

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 796, AFSCME, AFL-CIO

and

CITY OF OSHKOSH

Case 352
No. 65696
MA-13292

Appearances:

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

William Bracken, Labor Relations Coordinator, Davis & Kuelthau, Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2006 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievances of employees in the Department of Public Works regarding overtime. A hearing was held on June 6, 2006, in Oshkosh, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on August 10, 2006.

ISSUE

The issue is:

Did the City violate Article X of the collective bargaining agreement when it altered the work schedule of Russell Zibell at the Wastewater Treatment Plant on September 13 and 14, 2005, and when it altered the work schedule of Street Department employees on November 17, November 23, November 25, 2005 and January 5, 2006? If so, what is the appropriate remedy?

BACKGROUND

One of the Grievants is Russell Zibell, who has been employed by the City as an Instrumentation Technician for four years. He normally worked Monday through Friday, 7:00 a.m. to 3:00 p.m. On September 13, 2005, he worked his normal shift. A storm came through the area and several stations were without power. He was called back to work to haul out portable generators to get power to those stations. Zibell was called about 6:00 p.m. on the evening of September 13, 2005, and got to work at the wastewater plant at 6:38 p.m. and worked until 7:04 a.m. on September 14, 2005. Zibell testified that Maintenance Foreman, Jim Brandenburg, told him to work 12 hours and then punch out.

Zibell expected to work his normal shift on September 14th of 7:00 a.m. to 3:00 p.m., but Brandenburg told him to leave. Zibell talked the matter over with Union representatives Jerry Horton and Todd Holzhausen, who told him to punch in and work his regular shift if he wanted to. Brandenburg made it clear that he had to punch out and go home, so he did. Zibell worked his regular shift the rest of the week on Thursday and Friday.

In the past when Zibell was called in for emergencies, he was paid time and a half for the hours, but all of them were for less than eight hours. On this occasion, he was paid eight hours of regular time and four hours at time and a half overtime.

Tom Kruzick is the superintendent at the wastewater treatment plant for the last nine years. Before becoming superintendent, he was a foreman at the plant for seven years. There are 25 employees working 3 shifts. On September 13, 2005, Kruzick told Brandenburg to make sure that Zibell did not work more than 12 hours because there is a policy at the plant that no one works 16 hours in a row. Kruzick said there are a lot of hazards at the plant and he has never assigned anybody to work 16 hours. The plant has written rules, and under the rules for emergency fill in, it states: "No personnel shall work a double shift unless all possibilities for fill in have been exhausted." A double shift would be 16 hours in a row. Kruzick said that there were two occasions when employees worked 16 hours in a row. One of those times was when no one would come in to relieve an operator. Another time was when a newer operator decided not to call anybody in and worked 16 hours. He was told later that he could not do that.

In June of 2001, a storm caused a massive power outage throughout the City. Everyone at the wastewater treatment plant worked 12 hours. After that, Kruzick gave them a 24-hour notice that he was changing all their shifts and they would be working a 12-hour shift the first week, with electricians overlapping and on duty for a longer period of time, as much as 20 hours a day.

Bill Wittkowske is an Equipment Operator II for the Street Department and has worked for the City for 12 years. He works 7:00 a.m. to 3:00 p.m., except during the summer when he runs a sweeper. He has been called in to work outside his regular hours for various kinds

of emergencies, such as flooding, storm damage, sewer backups, snow plowing and salting. On November 17, 2005, Wittkowske was scheduled to work 7:00 a.m. to 3:00 p.m. In the early hours of that morning, he was called to come in early and salt. He punched in five minutes before 4:00 a.m. Jeff Luebke and Dan McCollian were also called in early. A foreman told them to punch out at noon after they had worked eight hours.

Wittkowske's supervisor is Robert Horton, the superintendent of the streets, sanitation and garage. Horton has been the superintendent of those departments for 2 and a half years and was the assistant superintendent for 11 and a half years. There are 34 employees in streets, 9 in the garage and 19 in the sanitation and recycling area. There are three shifts, but most employees work during the day. Most of the emergencies in Horton's area deal with snow removal and salting streets.

Horton noted that the third shift will usually call people in when they can't keep up with the weather problems. There is a list of employees who have signed up for emergencies and they are called in first if they are on that list. Wittkowske, Luebke and McCollian have been on that list for the past three years. Employees are often called in at 3:00 or 4:00 a.m. to get the roads salted before people go to work. Although the normal hours are 7:00 a.m. to 3:00 p.m., Horton said that he would change that shift to 3:00 a.m. to 11:00 p.m., or 4:00 a.m. to noon in order to take care of that emergency. If the emergency continued, employees could work 16 hours. But if the emergency is over when they have worked eight hours, then they go home after working eight hours. Horton believes that if an employee has worked 12 hours one day, he cannot tell them to go home 4 hours early on subsequent days to offset the 4 hours of overtime. The records show that Todd Burns was one of the employees affected by a change in shift on January 5, 2006. Instead of his normal 7:00 a.m. to 3:00 p.m. shift, he was called in at 5:30 a.m. and went home at 1:30 p.m. His shift was changed due to emergency conditions. Horton's records for prior years show that there have been several times when employees are brought in early, work eight hours and then go home.

The Union President is Bill Sitter, who has worked for the City for 16 years and is currently an Assistant Trades Tech/Mechanic. He believed that in all the cases where the records showed that employees were brought in early and left early, those employees had consented to those changes.

Bob Johnson is a water meter serviceman and has been working for the City for 25 years. His positions were all within the water distribution center. He is also an executive board member of the Union. Johnson's regular hours are 7:30 a.m. to 3:30 p.m. When he has worked outside those hours for emergencies, he was also able to work his full shift. If he worked after midnight, he still could work his shift that morning. In Johnson's current position, most of his overtime is for a couple of hours or shorter in duration. When he worked in maintenance, he and the outside crew fixed water main breaks that took eight hours or more to repair, and they would still work their regular shifts following those emergencies.

James Wolf is the superintendent for water distribution since 1989. The water distribution is a separate entity of the water plant that makes the water. There are nine construction workers, six meter servicemen and a foreman that work under Wolf. Employees at the water distribution center work Monday through Friday, either 7:30 a.m. to 3:30 p.m., or 8:00 a.m. to 4:00 p.m.

Wolf noted that typical emergencies for no water or water leaks can usually be fixed in an hour or two. When the construction crew has to fix water mains, there are at least three people called and sometimes up to five people, depending on the equipment needed. Fixing water mains and main leaks are longer jobs. Wolf considers anything after the eight hour day needed to keep customers in water to be an emergency.

In water distribution, employees typically work their regular shifts even after working all night on emergencies. If Wolf is concerned about employees working too long for the sake of safety, he will tell them to get up in the truck to sleep or rest. He said there were times when they worked all night and got done around 7:00 a.m., and were due to start at 7:30 a.m. He has told the employees to go home, eat breakfast, take a shower and come back, while he punched them in when they would start their next work day. Wolf said there are other things that have to be done during the day, especially in the winter when fire hydrants have to be checked all the time.

There are no grievances regarding overtime in the water distribution division, which is separate from the street department and the wastewater department. Wolf acknowledged that his practice differed from the street and wastewater departments. He believed that people could not go without water while they could wait longer for snow to be removed. And the wastewater department has three shifts of employees. Also, noise ordinances and darkness would make it difficult to dig a fire hydrant out at night, so he would not change a shift to do that at night even though he could. There have been times when Wolf has sent employees home, especially during one bad winter when the employees had worked around the clock and worked too many hours. He sent everyone home and told them to come back eight hours later.

DISCUSSION

The contract language at issue here is Article X, Normal Work Week, Normal Work Day and Normal Work Schedule. It states in relevant part:

The normal work week shall be forty (40) hours, Monday through Friday. The normal work day shall be eight (8) hours per day, Monday through Friday. The normal work schedule shall be five (5) consecutive eight (8) hour days, Monday through Friday, for the following divisions:

- a. Street Department
- b. Parks Department
- c. Sanitation Department
- d. Cemetery
- e. Water Department, Outside Crew
- f. Electrical Division
- g. Forestry Division

. . .

In the event it is necessary to change employees from one regular schedule of hours to another schedule of hours the employees shall be given at least 24 hours notice of change. Work performed on a revised schedule during the 24 hour notice period shall be compensated at 1 ½ times the normal rate of pay whether or not total working hours for the week are in excess of 40 hours, except as otherwise provided herein for emergencies.

For an emergency such as snow removal, ice control, flood control, sickness, and so on, the Employer shall have the right to schedule the work week as may be necessary and from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his/her normal work week schedule shall not be sent home early on subsequent days or denied his/her regular work week schedule to avoid over-time payments without his/her consent. The spirit of this provision is that the Employer shall not be penalized during emergency conditions through overtime payment during the 24 hour notice period, but neither shall the Employer adjust the working hours after emergency conditions (e.g. to less than 8 hours per day) so as to deny employees legitimate overtime.

The Union relies strongly on the language regarding an employee's consent. It even framed the issue as whether the Employer violated the agreement when it sent employees home without their consent to avoid paying overtime when called in for emergencies. The Union misplaces the "consent" element, however. The "consent" refers to being sent home early on subsequent days (after the emergency). That requires consent. If the Union's interpretation were correct – that an employee always had to consent to being sent home, the first sentence of that paragraph would make no sense, and the "consent" would have been put into the first sentence of the paragraph. Also, the last sentence states that Employer is not to be penalized for overtime during an emergency for overtime, which reinforces the notion that an employee does not have to give consent to being sent home on the emergency working day in question, but has to consent if the Employer were to send him or her home later on subsequent days in order to avoid overtime.

The Union also argues that a previous award in its favor is final and binding on the parties. This is the award by Arbitrator Houlihan, Case 197, MA-7599, issued March 23, 1993, or called the Kosmer Award. However, the facts in that case are different and called for Arbitrator Houlihan to interpret the "consent" and subsequent days language. Kosmer was asked to work on a Sunday and then take a different day off later in the week. Kosmer said he would work but that he did not want to take a day off later and wanted to be paid for overtime. The Arbitrator sustained the grievance because Article X precluded the Employer from denying Kosmer his regular work week in order to avoid overtime. Those facts are sufficiently different than the case before me. None of the Grievants were denied their regular days or work week after the emergency day. In the case of the Street Department workers, no overtime was incurred by the change in schedule, but in the case of Zibell, he earned four hours of overtime and was not asked to leave early on subsequent days in order to avoid the overtime payment. This is a significant different between the cases, and this Arbitrator would agree with Arbitrator Houlihan that Article X prevents the very thing that happened in the Kosmer case.

While the Union contends that the language of Article X is clear and unambiguous and requires an employee's consent to be sent home during emergencies or be allowed to work his or her normal shift, the language is not exactly a model of clarity, as Arbitrator Greco noted in a previous award also dealing with this language. The language has been the source of disputes and misunderstandings for years.

This would be a case where a solid past practice would be useful. But here, there are at least three different sets of past practices, depending on the department, for the same language under the same contract. There are no grievances in Water Distribution, and it has a practice probably most desired by the Union whereby employees work overtime as well as their normal shifts. The Wastewater Treatment Plant has a practice of cutting off all work after 12 hours if possible for safety reasons. And the Street Department has a practice of calling people in early to work and sending them home early after they have put in eight hours, thereby avoiding most short-term overtime situations. Oddly enough, if an employee were held over after his shift, he would get the overtime and could not be sent home early on a subsequent day to avoid the overtime payment. However, coming in early creates a different situation under this contract language. This seems inequitable, but that is what is allowed under the contract and the parties have agreed that the Employer is not to be penalized by paying overtime in emergency situations.

Basically, the City wants the right to bring employees in early or change their hours and then send them home early, thereby avoiding overtime payments during emergencies. And the Union wants the right to work early or late as overtime, and work all the normal hours in addition to the extra emergency work, and to get overtime when working something that is not the regular hours. If the Union wants to lock in the hours of work and obtain overtime for everything outside of those hours, it needs to do so at the bargaining table. As it stands, the City's right to change the hours during emergencies and avoid paying overtime is only restricted by the "subsequent days" language. The normal work week is 40 hours, and the normal work day is 8 hours, and the normal work schedule is Monday through Friday.

There is no question that the change in hours here occurred during emergencies, when the City does not have to give 24 hours notice of change. Under emergencies, it may schedule the work week as necessary and change shifts without prior notice. In exchange for that flexibility, the City may not send employees home early or deny them their regular work week schedule to avoid paying the overtime after the emergency is over. The normal work week is defined as 40 hours by contract. The City correctly states that it has the right to alter the employee's work schedule for the days in question but not for non-emergency days unless the employee consents to it. An employee does not have to consent to having his or her shift changed during an emergency and does not have to consent to go home after working eight hours during an emergency.

In Zibell's case, the City has an additional reason to deny him working his shift after he had already worked 12 hours. If Zibell had worked his shift, he would have worked 20 hours in a row. The City has the right to deny this because of its concerns for safety. While Zibell wanted the previous 12 hours on overtime and then his 8 hours of straight time, he got 4 hours of overtime and 8 hours of straight time. It is certainly within the City's right to send an employee home due to safety concerns, and working 20 hours straight is excessive and could certainly create an unsafe situation.

In conclusion, the Arbitrator has not relied upon past practices in this case because there are too many practices going on under the same contract language. The Arbitrator has found that the Kosmer Award is not on point and does not apply to these grievances. The Union's reliance on the term "consent" in Article X is misplaced, as the consent concept is for subsequent days after the emergency has been worked. The phrase regarding subsequent days or regular work week are linked together. The Union's concept would force the payment of overtime every time someone worked outside of his or her regular hours, and that concept is in conflict with the language about the Employer not being penalized for overtime during emergency conditions. The employees were not denied a regular work week, which is 40 hours. The Employer's interpretation of Article X in this case is preferred.

AWARD

The grievances are denied and dismissed.

Dated at Elkhorn, Wisconsin, this 13th day of October, 2006.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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