

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**WALWORTH COUNTY METROPOLITAN  
SEWERAGE DISTRICT (WALCOMET)**

and

**AFSCME LOCAL 2171, AFL-CIO**

Case 6

No. 62597

MA-12361

*(Vacation Cancellation)*

---

Appearances:

**Ms. Leslie Sammon**, Axley Brynelson, Attorneys at Law, Two East Mifflin Street, Suite 200, P.O. Box 1767, Madison, Wisconsin 53701-1767, appeared on behalf of Walworth County Metropolitan Sewerage District (WALCOMET).

**Mr. Thomas Larsen**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, appeared on behalf of Local 2171, Wisconsin Council 40, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

On August 7, 2003 the Walworth County Metropolitan Sewerage District (WALCOMET) and Local 2171, Wisconsin Council 40, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, as Arbitrator to hear and decide a dispute pending between the parties. A hearing was conducted on November 6, 2003, in Delavan, Wisconsin. A transcript of the proceedings was taken, and distributed by November 26, 2003. Post hearing briefs were filed and exchanged by January 26, 2004.

This Award addresses the cancellation of vacation days of Mark Polazzo and Terry Vaughn.

## **BACKGROUND AND FACTS**

Walworth County Metropolitan Sewerage District (WALCOMET) is a wastewater treatment facility that operates a treatment plant, gravity interceptors and remote lift stations pumping wastewater from each of the ten entities served by the facility in Walworth County. WALCOMET is organized into three functional groups; Plant Operations, which has four Operators, Plant Maintenance, which has three Mechanics and one Electrician, and Collection System Services. Operators are primarily responsible for the monitoring and operation of the equipment in the plant. Operators are licensed to perform their work. Maintenance mechanics are responsible for the preventative and corrective maintenance of plant equipment.

WALCOMET operates 24 hours a day, seven days a week. It is fully staffed and operational Monday through Friday, 7:00A.M. – 3:30 P.M. Operations are significantly scaled back the balance of the week. Operators regularly rotate into maintenance jobs. Maintenance mechanic do not rotate into Operator jobs.

This dispute, which concerns the cancellation of previously approved and scheduled vacation arises under the 2001 – 2003 collective bargaining agreement, the first contract negotiated by the parties. Relevant provisions of the contract are set forth below.

Gary Gagnon is the WALCOMET Administrator. Gagnon was hired into the position effective September 4, 2001. Among the early changes Gagnon brought to the facility was a minimum manning staffing plan. Gagnon formalized scheduling so that two Operators and two Maintenance mechanics were scheduled during the day shift. He testified that this was done because many tasks require two people, that some tasks are more safely performed by two people, and that with two people scheduled there is built in backup if someone calls in sick or otherwise fails to come to work due to last minute emergency.

The employer has historically denied leave requests which would result in the level of staffing falling below the prescribed minimum. This is true both under the formal system implemented by Gagnon and under the staffing levels that existed prior to his arrival, and prior to the unionization of the facility.

Mark Polazzo and Terry Vaughn are Operators who requested and were granted vacations, which were subsequently denied. On May 5, 2003 Polazzo requested that he be given a vacation day on July 7. The request was granted that same day. He had arranged to have a four day weekend over the Fourth of July by trading work days with co-worker Wiedmeyer. Mr. Wiedmeyer, an Operator, subsequently resigned, and was gone by July 7. On, or about June 18 Polazzo, who had made family plans for the long holiday was told that his previously approved vacation was cancelled.

On April 9, 2003 Terry Vaughn requested vacation time from June 30 to July 3, 2003. That request was granted on April 16. The departure of Wiedmeyer left a hole in the schedule. The employer canceled Vaughn's scheduled vacation sometime during the week of June 24. Both Polazzo and Vaughn have had leave requests denied for lack of staff. Neither has had leave granted and then rescinded.

Peter Borgo, the Union Steward, met with Gagnon to advise him that Polazzo would be filing a grievance over the vacation cancellation. According to Borgo, Gagnon indicated that if Polazzo pursued his grievance Gagnon would be forced to do something that everyone would find unfortunate. Borgo took that to mean that if Polazzo pursued his grievance Gagnon would deny Vaughn's vacation. Gagnon denied the remark or the implication.

Borgo also produced a document which was the work schedule of Operators for the period 1999 through 2001. The document purports to show that from October 2001 through the end of that year there were 12 instances of a single Operator working. On October 12 the employer granted a Comp. Day, a personal day, and left one man working. On November 7 all Operators were allowed to take a DNR sponsored test, pursuant to the terms of the collective bargaining agreement. The test is difficult to schedule. Successful completion leads to an additional certification, and additional compensation. A supervisor performed the Operations work. On November 23 two vacation requests were granted leaving one man to work. In the remaining instances there were multiple Operators working, but assigned to non-Operations tasks, i.e. Maintenance.

Gagnon testified the Wiedmeyer's last day was June 5. He was aware of Wiedmeyer's decision to leave but did not post his vacancy until after Wiedmeyer actually left. His rationale was that people sometimes change their minds. Gagnon was on vacation until June 9. The vacancy was posted June 10, and allowed to run for two weeks, pursuant to the collective bargaining agreement. The posting came down June 25. There was one internal candidate, Paul Wilson, who was on vacation in a remote location. Wilson was away for two weeks and was not reachable. He would not have been available to cover for the scheduled vacations.

Gagnon testified that he first realized that he had a scheduling problem involving Polazzo on June 18. Polazzo's vacation was canceled that day. Gagnon testified that he first realized that Vaughn's vacation was an issue when a supervisor brought it to his attention on Friday, June 20. Vaughn's vacation was cancelled on Monday, June 23. Gagnon testified that he sought alternatives to canceling vacations but found none. A senior employee, Greenlee was also scheduled to take vacation. All parties agree that Greenlee has first call on the time off. Gagnon testified that he suggested the grievants' contact Greenlee to see if he could accommodate their time off needs. Both men deny that such a suggestion was made. Gagnon was unwilling to work short staffed or to fill in with supervisory staff.

In the negotiations leading to this contract the Union proposed, and dropped the following: "...Once a vacation is approved it may not be rescinded."

**ISSUE**

The parties stipulated to the following issue:

Did the employer violate the Collective Bargaining Agreement by canceling the approved vacations of Mark Polazzo and Terry Vaughn?

If so, what is the appropriate remedy?

**RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

...

**Article 3. Management Rights**

Section 3.1 Operation of the Employer.

The Employer has the responsibility and authority to manage and direct all the operations and activities of WALCOMET to the full extent authorized by law; therefore it is understood that the Employer retains, without limitation, all rights of possession, care, control and management and all powers, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, regulations and the Constitution of the State of Wisconsin and/or the United States.

These rights include, but are not limited by enumeration, the right to:

...

4. Hire, promote, transfer, schedule, determine staffing levels, and assign employees in positions within WALCOMET;

...

9. Schedule and modify the hours of work and determine the assignment and allocation of duties;

10. Determine, direct and manage the workforce (including the size, staffing levels, qualifications, reductions in and composition thereof) and assign work to employees on said jobs;

...

16. Determine the number of positions within a given job classification and the duties performed by each of the job classifications.

The exercise of any of the retained and/or enumerated functions or rights shall not be deemed to exclude other functions of the Employer not specifically set forth. To the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or employees, such rights are retained by the Employer.

...

### Section 3.3 Bargaining Unit Work.

No non-bargaining unit members shall perform work normally performed by bargaining unit members, unless otherwise mutually agreed to, except under the following circumstances:

- A. The quantity of the work or the effect on the bargaining unit is minor or *de minimus* in nature;
- B. The work is experimental or arises as a consequence of a technological change or a change in existing practices, methods, equipment or facilities;
- C. An emergency (including but not limited to plant emergencies or Acts of God) or special situation or need is involved (including but not limited to unscheduled or unanticipated absences); or
- D. Employees are being trained, including new or promoted employees in new jobs, and existing employees being trained in new job duties.

...

**Article 16. Benefits.**

Section 16.2 Vacation.

...

E. Vacation Selection and Scheduling.

Employees are required to take their vacation in weekly increments, with the exception of one (1) week of vacation which may be taken in increments of one (1) day. In the event that a holiday falls within an employee's vacation period, the employee may take an additional day of vacation, either the Friday prior to or the Monday following his/her vacation. Employees must specify, in writing, their first choice of vacation periods by May 1 of the current year. Should there be a conflict in the choice of vacation periods, vacation requests will be granted on the basis of bargaining unit seniority. All other requests must be received by an employee's supervisor at least two (2) week` prior to the start of the desired vacation period, and will be granted on a first come-first serve basis. The Employer shall respond within one (1) week of when a request is submitted, in person, to the employee's immediate supervisor.

...

**MEMORANDUM OF UNDERSTANDING**

The parties agree that the Employer has historically employed supervisors, who, in addition to their supervisory or other non-bargaining unit work responsibilities, also perform bargaining unit work. Notwithstanding anything contained in the Agreement, it is agreed that the Employer may continue this current practice with respect to one (1) supervisor, Steven Scheff, provided that the amount of bargaining unit work historically performed by Mr. Scheff is not expanded beyond 37-40% of his work time, which is equivalent to the average amount of time spent performing such work during the years of 1996-1999.

...

### **SIDE LETTER OF AGREEMENT**

This side letter of Agreement confirms the understanding and agreement of the parties concerning implementation of Addendum A with regard to employees in the Operator Classification. Operators who sit for and successfully pass the relevant examinations scheduled for May, 2001, that are required in order to acquire and/or maintain State of Wisconsin Wastewater Operator Certifications for subclasses relating to processes used at WALCOMET, will receive the applicable hourly premium rate of pay set forth in Addendum A retroactive to January 1, 2001. Those Operators who sit for and successfully pass the relevant certification examinations scheduled for November, 2001, will prospectively receive the applicable hourly premium rate of pay set forth in Addendum A. This Side Letter of Agreement expires at 11:59 p.m. on 12/31/01.

### **POSITIONS OF THE PARTIES**

The Union contends that the Employer should have honored the scheduled vacations because there would have been several other employees in the plant during the time period in question, including maintenance workers, lab workers and supervisors, who are also certified treatment plant operators. The Union contends that the plant is regularly staffed by only one operator, specifically during the period July 4-6. Frequently when two operators are scheduled to work, one operator is assigned non-operator work.

The Union contends that records establish that the plant has operated on many occasions with only one operator. In the view of the Union the two operator minimum is a relatively recent concern, brought about by the newly hired Gagnon, after the first collective bargaining agreement was signed. The Union notes that Vaughn was allowed to work alone on July 5 and 6, but not July 7.

It is the view of the Union that the employer should have taken steps to accommodate the previously granted vacation. The Union points to Borgo's testimony, and asserts that the employer cancelled Vaughn's vacation as retribution for Polazzo filing a grievance.

It is the Employer's position that the collective bargaining agreement contains no restriction on its right to rescind approved vacations; that the parties bargaining history supports the Employer's interpretation of its right; and that the Employer did not act arbitrarily or capriciously when it rescinded the grievants' vacation.

The Employer points to the Management Rights clause and contends that it clearly grants the Employer the right to manage and direct the work force. It further reserves those rights not otherwise delegated away to the Employer. In the absence of any contractual

provision restricting the Employer in canceling vacation the Employer asserts the Management Rights clause controls this proceeding. The Employer argues that the establishment of minimum levels of staffing are a legitimate application of the rights found in Article 3. The Employer goes on to point out that it has denied leave requests on several occasions in order to maintain those staffing levels.

The Employer points to the Union's proposal in bargaining that would have restricted the Employers right to cancel a scheduled vacation. The proposal was dropped, and the Employer urges that an adverse inference be drawn from that fact.

It is the Employer's view that it acted rationally in rescinding the vacations. The employer takes issue with the Union's characterization of the data presented on Operators working alone. The Employer contends that Operators rarely work alone, and when they do it is typically because of sick or disability calls resulting in a scheduled Operator missing work. The Employer contends that there is no contractually permitted relief available, should I conclude that a violation occurred.

### DISCUSSION

I believe that the Employer has the right to determine the level of staffing appropriate to the operation of the facility. The establishment of a minimum manning level is the exercise of that right. Nothing in this record suggests that the level of manning is inappropriate or a subterfuge of rights found elsewhere in the Agreement. As a practical matter, if the Employer is denied the right to establish the level of the workforce and staffing patterns it is unclear who would do so. The Management Rights clause confirms that fact.

The Employer has established two Operators and two Maintenance Mechanics as the minimum to be scheduled during the fully staffed work day. The Employer offered three reasons supporting the decision, all of which are rational on their face. The record supports a conclusion that work activity is significantly diminished during the evenings and weekends. The staffing levels appear to be a legitimate attempt to staff to get the work done. When the Employer announced the minimum staff levels there is no indication that any protest ensued. The Employer has repeatedly denied leave requests in order to maintain the minimums. There is no dispute that such regulation of the staffing levels is permitted by the contract.

The Union distinguishes vacations approved and scheduled from those denied initially. I recognize that there is a distinction. If a vacation request is initially denied the individual has been told the time off will not be forthcoming and is permitted to plan accordingly. Once a vacation is granted, the employee should feel free to plan to use the time off provided by contract as he or she sees fit. It is hardly surprising that employees who had the forethought to request vacation days months in advance would plan to use that time. An employer who



cavalierly rescinded approved and scheduled vacation would run the risk of being found to have frustrated the very purpose of the vacation clause itself.

However, that is not what happened here. Mark Wiedmeyer resigned after the vacations were approved and before the vacation dates. Wiedmeyer was scheduled to work, and provide a portion of the minimum. Another employee, Greenlee, who is senior, was scheduled for vacation at the same time. The timing of Wiedmeyer's resignation was such that the vacancy posting required by contract, ate up a two-week period. The single internal candidate was away on vacation and not reachable. His scheduled return from vacation was not timely to aid the situation. The record does not suggest that the Employer delayed in order to frustrate the process.

Given the circumstances that led to the facility being short staffed, I do not regard the Employers right to cancel vacations already approved and scheduled as contractually different from its right to deny requested vacation time off to maintain staffing levels.

The Union argues that the Employer could have done more to accommodate the grievants. That is possible. The Employer could have worked short staffed, or possibly could have assigned a supervisor to the work, assuming Sec. 3.3 was satisfied. The question for me is not what the Employer could have done, but rather what was the Employer required to do. I see nothing in the contract that obligated the Employer to honor the vacations granted regardless of the staffing consequences.

I do not believe that the Employer exercised its rights in an arbitrary or capricious fashion. There is a dispute as to whether or not Gagnon told Borgo that he might have to take an unpopular action if Polazzo pursued his grievance. Assuming that the remark was made, I do not believe it influences the outcome of this award. The Employer had the right to cancel vacations to maintain staffing levels. It had done so to Polazzo. If, in the context of the Polazzo grievance it had knowingly let the Vaughn vacation stand, it would have been hard pressed to explain the need to cancel Polazzo.

For me to overturn this decision requires me to step in, and manage the staffing of the operation. That is not my role, nor contemplated by the collective bargaining agreement.

**AWARD**

The grievances are denied.

Dated at Madison, Wisconsin, this 1st day of July, 2004.

William C. Houlihan /s/

---

William C. Houlihan, Arbitrator

