

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LABOR ASSOCIATION OF WISCONSIN AND  
WISCONSIN INDIANHEAD TECHNICAL COLLEGE CUSTODIAL &  
MAINTENANCE EMPLOYEE'S ASSOCIATION, LOCAL 722**

and

**WISCONSIN INDIANHEAD TECHNICAL COLLEGE**

Case 79  
No. 64226  
MA-12844

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**Appearances:**

**Thomas A. Bauer**, Labor Consultant, Labor Association of Wisconsin, 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Association.

**Victoria L. Seltun**, Attorney at Law, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, appearing on behalf of the Employer.

**ARBITRATION AWARD**

Wisconsin Indianhead Technical College, hereafter WITC or Employer, and Labor Association of Wisconsin and Wisconsin Indianhead Technical College Custodial & Maintenance Employee's Association, Local 722, hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Upon the request of the Association and WITC, the Commission appointed Coleen A. Burns, a member of its staff as arbitrator to hear and decide the instant grievance. Hearing was held in Superior, Wisconsin on March 10, 2005. The hearing was transcribed and the record was closed on May 11, 2005, following the submission of written briefs.

**ISSUES**

The parties have stipulated to the following statement of the issues:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the employer began unilaterally scheduling employees to a

Tuesday through Saturday shift on a rotating basis when past practice has been that the schedule is Monday through Friday for all but one employee?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE I – RECOGNITION**

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Section 3. The Board agrees that the work normally performed by the custodial employees will not be assigned to any other employees, unless mutually agreed to by both parties.

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**ARTICLE XII – WORK WEEK**

Section 1. The regular workweek shall consist of forty (40) hours per week, computed on five (5) eight (8) hour working days per week with a ½ hour paid meal period.

Section 2. An employee workweek may be modified to reflect four (4) ten (10) hour days either for the summer months of June, July, and August, or for the school year of September through May, provided:

- A. The Campus Administrator approves such plan; and
- B. The number of weeks during either the summer or school year periods that may be affected will be at the discretion of the Campus Administrator; and
- C. Any such workweek modification will expire at the end of each summer period or each school year period, and any proposal for a new or renewed workweek modification must be made by May 1 for the summer period and August 1 for the school year period.

...

Section 5. In an emergency as determined by the Supervisor, overtime will be assigned by classification according to seniority. However, the Employer reserves the right to hire temporary help for absence of existing employees or for excessive work beyond the normal needs of the institution. This help is exempt from seniority rights and union dues obligations. Employment of

temporary help cannot exceed twenty-five (25) consecutive workdays. Employment of temporary help beyond twenty-five (25) consecutive days will be allowed based upon "the mutual consent" of both parties.

### **BACKGROUND**

The Association's collective bargaining unit includes the classifications of Maintenance Custodian, Custodian I and the red-lined classification of Custodian II. At the expiration of the 2001-2004 collective bargaining agreement, the Maintenance Custodian wage rate was approximately three dollars per hour more than the wage rate of the Custodian I.

WITC has four campuses located in New Richmond, Rice Lake, Superior and Ashland, Wisconsin. The 2004-2005 seniority roster establishes that six bargaining unit members are employed at New Richmond; six bargaining unit members are employed at Rice Lake; three bargaining unit members are employed at Ashland; and six bargaining unit members are employed at Superior. All of the Association's collective bargaining unit members are covered by the same contract.

Prior to 1998, the normal work schedule for Maintenance Custodians and Custodians at the Superior campus was Monday through Friday. When work was needed to be performed on a Saturday, all of the Custodians were offered the overtime work on a rotating seniority basis. If all of the Custodians refused the work, a call-in employee was employed.

Prior to January 1998, there was one Maintenance Custodian at the Superior campus. In January of 1998, WITC posted for a second Maintenance Custodian at the Superior campus, with a posted work schedule of Tuesday through Friday, 6:00 a.m. to 2:30 p.m. and Saturday, 7:00 a.m. to 3:30 p.m. All of the Superior campus Custodians applied for the position and Custodian Pamela McGraw, who remains employed at the Superior campus, was selected for the position. When McGraw was absent from her Saturday work, the Saturday work was offered to full-time and part-time bargaining unit employees at the Superior campus on a rotating seniority basis. If the bargaining unit employees declined this work, then it was assigned to on-call staff. On-call staff is not represented by the Association.

In the summer of 2004, Superior Campus Administrator Vertin and Superior Facility Maintenance Supervisor Peter Gamache decided to change the normal work schedules at the Superior campus. As a result of this change, which was implemented in early October of 2004, each of the five full-time Custodian and Custodian Maintenance employees at the Superior campus, including McGraw, was scheduled to work every fifth Saturday. When scheduled to work a Saturday, the employee received one day off between Monday and Friday and was paid his/her regular rate of pay for Saturday work.

On or about October 7, 2004, a grievance was filed alleging that WITC violated the provisions of Article XII of the collective bargaining agreement when it changed the normal work schedules of the Association's bargaining unit members. The grievance was denied and

submitted to arbitration. The parties have stipulated that the grievance is properly before the Arbitrator.

### **POSITIONS OF THE PARTIES**

#### **Association**

For over twenty years prior to October 5, 2004, the Custodian and Maintenance Custodians at the Superior campus worked a Monday through Friday workweek. The only exception to this workweek is the Maintenance Custodian position held by Pamela McGraw, which position was posted and bid in accordance with the provisions of the collective bargaining agreement. The testimony of retired supervisor Donald Setterstrom establishes that he felt obligated by the contract to post the sole exception to the Monday through Friday work schedule.

The employee work week is defined in Article XII, Section 1. Although there is not a specific reference to a Monday through Friday work week, the parties have a past practice of a Monday through Friday work week that is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The practice has become an implied term of the parties' labor contract.

The hours and work schedules of employees are mandatory subjects of bargaining. The only contractual provision that allows for a change in work week is Article XII, Section 2. Section 2 provides for a change to a 10-hour day for the summer months of June, July and August, or for the school year of September through May. Any other change, as well as the impact of any other change, must be bargained with the Association.

Although Campus Administrator Vertin testified that the work week was changed, in part, due to an air quality study that had been completed in April, 2004, the study does not justify a change in the work schedule. The study findings of the visual inspection of the facility were found to have been in good condition indicating that the custodial staff was doing an adequate, if not superior, job of maintaining the facility; and that only regular maintenance staff was required.

The Employer has violated the collective bargaining, as alleged by the Association. In remedy of this violation, the Arbitrator should order the Employer to cease and desist from further violations of this nature. Additionally, any paid time off (i.e. - vacation or comp time) lost by employees as a result of this arbitrary change in the work schedule should be restored to the employee's bank. All employees required to work the Saturday shift, who would normally work Monday through Friday, should be compensated at time and one-half for all hours worked on the Saturday shift.

## WITC

The Association erroneously argues that WITC may not change the “practice” of working a Monday through Friday work schedule. Under arbitral authority, the right to direct the workforce and establish work schedules is an inherent right of management, which can be limited only by express contract language.

By the express terms of Article XII, Section 1, the regular workweek must consist of 40 hours over five (5) eight (8) hour days. The contract language does not identify the “days.” Under the express terms of the contract, custodial employees are not guaranteed a Monday through Friday workweek.

If contract language is clear and unambiguous on its face, an arbitrator should not consider evidence of past practice. Moreover, not all “practices” are binding. Rather, a “practice” may be established unilaterally by the employer as a discretionary use of the employer’s management rights.

Prior to the summer of 2004, the Superior Campus assigned Custodians to Saturday work on an “as needed” basis. The disputed work schedule change is consistent with the scheduling of the Association’s bargaining unit members at other campuses.

None of the witnesses at hearing refuted either the fact that the need for Saturday custodial services was increasing at the Superior Campus, or that it was getting harder to complete all work tasks. The disputed work schedule change was dictated by legitimate operational needs of WITC. The disputed work schedule change is neither arbitrary nor capricious.

The bargaining unit employees’ objection to the new scheduling is based solely upon personal and financial reasons. The reasonableness of management’s decision is to be tested from the point of business needs, rather than the convenience of the employees. An expectation that custodial employees work every fifth Saturday is not unreasonable.

WITC has acted consistent with its inherent and reserved rights. The grievance is without merit and should be dismissed.

## DISCUSSION

The Association’s arguments regarding the Employer’s duty to bargain over mandatory subjects of bargaining are for another forum. As set forth in Article III, Section 1, this grievance is limited to the interpretation or application of the parties’ contract.

The Association, contrary to the Employer, argues that the Employer violated the parties’ collective bargaining agreement when the Employer changed the Monday through Friday workweek of full-time bargaining unit employees at the Superior Campus by requiring

such employees to rotate into a Saturday shift. As each party recognizes, “Work Week” is addressed in Article XII of the parties’ collective bargaining agreement.

Article XII, Section 1, states that the “regular workweek shall consist of forty (40) hours per week, computed on five (5) eight (8) hour working days per week . . .” Article XII does not identify the “week” as Monday through Friday. Nor does it otherwise define “working days.”

As the Employer argues, the plain language of Article XII, Section 1, does not establish that a “regular workweek” is Monday through Friday. Accordingly, one may reasonably conclude that the establishment of a Monday through Friday workweek is within the discretion of management.

Article XII, Section 2, provides a procedure for modifying the “workweek” to “reflect four (4) ten (hour) days.” The Association argues that, by addressing only one modification to the “workweek, the parties have demonstrated that there can be no other modification to a Monday through Friday “workweek” unless the modification is negotiated with the Association.

Had the plain language of Article XII, Section 1, established a regular workweek of Monday through Friday, the Association’s argument would have merit. Construing the plain language of Article XII, Section 2, in conjunction with the plain language of Article XII, Section 1, the most reasonable conclusion is that Section 2 provides an exception to the Section 1 requirement that the forty hour regular workweek consist of five (5) eight (8) hour working days, but offers no support to the Association’s argument that the “regular workweek” is Monday through Friday.

Acknowledging that there is no specific reference to a Monday through Friday workweek in Article XII, the Association relies upon the “practices” of the Superior Campus to argue that such a workweek has become an implied term of the contract. As the Association argues, prior to the work schedule change in dispute, there had been more than a twenty year history of bargaining unit employees at the Superior Campus having a regular workweek of Monday through Friday. The only exception was the second Maintenance Custodian position that was posted in January of 1998.

The Association relies upon this posting to argue that Donald Setterstrom, who was then the Maintenance Supervisor, felt obligated by the contract to post the sole exception to the Monday through Friday workweek. Setterstrom’s testimony, however, does not establish that this position was posted because it created an exception to the Monday through Friday workweek. Nor, given the fact that the posting was a “newly created position” that presented a significant promotional opportunity for the Custodians and “newly created positions” are required to be posted under Article II, Section 6, of the parties’ collective bargaining agreement would it be reasonable to infer that the exception to the Monday through Friday workweek was the reason for the posting.

Setterstrom's testimony establishes that he determined the need for a second Maintenance Custodian and the need for a Tuesday through Saturday work schedule and then obtained the required approval to post the position from central administration. (T. 17 – 20) Prior to approaching central administration, Setterstrom discussed his "idea of having the second Maintenance Custodian" at one of the custodial meetings. Setterstrom recalls that he "brought it to the table and just let them all see it, all think about it. I don't recall any type of protest, anybody that didn't think it was a good idea." The information provided by Setterstrom included the Tuesday through Saturday work schedule. (T. 20) According to Setterstrom, "rather than maybe get into an overtime situation, I decided to have the Saturday at a straight time." (T. 21)

Robert Zimmermann has been employed by WITC as a Custodian I for twelve years. Given his testimony that he has been a Union Steward for eight or nine years, it appears that he was a Union Steward in 1998, when the second Maintenance Custodian position was posted. According to Zimmermann, neither he, nor the union, was approached by the employer with a request to negotiate the change in the hours. (T. 43)

In summary, Setterstrom's testimony establishes that, prior to posting the second Maintenance Custodian position, he discussed his "idea" with bargaining unit employees. Neither Setterstrom's testimony, nor any other record evidence, reasonably indicates that Setterstrom, or any other employer representative, bargained the new work schedule with the union, or its bargaining unit employees; or that Setterstrom, or any employer representative, acknowledged that such bargaining was required.

The evidence of the "past practice" at the Superior Campus does not indicate that the parties' have agreed, or mutually understood, that the "regular workweek" referenced in Article XII, Section 1, is Monday through Friday. Rather, such evidence indicates that the Monday through Friday workweek is subject to change at the discretion of management.

As the Employer argues, all of the Association's bargaining unit employees are covered by the same contract and, thus, it is reasonable to consider the "practices" of other Campuses when ascertaining the mutual intent of the parties. Neither party called bargaining unit employees, or supervisors, of the other Campuses to testify at hearing. An e-mail from the supervisor at Rice Lake indicates that the Rice Lake Campus employs six bargaining unit members; all rotate to cover Saturday; one employee takes Monday off to cover Saturday; and five employees take Friday off to cover Saturday. An email from the supervisor at New Richmond indicates that employees assigned the Saturday shift are off on Mondays. (Er. Ex. #17) According to Gamache, he had a conversation with the Ashland supervisor and was told that bargaining unit employees "rotated on Saturdays." (T. 104) The evidence of the practices at the other Campuses, while scant, supports the Employer's argument that the parties have not agreed that the "regular workweek" is Monday through Friday.

In summary, the plain language of Article XII does not guarantee bargaining unit employees a "regular workweek" of Monday through Friday. Nor does the evidence of past

practice establish that the parties have otherwise agreed that the “regular workweek” is Monday through Friday. The most reasonable conclusion to be drawn from the plain language of Article XII, as well as the evidence of “past practice,” is that a “regular workweek” of Monday through Friday may be changed, at the discretion of management, to the Saturday rotation that is in dispute herein. The undersigned turns to the issue of whether or not management has exercised its discretion in an arbitrary, capricious or discriminatory manner.

Union Steward Robert Zimmermann recalls that, when he approached Superior Facility Maintenance Supervisor Peter Gamache to discuss the change in the work schedules, Gamache “told me that Pam didn’t want to work Saturdays anymore.” (T. 38-39) According to Zimmermann, at a subsequent meeting with bargaining unit members, Gamache “told the five people that were there that that was the reasoning of this, because Pam didn’t want to work Saturdays anymore, that she worked Saturdays since ’98 and she didn’t want to work them anymore.” (T. 41)

Although acknowledging that McGraw made such a statement to him, Gamache denies that he told bargaining unit employees that their work schedules were being changed because McGraw wanted him to change the schedule. According to Gamache, he said the schedule was changed because the Employer had a need for custodians on Saturday. (T. 115)

At hearing, Gamache claimed that the schedules were changed because an increase in Saturday usage had resulted in a greater need for custodial staff than maintenance staff. (T. 102) Superior Campus Administrator Vertin, who together with Gamache, made the decision to change the work schedules, confirms this claim. (T.90; 96)

Zimmermann is a credible witness. The undersigned is satisfied, therefore, that Gamache made statements that lead Zimmermann to conclude that the employee work schedules were being changed because McGraw did not want to work Saturdays. However, given Vertin’s corroborating testimony, the undersigned is persuaded that management’s decision to change the employee work schedules was motivated by a greater need for custodial staff than maintenance staff and not by McGraw’s desire to not work Saturdays. Given the evidence that the Saturday work primarily involves custodial cleaning, Custodians assigned to perform the Saturday work are not working outside of classification.

To be sure, the Employer continues to rotate McGraw and the other full-time Maintenance Custodian to the Saturday shift. It is not evident, however, that the decision to include the Maintenance Custodians in the rotation is due to any factor other than Vertin’s desire to follow what she understood to be the staffing model of other Campuses. (T. 89; 103; ER EX. #16)

The fact that McGraw continues to rotate into Saturday work demonstrates that she is capable of performing the required Saturday custodial work. Inasmuch as McGraw is paid approximately \$3/hour more than Custodians, the Employer’s operational efficiency is served by rotating Custodians into the Saturday shift.



One of the factors relied upon by Vertin in making the decision to change the employee work schedule is an air quality report. (T. 86-87) According to the Association, the air quality report did not justify a change to the employee work schedule.

Vertin agrees that the air quality report did not recommend the change in custodial hours. (T. 93) According to Vertin, the air quality report indicated an increased need for cleanliness within the facility (Id.) Inasmuch as the air quality report recommended a cleaning management program for Room 102, Vertin's conclusion that the report indicated an increased need for cleanliness is reasonable. (Association Exhibit 19) The report was of relevance to the schedule change because the leadership committee, of which Vertin was a member, had concluded that custodial cleaning on Saturday would assist the overall cleanliness of the facility. (T. 87-88)

### **Conclusion**

Neither the language of the collective bargaining agreement, nor the evidence of past practice, establishes that the parties have an expressed, or implied, agreement that the "regular workweek" shall be Monday through Friday. Rather, the most reasonable conclusion to be drawn from the plain language of Article XII, as well as the evidence of "past practice," is that management has discretion to change the employee's regular workweek of Monday through Friday to include Saturday.

The record does not establish that management has exercised this discretion in an arbitrary, capricious or discriminatory manner. Rather, the record warrants the conclusion that management exercised this discretion to meet legitimate operational needs.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

### **AWARD**

1. The Employer did not violate the terms and conditions of the collective bargaining agreement when the employer unilaterally scheduled employees to a Tuesday through Saturday shift on a rotating basis when past practice has been that the schedule is Monday through Friday for all but one employee.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 2nd day of August, 2005.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

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