Maintainers work 8:00 a.m. through 4:30 p.m. Mondays through Fridays, and two Water Meter Maintainers work 10:00 a.m. through 6:30 p.m. Tuesdays through Fridays and 8:00 a.m. to 4:30 p.m. on Saturdays. The proposed schedule would last from April 15 through October 31, 1999, through daylight savings time. The Union was especially concerned about Saturday hours, while acknowledging that the work needed to be done, according to St. Peter. The parties discussed starting later on Mondays through Fridays to catch people who were not at home. St. Peter discussed working noon to 8:30 p.m. and 11:00 a.m. through 7:30 p.m. Mondays through Fridays.

On April 12, 1999, St. Peter sent a memo to Garner to notify the Union that Yunker and Oscar would work 11:00 a.m. to 7:30 p.m. Monday through Friday, although the 7:30 p.m. time was later changed to 7:00 p.m. St. Peter's memo states that the assignments were based on the fact that Yunker had a permanent weight restriction of 20 pounds, and Oscar was the lowest in seniority in the meter section. Oscar's weight restriction had been lifted on April 7, 1999.

The Grievant, John Yunker, started working for the City in 1973 as a bus driver and his current job is called Water Meter Maintainer II. He started in the Water Department as a Water Meter Maintainer I on February 7, 1994. His hours were 7:00 a.m. to 3:30 p.m. on Mondays, Wednesdays and Fridays, and 8:00 a.m. to 4:30 p.m. on Tuesdays and Thursdays. Yunker worked those same hours between 1994 and 1999. He worked on meter service and first started to test residential meters in April of 1999, when his hours were changed.

According to Yunker, a temporary full-time employee worked from 11:00 a.m. to 7:30 p.m. and the Union filed a grievance over this position. The position was a non-represented position and the Union sought to represent the position. On December 19, 1991, the City posted a position for Water Meter Maintainer I with hours of 10:00 a.m. to 6:30 p.m. This position was created based on the settlement of the grievance, Yunker testified. Puckett posted for the position. Puckett left that position in about 1994, and Young was appointed to the position of Water Meter Maintainer on July 25, 1994. Young's hours in 1999 were varied, but he received the 7:00 a.m. to 3:30 p.m. and 8:00 a.m. to 4:30 p.m. hours when Yunker was given late hours in 1999. Young's hours were flexible (or 10:00 to 6:30 p.m.) when he was testing or reading water meters. Young could read meters anytime during daylight hours.

Yunker received no overtime between April through October in 1999. Rivera worked some overtime when Yunker or Oscar were not there and he took over their appointments after regular hours up to 7:00 p.m. He usually earned two and one-half or three and one-half hours of overtime when that happened. Rivera estimated that he worked only two or three times for Yunker and Oscar.

The parties used win-win bargaining to reach many tentative agreements for their current contract. Cecil Garner was the Union President between 1996 and 2000, and he was on the bargaining committee when the parties agreed to the new language in Section 27.03 on August 27, 1997. Garner testified that there was a lot of discussion regarding this section. He understood that departments or divisions could use the flexible starting time on a case by case basis. Garner understood that the City could eliminate some overtime and expand hours by this section, and the Union wanted some flexibility for employees. Garner thought that the advantage to the Union was that Section 27.03 restricted Appendix B, and modifications to Appendix B hours had to be mutual and could be withdrawn with notice by either party. Upon such notice, hours would revert to Appendix B. Garner believed that under the old contract, the City could change hours for a complete division, but not for individuals or a group of employees. Garner never saw the City change hours except for a division. Garner works in the Street Division, and understood that if the City wanted to change the hours for that Division, it would be for the whole Division.

St. Peter also participated in the win-win bargaining sessions for the current contract. His recollection of the discussion around Section 27.03 was that the Union wanted some employees to have flexible time. Prior to the new language, the City could change hours but there was no way for employees to seek to change their hours. St. Peter recalled that the City said the language in Appendix B about changing hours would remain.

The City's Personnel Director, Charles Grapentine, was involved the negotiations for the current contract and recalled that Section 27.03 was meant to provide flexibility for employees to have a modified work schedule. Grapentine stated that the City intended to retain its right to change work schedules, and he made that clear during bargaining. Grapentine views Appendix B as the language that gives the City the right to change work schedules without mutual agreement, while Section 27.03 allows for work schedule changes that require a mutual agreement. If there is no mutual agreement, or one side decides to withdraw such agreement, management could schedule the appropriate hours, according to Grapentine. He viewed Section 27.03 as a way for employees to communicate with management and make changes in hours, and memorialized a practice that had been in effect between employees and supervisors.

During the bargaining, the management team proposed some work schedules for four 10-hour days or three 12-hour days. There was a lot of discussion – perhaps up to 16 hours of discussion – regarding work schedules. The end result was Section 27.03. Appendix B was discussed during the bargaining over work schedules.

Employees and supervisors have changed hours in the past, in line with the language in Appendix B. The City was never required to change the hours for a whole division when changing hours under Appendix B. The City could change hours for one employee and has done so in the past. Grapentine testified that it is up to the managers of departments to set up work schedules. He has told them that they may change hours with proper notification. He usually tells managers to discuss the matter with the Union, and to give employees at least two weeks' notice. Grapentine was aware of two instances in which the Union President asked if a cement crew could be flexed by an hour, and there was mutual agreement to do so.

There are several employees whose hours differ from those stated in Appendix B. In almost all of the examples listed here, the employees were working the different hours before the current contract went into effect and continued to work the different hours after the contract was signed. In the Municipal Office Building, the Engineering Division of Public Service has hours listed as 8:00 a.m. to 4:30 p.m. Four of the five Engineering Technicians work from 7:00 a.m. to 3:30 p.m. when construction projects are being overseen in the summer. After deer season ends, they go back to the stated hours. One person in that division works 8:30 a.m. to 5:00 p.m. year round.

The Museum has two employees whose hours vary from the contract's hours of 9:00 a.m. to 5:00 p.m. A maintenance person works 7:30 a.m. to 4:30 p.m., and an office person works 8:00 a.m. to 5:00 p.m. In Public Service Administration, the contract's hours are 7:30 a.m. to 4:30 p.m. Three secretaries work from 8:00 a.m. to 4:30 p.m., and one works from 7:30 a.m. to 3:50 p.m. every other week. A maintenance person works from 8:00 a.m. to 4:30 p.m. About five years ago, that person used to work 6:45 a.m. to 3:15 p.m., until a new City administrator started. In the Parks Division, the hours call for 7:00 a.m. to 3:00 p.m. There are two beach and pool supervisors - one works from 6:00 a.m. to 2:00 p.m., the other works from noon until 8:00 p.m. when the beaches and pools are open between April 1st and October 31st.

In the Waste Division, the contract's hours call for 7:00 a.m. to 3:00 p.m. hours, Monday through Friday. There are two people that work from 9:30 a.m. to 5:00 p.m. in the winter Tuesday through Friday, and on Saturday, they work 8:00 a.m. to 3:30 p.m. In the summer, they work from 10:30 a.m. to 6:00 p.m. Tuesday through Friday, and 8:00 a.m. to 3:30 p.m. on Saturday. There are also two equipment operators and one maintenance person who work 6:00 a.m. to 2:00 p.m.

In the Transit Department, the Mechanics in the garage have hours that call for 7:00 a.m. to 3:30 p.m. Monday through Friday. One works from 5:00 a.m. to 1:30 p.m.; one from 6:00 a.m. to 2:30 p.m.; one from 7:00 a.m. to 3:30 p.m. on Tuesday through Saturday; one from 7:00 a.m. to 3:30 p.m. per the contract; and one from 11:00 a.m. to 7:30 p.m. The Tuesday through Saturday work started in 1999 with the arrival of antique streetcars.

In the Police Department, the Counter Clerks' contractually stated hours are Monday through Friday, 7:00 a.m. to 3:30 p.m., 3:30 p.m. to midnight, and 11:00 a.m. to 7:30 p.m., and Tuesday through Saturday 7:00 a.m. to 3:30 p.m. Three of them work during those hours. No one works the shift to midnight. One works 2:00 p.m. to 10:30 p.m. and this schedule started about three or four months ago. The Parking Enforcement Aides' hours are listed as 7:00 a.m. to 3:30 p.m. and one works those hours but two of them work from 8:00 a.m. to 4:30 p.m.

In the Water Utility, a Stockroom Clerk's stated hours are 7:00 a.m. to 3:30 p.m., Monday through Friday, but she has worked starting times of 6:00, 7:00 and 8:00 a.m. for the last three years, at least in 1998 before the current contract was signed. An Engineering Technician, who is the Union Steward, has worked starting times of 6:00 and 7:00 a.m., although the stated contract hours start at 8:00 a.m. She wanted to take an afternoon class during one semester, so St. Peter allowed her to start work at 6:00 a.m.

During the 1989-1991 contract, the Appendix B hours for the Water Distribution Plant stated them as 7:00 a.m. to 3:30 p.m., Monday through Friday. During that contract, in 1991, Puckett signed his posting for the Water Meter Maintainer I position that called for hours of 10:00 a.m. to 6:30 p.m. and he worked those hours. In the 1992-1994 contract, the hours are listed for Water Construction, Water Distribution Plant (Construction and Meter Shop) as 7:00 a.m. to 3:30 p.m., Monday through Friday. The contract for 1992-1994 was revised, and the hours for the meter shop were listed as 7:00 a.m. to 3:30 p.m. on Monday, Wednesday, and Friday and 8:00 a.m. to 4:30 p.m. on Tuesday and Thursday. The meter reading and meter test employees hours were stated as "flex hours dependent on day light hours." Employees were already working that schedule before the contract was revised. St. Peter wanted them to work 8:00 a.m. to 4:30 p.m., but employees and the Union objected, and the schedule kept 7:00 a.m. starting times three days a week after the parties discussed it. Puckett worked 10:00 a.m. to 6:30 p.m. between 1991 to 1994, and Young worked 10:00 a.m. to 6:30 p.m. between 1994 and 1997. Young did not work that schedule after 1997. He was assigned to read meters, and St. Peter called his schedule an incentive program – the readers can read whenever they want to read them. The meter readers can work early, late, finish early, as long as they finish their routes.

Routes in the Waste Department are selected by seniority but the contract does not require assignment of work schedules by seniority. Management has decided to assign maintenance and operations in the Water Utility without regard to seniority.

THE PARTIES' POSITIONS

The Union

The Union points out that this is a complex bargain for a wall-to-wall bargaining unit in the City. Negotiations have always been complex with an endless list of issues to be addressed. In the summer of 1997, the parties engaged in win-win bargaining, whereby issues

were agreed to only by consensus. The parties reached a tentative agreement, after much time passed, and among the changes was a new section at issue here – Section 27.03. The Union asserts that it never agreed with the City's position that it had the unbridled right to modify employees' work schedules at will, but notes that Section 23.01 required the City to notify the Union of an anticipated change and bargain the impact.

When Section 27.03 was added, the ability of management to force changes in working hours was restricted to a one-hour swing from the established starting times contained in Appendix B, and only with the approval of both parties. The new section was tentatively agreed to at a bargaining session held on August 27, 1997. After everyone gave it a thumbs up, Personnel Director Grapentine had the tentative agreement typed and it was initialed by the entire cast of characters.

The Union notes that the Grievant signed a posting for Water Meter Maintainer in 1994 with hours of 7:00 a.m. to 3:30 p.m. on Mondays, Wednesdays and Fridays, and hours of 8:00 a.m. to 4:30 p.m. on Tuesdays and Thursdays. When the City changed the hours of work for the Grievant in 1999, a less senior employee, Rivera, maintained hours in Appendix B. Also, prior to 1999, only one employee classified as a Meter Maintainer was scheduled to work hours that varied from those identified in Appendix B. That came about when the City and the Union reached an agreement over a grievance about a posting to work hours different than those contained in Appendix B.

The City served notice that it wanted to change the working hours of the Meter Maintainers, citing Section 23.01 of the bargaining agreement. However, the Union states, Section 23.01 indicates that the City needs to notify the Union "prior to effectuating any change where the proposed change would introduce new job classifications, or affect the wages of employees." That section of the contract does not contemplate the unilateral right of the City to change working hours.

The Union argues that the City violated Article XXVI – Maintenance of Standards, which states: "The employer agrees that all conditions of employment in his/her individual operation relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the standards in effect at the time of the signing of this agreement." At the time of the contract signing, the hours of work for the Grievant were those stated in Appendix B. The change in his working hours thus violates Article XXVI.

When the Grievant's hours were changed, he continued to receive straight time pay. Article XVII – Overtime Pay, at Section 17.02, states that hours outside of an employee's regular shift are to be paid at time and one-half. Article XXVI states that overtime differentials must be maintained. By not compensating the Grievant at an overtime rate for hours of work outside of his normal schedule, the City violated Section 17.02 of the contract.

The Union asserts that the City failed to show that another employee could have worked the hours. Yunker's hours were changed outside of considerations of seniority and outside of the fact that Young's hours remained constant, even though Young's job called for the possibility of seasonal adjustments in work hours. When Yunker's hours were changed, those hours varied from the known hours of the position at the time he posted for it.

The Union contends that the City effectively laid him off out of seniority, and he had the right to bump any employee junior to him in seniority with the understanding he would have to be able to perform the duties of the person he bumped. He was not given that opportunity, pursuant to Section 4.07. The job in the Meter Maintainer classification that Yunker held – assuming the hours were modified outside the parameters in the newly negotiated Section 27.03 – would have to be posted. None of that happened.

The Union recalls the euphoria of the agreement reached in the summer of 1997, the collective sigh of relief to limit the rights of management by adding Section 27.03, the sense of empowerment. Now the City says that Section 27.03 really doesn't mean anything. Say it ain't so, the Union concludes.

The City

The City asserts that Appendix B of the bargaining agreement clearly gives it the right to unilaterally change the work schedules of employees in the bargaining unit. There is no ambiguity in the provision that states: "It is mutually understood that the above schedules are those in effect on March 25, 1999 and that they are subject to change upon proper notification being given by the City." The only restriction on the City is the proper notice, and the City gave more than two weeks notice, which has been considered proper in the past. Section 2.01 provides that the powers or authority not specifically abridged, delegated or modified by the agreement are retained by the City, and such powers include those in other sections of the agreement. Appendix B provides that the City has the power and authority to unilaterally change work hours of bargaining unit employees as long as proper notification is given. Section 2.04 also provides that the City has the right to determine reasonable schedules of work. The City's need to change hours to gain access to residences to complete testing water meters is reasonable. Section 5.09 provides that nothing restricts the right of the City to assign duties within a classification as the needs of the service requires. The City was well within its rights in determining who should perform the testing of residential water meters.

The City notes that it has often in the past unilaterally changed the work schedules of bargaining unit employees from those listed in Appendix B. Both St. Peter and Grapentine testified about the many times and employees whose schedules were changed. When Puckett worked 10:00 a.m. through 6:30 p.m., the contracts did not list that work schedule. The City has used the provision in Appendix B often in the past, and this situation was no different.

While the Union claims that the addition of Section 27.03 rescinded the City's ability under Appendix B to unilaterally change work schedules, the new section provides for flexible starting times varying not more than one hour from the times listed in Appendix B. The City contends that Section 27.03 did not rescind the final statement of Appendix B and that statement remained in the 1998-2000 bargaining agreement. If the parties intended to rescind the final statement of Appendix B, they would have removed it. Grapentine testified that the purpose of adding Section 27.03 was to formalize a practice which provided employees the ability to propose and get a change in their starting times. But Grapentine never agreed to give up the City's right to unilaterally change work schedules. The Union did not challenge his testimony.

The City further asserts that the contract does not require it to consider seniority when changing hours of work. Section 4.06 lists seniority to be considered for matters involving increase or decrease of forces, layoffs, or promotions. Section 4.07 outlines the role of seniority in layoff, bumping and recalls. Section 4.10 provides for super-seniority in involuntary transfers and layoffs. Sections 5.03, 5.04 and 5.07 provide for using seniority to fill vacancies. Section 8.04 lists consideration of seniority in returning from leave for public office. Section 11.04 specifies the use of seniority in vacation selections. The City may use seniority in assigning employees to a work scheduled that differs from those listed in Appendix B, as St. Peter did in Oscar's case, but it is not required to. St. Peter assigned the Grievant to the 11:00 a.m. to 7:00 p.m. schedule based on his medical restrictions that prevented him from being assigned to work on anything but residential water meters.

There was no violation of Section 23.01, the City notes, because this section does not prohibit the change but merely requires prior notification, and in certain cases, discussion prior to implementation. The contract does not list a specific time period for giving notice and the parties has considered two weeks notice to be sufficient in changing hours of work. The Union has not raised the issue of the sufficiency of the notice in this proceeding.

The City argues that it did not violate Section 26.01, the Maintenance of Standards clause. Previous arbitrators have noted that there are specific contract sections and language that control over the language of Section 26.01. In this case, the contract contains specific provisions in Appendix B giving the City the power and authority to unilaterally change work hours, as well as specific provisions in Section 5.09 giving it the power and authority to assign duties within the Water Meter Maintainer II job classification. These specific contract provisions control over the general provisions of Section 26.01. Even if Section 26.01 applied, the long and consistent past practice of the City making unilateral changes in hours would constitute general working conditions to be maintained.

In conclusion, the City points out that it had a legitimate business reason for making the change in hours as well as a legitimate business reason for assigning the Grievant to those hours. Its actions were proper and did not violate the labor contract.

In Reply – the Union

The Union takes issue with the City's contention that it changed the Grievant's hours to facilitate both operational needs as well as the Grievant's medical restrictions. There are five employees in the department. Commercial as well as residential meters are in constant need of repair and reading. To claim that only the Grievant could be assigned to the newly created nighttime hours to service residential needs is absurd. Even with his restrictions, the Grievant had been assigned to commercial meters in the past, when he would work with another employee. The same assignment could have been extended to him in 1999.

The Union notes that St. Peter acknowledged the principle of seniority in the assignment of work shifts. The City cites the seniority dates of the Meter Maintainers on the basis of departmental seniority, but nowhere in the labor agreement is the principle of departmental seniority acknowledged. The true seniority dates put Yunker in the middle of the department. Also, as previously noted, the position held by Young called for hours that could vary from the hours listed in Appendix B based upon a grievance settlement. The hours of Rivera, junior to Yunker, only changed in 1999 in Yunker's absence, even though Yunker had seniority rights over him.

The City cites Section 2.01 as justifying its actions. The crux of Section 2.01 is to codify the rights of management where those rights have not been specifically abridged, delegated or modified by other provisions of the agreement. The newly negotiated Section 27.03 effectively abridged those rights as they relate to work hours. While Section 5.09 talks about assignment of duties within a classification, it does not contemplate the right of the City to change hours of work which abridge the seniority of affected employees.

The Union disputes the relevance of the times where hours of employees were modified in the past. Whatever happened prior to the 1998-2000 agreement occurred before Section 27.03 was in place. Also, those modifications after 1998 varied by one hour from the hours listed in Appendix B, in accordance with Section 27.03.

The Union takes issue with the City's claim that the Union did not refute the City's contention that it could still change hours of work even with the newly negotiated Section 27.03. Former Union President Garner testified that there were no questions advanced in the bargaining for the 1998-2000 agreement by the City as to the effect of Section 27.03 as it related to Appendix B. Garner stated that the Union never agreed that Appendix B superceded Section 27.03, and it was his understanding that Section 27.03 restricted the language of both Appendix B and Section 2.01.

When a job is posted in accordance with Section 5.01, reference is made to Appendix A as well as the table of organization. Part of this reference is the hours of work found in Appendix B. It is with that understanding that employees post for vacancies. If it were found

that the City had the right to eliminate Yunker's job, outside of seniority considerations and in violation of Section 4.06, the Union maintains he was laid off and had the right to exercise bumping rights per the agreement. The newly created position forced upon Yunker would then need to be posted. Arbitrator Gratz, in MUSKEGO-NORWAY SCHOOL DISTRICT, Award No. 4447 (GRATZ, 8-13-92), noted that the District's decision to reschedule custodial work to second or third shifts when that work was being performed on the first shift constituted the creation of newly created positions within the meaning of the contract, which required posting of transfer opportunities.

In Reply – the City

The City, while amused at the Union's staff representative's forthright critique of the win-win bargaining process, maintains that by leaving the last provision of Appendix B in the contract, the City retained the right it had to unilaterally change the work schedules of employees. If you want to change contract language, you've got to throw out the old before you bring in the new. If the new Section 27.03 were intended to do what the Union now claims, the Union would have insisted that the last provision of Appendix B had to be eliminated. The City acknowledges that the staff representative is an experienced and extremely competent negotiator who understands the bargaining process very well, whether it is win-win or traditional.

While the Union claims it never thought that the City had the unbridled right to modify employees' work schedules at will, the City has had this unilateral right and exercised it often in the past without objection from the Union. Moreover, Section 23.01 does not require the City to bargain the impact of anticipated changes. That section merely requires a discussion to take place.

The Union stated that when Yunker signed a posting to become a Water Meter Maintainer in 1994, the hours were as listed in Appendix B. The 1992-1994 contract contained the provision that the listed work schedules were subject to change upon proper notification given by the City. The posting that Yunker signed was put up on November 17, 1993, and that 1992-1994 contract was in existence, which contained the 7:00 a.m. to 3:30 p.m. Monday through Friday work schedule. The City notes that there were no documents substantiating the alleged grievance settlement agreement in 1991 whereby the Union demanded that a job be posted internally. The City had the right to change work schedules in 1991, both before and after the alleged grievance and alleged settlement agreement. Even if there were such an agreement, which the City denies, it has no relevance to this grievance.

The City takes issue with the Union's claim that Section 23.01 does not contemplate the unilateral right of the City to change working hours. The work schedule change is a change in the methods of operation which affects employees covered by the agreement. Even though

discussion of the change is not required under this section of the contract, the City had an extensive discussion with the Union over its proposed changes in work schedules. The City made changes to its original plan after getting the Union's input. Moreover, Yunker was not entitled to overtime pay under Section 17.02, as claimed by the Union, since he was not working outside his regular shift.

The City disputes the Union's contention that Yunker could have performed his job duties under the hours listed in Appendix B. The City tried to test residential water meters during those hours but had an 85 percent failure ratio because people were not at home during those hours. An alternate work schedule was needed to test 3,600 meters by the end of 1999. Since Yunker's medical restrictions limited him to working on residential meters, he could not have kept his old hours.

The City objects to the Union's argument that Young should have been given the new hours. Yunker has less bargaining unit seniority as well as less departmental seniority than Young. The contract does not require consideration of seniority in making changes of work schedules. Further, Yunker was not laid off – the City merely changed his work schedule. There is no requirement in the contract that the City post a revised work schedule.

DISCUSSION

Portions of Section 27.03 appear to be in conflict with the last sentence of Appendix B. This is one reason that contracts should be read as a whole. Arbitrators frequently apply the concept that the agreement must be construed as a whole. As stated in Elkouri & Elkouri, How Arbitration Works, 5th Edition, p. 492-3 (1997), to ascertain the intent of the parties, the disputed portions must be read in light of the entire agreement. The City's position on this issue is preferred for the following reasons.

Significantly, the parties never deleted the language in Appendix B that had long given the City the unilateral right to change hours upon proper notice. Also significant – the City told the Union when bargaining over Section 27.03 that it intended the language in Appendix B to remain and made it clear that it retained the right to change hours. Grapentine's testimony on this point is undisputed. And the City is correct when it states that if the parties had agreed that Section 27.03 would restrict the City's right to change hours under Appendix B, they would have removed the language of Appendix B that gives the City the right to change hours with proper notice. Both parties are competent and experienced negotiators, and while their experience with win-win bargaining may have been a new experience, they knew their contract language well and knew how it has been used and interpreted.

Section 27.03 would not make sense if it were given the interpretation urged by the Union, in light of the language of Appendix B. Under Appendix B, the City has the right to change schedules with proper notice. If Section 27.03 allowed employees and supervisors to

change schedules by one hour – but then an employee could nullify that change – how could that language co-exist with the City's right to change schedules? The limitation of a one hour deviation from the schedule of hours listed in Appendix B is also in seeming conflict with the last sentence of Appendix B which gives the City the right to change the work schedules. In order to give effect to both Section 27.03 and Appendix B, the City's interpretation that Section 27.03 memorialized or codified the practice of employees and supervisors changing schedules by mutual agreement makes more sense. It also is consistent with the record of hours being worked by other employees, the bargaining history and the testimony that is undisputed.

Additionally, the City is correct when it points out that in Section 2.04, it has the right to determine reasonable schedules of work. Under the facts presented in this case, the schedule was reasonable to accomplish the work that needed to be done. The City had tried to do the residential meter testing on the schedule of 7:00 a.m. to 3:30 p.m. Mondays, Wednesdays and Fridays and 8:00 a.m. to 4:30 p.m. on Tuesdays and Thursdays. However, the fact that it had an 85 percent failure rate reaching residents gave it the need to change schedules to reach residents, who were asking for late afternoon and Saturday appointments. Moreover, the City's assignment of Yunker to residential water meter testing was reasonable in light of his medical restrictions on lifting. While the Union asserts that he could have been assigned to commercial water meter testing and work with another employee, the weights of commercial water meters would have been too heavy in some instances to accommodate the Grievant's restriction even with two employees. The assignment is also consistent with the language in Section 5.09, which states:

> Nothing contained herein shall restrict the right of the City to assign duties within a particular classification as the needs of the service requires.

The Union has argued that the City failed to consider seniority in assigning the Grievant to the later hours. The labor agreement does not require consideration of seniority in determining which employee works which hours. The contract, in Section 4.06, states:

> The Employer recognizes the principle of seniority and the Union recognizes the need of maintaining an efficient work force. In all matters involving increase or decrease of forces, layoffs, or promotions, the seniority of the employees involved shall be given primary consideration. Skill, ability and efficiency shall be considered only where they substantially outweigh consideration of length of service.

The City's change in hours did not involve an increase or decrease in the work force, nor did it involve a layoff or promotion. While the Union argues that the Grievant should be considered laid off and entitled to bumping rights under Section 4.07, there was no layoff where there was no separation from employment.

Another theory – the change in hours created a vacancy and required a posting. Section 5.01 defines a vacancy "as an opening in a specific classification . . ." There was no opening in a specific classification. No position was vacated by any employee. No new position was created by the City. The City changed hours temporarily on current positions, only during daylight savings time.

The Union's position that the Grievant's seniority is based on his service with the City rather than in a department is preferred under Section 4.01, which refers to length of continuous service without further limitation.

The Maintenance of Standards clause does not control in this case. As previously stated, the agreement must be construed as a whole. Article XXVI, the Maintenance of Standards clause, must be read in conjunction with Appendix B. When one notes the specific right of the City in Appendix B to change schedules with proper notice, one must give meaning to that clause so as to not render it null and void. See CITY OF KENOSHA, Case 128, No. 39005, MA-4670 (SCHIAVONI, 4/88). Further, the specific language will be given precedence over general language where two contract clauses bear on the same subject. See Elkouri & Elkouri, supra, p. 498-9. Appendix B is specific language that gives the City the right to change schedules. Article XXVI should not be interpreted in a manner that would nullify that right.

The overtime provisions in the bargaining agreement would not apply to the Grievant in this case. Section 17.02 states:

> Employees called upon to perform any service prior to or following his/her regular eight (8) hour shift, and on Saturdays, shall be compensated for at the rate of one and one-half (1-1/2) times the employee's regular rate of pay.

The Union would ask that the Grievant be paid for all hours worked after the 3:30 p.m. or 4:30 p.m. shifts ended. However, the Grievant would not have put in eight hours by then, and Section 17.02 calls for overtime outside of an eight hour shift. The Grievant was re-assigned regular hours of 11:00 a.m. to 7:00 p.m. Monday through Friday between April 26 and October 31, 1999. He was not working any overtime either prior to or following his regular eight hour shift. The Arbitrator cannot deem the Grievant's old hours to be his "regular" hours for purposes of Section 17.02 without coming into conflict with the language in Appendix B that allows the City to change hours.

There is no violation of Section 23.01. Arguably, the change in hours falls within this clause as a "change in the methods of operation which may affect employees." However, the City discussed the proposed changes with the Union before implementing them as required by Section 23.01. The notice to the Union was not short, as in a prior case, and the parties had time to make modifications to the proposed changes and did so.

For all the reasons stated above, I find no violation of the contract.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 1st day of November, 2000.

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

KJM/ans
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