

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF MENOMONEE FALLS

and

**LABOR ASSOCIATION OF WISCONSIN, INC., on behalf of the
MENOMONEE FALLS POLICE SUPPORT SPECIALISTS
ASSOCIATION, LOCAL 813**

Case 68
No. 61973
MA-12121

(grievance 2002-33 - Shift Change)

Appearances:

Mr. Sean Scullen, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of the Village.

Mr. Kevin Naylor, Labor Consultant, Labor Association of Wisconsin, N116W16033 Main Street, Germantown, Wisconsin, appearing on behalf of the Association.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance in accordance with the grievance and arbitration procedures contained in the parties' 2001-03 agreement (Agreement).

The Arbitrator heard the dispute on April 3, 2003, at the Village Hall in Menomonee Falls. Following preparation and distribution of a transcript, the parties exchanged post-hearing briefs on or before May 22, 2003, and advised the Arbitrator by letter dated June 2, 2003, that neither party intended to file a reply brief. The close of the hearing was confirmed by the Arbitrator in an e-mail to the parties on June 4, 2003.

ISSUE

The parties authorized the Arbitrator to frame the issues for determination. The Arbitrator frames the dispute as follows:

What shall be the disposition of the grievance dated October 29, 2002?

PORTIONS OF THE AGREEMENT

ARTICLE IV – GRIEVANCE PROCEDURE

. . .

Section 4.06 – The arbitrator shall neither add to, detract from nor modify the language of this agreement in arriving at a determination of any issue presented for final and binding arbitration. The decision of the arbitrator shall be final and binding on the parties.

. . .

ARTICLE VII – SENIORITY

. . .

Section 7.03 – Shift Selection: Effective September, 1996 and each year thereafter during the month of September of each calendar year but not later than the 15th of the month, the Employer shall post the shift(s) for the forthcoming calendar year. The employees shall bid for the shifts and where more employees bid for a shift than there are openings, the most senior employee(s) bidding for the shift shall be awarded their shift selection provided they are qualified. Employees whose initial selection is not approved shall be given another opportunity to select based on seniority until all shifts are filled. The lead Police Support Specialist will be assigned to the second shift. Job Share employees shift hours shall be determined by the Chief of Police. The days of the week that each job share employee works will be divided between the two job share employees, the most senior job share employee will have the option of selecting a work schedule of Monday, Tuesday and alternating Wednesday or Thursday, Friday and alternating Wednesday. The Employer shall post the shift assignments no later than November 1st of each year.

Section 7.04 – Temporary Shift Changes: Employees who are assigned to regular shifts may have those shifts temporarily changed and shall receive additional compensation as follows:

If the total number of hours worked does not exceed eight (8) hours, the employee shall receive half (1/2) pay in addition to regular compensation for those hours worked outside the employee's regular shift.

Temporary changes shall not exceed sixty (60) calendar days' duration unless mutually agreed otherwise.

. . .

ARTICLE VIII - MANAGEMENT'S RIGHTS

Section 8.01 - The traditional functions of management and the direction of the work force including, but not limited to, the hiring of employees, determining staffing levels, suspending, discharging, or otherwise disciplining employees for just cause; establishing reasonable rules and regulations, scheduling hours of work, determining the methods and means of operation and the control and regulation of all equipment and the right to subcontract work (provided however, that no employees shall be laid off or reduced in hours below their normal work week as a result of such subcontracting) are the exclusive functions of the Village; provided, however that in the exercise of such functions, the Village shall observe the provisions of this Agreement and applicable law. Any rules or regulations issued by the Village are valid so long as they are reasonable and do not conflict with the express terms of this Agreement. The Association, by agreeing to the above enumerated management rights, does not in any way waive their rights under the Municipal Employment Relations Act.

BACKGROUND

The grievance dated October 29, 2002, asserts that the Village violated Article VII - Seniority by assigning bargaining unit members Mary Maddalena and Brian Witt to shifts outside of their regular shift from October 28 through December 31 of 2002. By way of remedy, the grievance requests that the Village cease and desist from violating the Agreement, pay the two Grievants an additional one-half hour of pay for every hour worked outside of their normally assigned shift during that time period, and provide any additional relief the Arbitrator considers appropriate.

The facts are not disputed. The customary annual shift selection process described in Agreement Sec. 7.03 was conducted in the fall of 2001 as regards shift assignments for 2002. Department management posted the available slots on the three available shifts, obtained each employee's shift preferences, and assigned the available shifts based on the employees' relative seniority. Grievant Maddalena alone was assigned to the late shift, Grievant Witt and another were assigned to the early shift and employee Mary Pollock and others were assigned to the day shift.

In October of 2002, Pollock resigned. The Village Board had previously directed Department Management not to fill Police Support Specialist vacancies as they occurred in anticipation of possible cuts in State aid to municipalities then under consideration by the Governor and State Legislature. When Pollock resigned, Department Management decided to eliminate the late shift and to consolidate the remaining staff on the remaining two shifts. Management offered Maddalena (the more senior of the Grievants) the choice of changing from late shift to either the day or the early shift. She chose the early shift. Management then offered Witt the available position on the day shift, and he accepted that shift assignment. On October 23, 2002, Police Chief Jack Pitrof issued a Personnel Directive transferring the Grievants to those shifts, effective October 28, 2002. Both Grievants thereafter submitted requests for premium pay on the grounds that they were experiencing a "temporary shift change." Those requests were denied by their immediate supervisor, Office Operations Supervisor Carol Knope, on the grounds that the changes in the Grievants' shifts were not temporary.

The subject grievance was filed on October 29, 2002, denied at the pre-arbitral steps, and submitted to arbitration as noted above. At the hearing, the Association presented testimony by Witt and Association Labor Consultant Kevin Naylor. The Village presented testimony by Knope.

Additional background information is set forth in the summaries of the parties positions and in the discussion, below.

POSITIONS OF THE PARTIES

The Association

Section 7.03 clearly requires the Village to "[p]ost the shift(s) for the forthcoming calendar year." Section 7.04 provides that "[e]mployees who are assigned to regular shifts may have those shifts temporarily changed and shall receive additional compensation" and that "[t]emporary changes shall not exceed sixty (60) calendar days' duration unless mutually agreed otherwise." Section 8.01 authorizes the Village to schedule hours of work but requires "that in the exercise of such functions, the Village shall observe the provisions of this Agreement"

Reading those provisions together and the Agreement as a whole, the regular shifts posted by the Village pursuant to Sec. 7.03 are applicable throughout the forthcoming calendar year and subject to unilateral change by the Village without payment of premium pay only annually when the Village posts the available regular shift opportunities for the following calendar year. The Village can unilaterally assign employees to other than their regular shift only for up to 60 days and for longer periods only by mutual agreement. All hours worked outside the employee's regular shift must be paid at a one-half time premium.

The above-noted Agreement language was clearly intended to provide employees with certainty as to what their regular shift assignment will be for the entire calendar year. The Village's understanding to that effect is reflected by its statement on Shift Selection posting that "[t]here will be no changes made to shift assignments after they are posted."

The Village's contention that it has the right to make permanent shift changes in addition to the temporary shift changes authorized by Sec. 7.04 is without support in the Agreement. The Agreement contains no language to that effect, and the Arbitrator is foreclosed by Sec. 4.06 from adding to the Agreement provisions that it does not contain.

The Village's proposed interpretation must also be rejected because it would permit the Village to circumvent (and thereby render meaningless) the premium pay and other requirements and limitations of Sec. 7.04 simply by characterizing any and all shift changes as permanent.

The Grievants have not objected to working the hours assigned to them on and after October 28, 2002, but they have requested and are being improperly denied the premium pay to which Sec. 7.04 entitles them until January 1, 2003, when the shifts as posted for 2003 under Sec. 7.03 took effect.

The Arbitrator should therefore order the Village to pay the Grievants the additional compensation as requested in the grievance.

The Village

Section 8.01 reserves to the Village the function of "scheduling hours of work." That language, read together with Secs. 7.03 and 7.04, requires the Village to assign shifts in accordance with employee preferences based on seniority, to limit temporary shift changes to 60 days unless mutually agreed otherwise, and to pay additional compensation for hours worked outside the employee's regular shift that result from such temporary shift changes. Section 7.04 was intended to protect employees from being bounced from one shift to another and back without compensation.

The Village's actions in this case have complied with all of the contractual requirements. The Agreement does not limit the District's right to make a permanent change in shift assignments, and it does not require the Village to pay a premium to employees affected by a permanent change in shift. After it exercised its scheduling of hours right to eliminate the late shift in October of 2002, the Village offered the remaining available work opportunities on the day and early shift first to the more senior Maddalena, and then offered the remaining opportunity to Witt. The Agreement requires no more of the Village in the circumstances.

To adopt the Association's proposed interpretation would inappropriately render meaningless the word "temporary" in Sec. 7.04, and would potentially result in harsh and clearly unintended result of the Village paying a temporary shift change premium to employees for a full year if the Village found it necessary to eliminate the employee's regular shift effective at the beginning of January of a calendar year.

The record clearly establishes that the actions taken by the Village were not temporary shift changes. The changes were of indefinite rather than definite duration; they were in excess of the 60 days referred to in Sec. 7.04; and they were in no way an unreasonable exercise of the Village's rights to schedule employees under Sec. 8.01.

Accordingly, the grievance is without merit and should be denied in all respects.

DISCUSSION

Faced with the possible loss of State aids, the Village decreased its budget and workforce by not filling positions that became vacant as a result of resignation or retirement.

"Many arbitrators have recognized that except as restricted by the agreement the right to schedule work remains in management." Elkouri and Elkouri, How Arbitration Works, 5th Edition, p.725 (1997). The traditional functions of management expressly reserved in Sec. 8.01 are ordinarily understood as including the right to determine what services will be provided on what days of the week and at what times of the day, except to the extent that right is otherwise limited elsewhere in the Agreement.

Section 7.03 provides a mechanism for assigning Police Support Specialists to available shifts in accordance with their wishes and seniority. It unquestionably was written in anticipation that shifts would be available throughout the year for which the selections are made. However, although it contains an express requirement that the Lead Police Support Specialist will be assigned to the second shift, Sec. 7.03 contains no language that expressly or implicitly requires the Village to continue to staff a late shift throughout the calendar year once it has posted and assigned an opportunity on that shift.

It is true that the Village's memo requesting the police support personnel to make shift assignment selections includes a statement that "[t]here will be no changes made to shift assignments after they are posted." However, Knope testified that that language was included in the memo solely to prevent employees from changing their stated shift preferences once the annual assignment process had been completed. In any event, the quoted language of that memo is not a part of the Agreement, so it cannot modify the rights of the Village otherwise reserved in the Agreement.

Section 7.04 provides a mechanism for the temporary assignment of Police Support Specialists to different shifts, and it prescribes the premium pay to which personnel become entitled in the event they work a different shift on a temporary basis. Although the examples of historically issued temporary assignments provided in the record were for from one (1) to five (5) days, the language indicates that a temporary assignment may be up to sixty (60) days, or longer upon mutual agreement of the Village and Association. Temporary assignments have historically been administered by use of a “Temporary Shift Hours Change” posting. The Village did not use such a posting in October, 2002, however, because it considered the change being made at that time to be permanent, rather than “temporary” as that term is defined in Sec. 7.04.

By its terms, Sec. 7.04 applies only to shift changes that are “temporary” in nature. Accordingly, it does not apply to those that are non-temporary, or permanent in nature. To conclude otherwise would improperly render meaningless the words “temporary” and “temporarily.” Section 7.04 provides a monetary premium to employees experiencing the inconvenience of temporary changes from, and back to, their regular shift. Unlike a temporary change, in the case of permanent shift changes, the employee is not changed back to his or her bid shift, and the Village is not subject to the provisions of 7.04.

In sum, the Arbitrator concludes that, read together, Sections 7.03 and 7.04 were not intended to guarantee that employees' shift preferences would be honored even if the employer decides, for legitimate business reasons, to permanently eliminate the late shift during a calendar year.

Neither the hiring freeze nor the decision to concentrate the remaining employees on the first and second shifts on and after October 28, 2002, has been shown to be an arbitrary or otherwise unreasonable exercise of Village rights. The Arbitrator is also satisfied that this is not a case in which the Village is attempting to improperly circumvent the premium pay requirements of 7.04 by merely labeling a temporary shift change as permanent.

For those reasons, the Arbitrator concludes that the Village has acted in this case within the rights reserved to it in Sec. 8.01. Accordingly, the grievance is denied in all respects.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the Arbitrator's decision and award regarding the ISSUE noted above that

The disposition of the grievance dated October 29, 2002, shall be that the grievance is denied in all respects.

Dated at Shorewood, Wisconsin, this 11th day of August, 2003.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator