BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC

and

CITY OF FOND DU LAC EMPLOYEES UNION LOCAL 1366, AFSCME, AFL-CIO

Case 191
No. 64598
MA-12945

(Use of Seasonal Help/Interns Grievance)

Appearances:

Mr. William G. Bracken, Labor Relations Coordinator, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903, on behalf of the City of Fond du Lac.

Mr. Thomas Wishman, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 2236, Fond du Lac, Wisconsin 54936, on behalf of City of Fond du Lac Employees Union, Local 1366, AFSCME, AFL-CIO.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the City agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Walter Kloske and various other members of Local 1366, hereinafter referred to as Grievants. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on January 27, 2006 at Fond du Lac, Wisconsin. At the hearing the parties agreed that four additional grievances would be heard at that time and that all five grievances would be determined in this proceeding. A transcript was prepared and made available to the parties. The parties filed written briefs and reply briefs, and the record was closed on April 28, 2006.

ISSUES

The parties did not stipulate to a statement of the issues. The Union proposed the issues be stated as:

> Did the employer violate the collective bargaining agreement during 2003, 2004, and 2005 when it hired summer interns to serve in the capacity of a seasonal or temporary employee when there was no additional work or special projects beyond the normal work performed at the plant and additionally to displace bargaining unit employees from their regular duties?
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> If so, what is the appropriate remedy?

The City proposed the issues be stated as:

> Did the City of Fond du Lac violate the 2003-05 contract when it used interns according to its long-standing past practice?
>
> If so, what is the appropriate remedy?

The undersigned finds the record best supports a statement of the issues as:

> Did the City of Fond du Lac violate the 2003-05 collective bargaining agreement when it utilized student interns in the laboratory of the wastewater treatment facility on weekends in the summer and fall of 2003, 2004 and 2005, on two holidays in December of 2003, and on a holiday in July of 2005?
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> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III
PROBATIONARY PERIOD – EMPLOYMENT STATUS

. . .

Section 2 – A permanent employee is hereby defined as a person hired to fill either a permanent full-time or permanent part-time position. A temporary/seasonal employee is one who is hired for a specific time or for a specific project (not to exceed 4 months) except in the parks Division (or other divisions or projects when specifically agreed to by the Union and City) where temporary/seasonal positions of up to eight (8) months duration will be

permitted between April 1 and December 1. A temporary/seasonal employee will be separated from the payroll at the end of such period or project. The intent of this section is to permit the use of temporary/seasonal employees during period of increased work, but temporary/seasonal employees, after completing their employment, will not be replaced until the next season or project. The City shall inform the Union of the status at time of hire of all temporary/seasonal employees and shall indicate to the Union when such employees have been removed from the payroll. Temporary/seasonal employees, of less than six (6) months duration, are not subject to the terms and conditions of this Agreement; however, temporary/seasonal employees will not be utilized to displace regular employees but rather to augment the work forces. Seasonal/temporary employees of six (6) months or more duration in the Parks Department shall be given first preference for re-hire the following year.

. . .

Section 4 – Personnel records indicating the status of the employee shall be completed at the time of employment and a copy of the PERSONNEL ACTION FORM, indicating such status, shall be provided the employee. Any future changes of employee status such as change of classification, promotion, etc., shall be treated in a similar manner.

The City shall inform the Union of the status at time of hire of all temporary/seasonal employees and shall indicate to the Union when such employees have been removed from the payroll. Temporary/seasonal employees of less than six (6) months duration, are not subject to the terms and conditions of this Agreement; however, temporary/seasonal employees will not be utilized to displace regular employees but rather to augment the work forces.

In addition the employer shall send copies of all personnel forms on all employees moving through the pay scales and longevity steps, and on all seasonals upon their hire and termination to the President of Local 1366.

ARTICLE VIII
OVERTIME AND HOLIDAY PAY

. . .

Section 5 – Overtime shall be divided as equally as possible on a calendar year basis among qualified employees in a division. Overtime of employees shall be posted. Part-time and temporary employees will not be assigned overtime work except in cases of emergency or when all permanent employees are working overtime or when permanent employees are unavailable for overtime work.

. . .

ARTICLE XXV
GRIEVANCE PROCEDURE

A. Grievances to be processed within the grievance procedure shall involve only matters of interpretation, application or enforcement of the terms of this Agreement and, as such, only those items may be processed under the grievance procedure.

B. The grievance process must be initiated within ten (10) working days of the alleged incident or within ten (10) working days of the aggrieved being aware of such incident. Any grievance not reported or filed within the time limits set forth above shall be invalid.

. . .

Step 4 - ….The arbitrator in arriving at his determination shall rule on only matters of application and interpretation of this Agreement. . . .

. . .

ARTICLE XXVII
MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the workforce, including but not limited to the right to hire, to disciplined or discharge for proper cause, to decide initial job qualifications, to layoff for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work (no employee shall be laid off due to subcontracting provisions), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

BACKGROUND AND FACTS

The City wastewater treatment plant is a 24-hour operation, 7 day a week, 52 weeks a year. As shown on the organizational chart there are approximately 25 people who regularly work there. The plant contains a laboratory where a wide range of laboratory procedures are performed daily. To cover the 24 hour operational needs of the plant, some employees work a rotating schedule. Operations Crew Leaders (OCLs) and Secondary Treatment Operators

(STOs) work seven days 8:00 a.m. to 4:00 p.m.; four days off; then midnight to 8:00 a.m. for six days; two days off; then 4:00 p.m. to midnight for seven days; two days off; and then the 28 day rotation repeats itself. This schedule has these employees working some weekends. The schedule is prepared for a year.

Normally the lab work is done Monday through Friday 6:30 a.m. to 4:00 p.m. by the chemist and the lab technician. On weekends the STOs can do lab work. OCLs had done weekend lab work in the past, but do not currently do so. Lab work on weekends is normally done by the STOs from 8:00 a.m. to 4:00 p.m.. If they finish the lab work early the STOs resume their STO duties. Sometimes STOs are offered overtime to do lab work if other STOs or employees are absent from work.

Since at least 1981 the City has operated an internship program at the wastewater treatment plant. Much of the work of the interns is in the laboratory doing a wide range of laboratory work, although they see and work in most of the areas of the plant. The interns are from various colleges or technical colleges and are studying in areas such as water/wastewater, environmental studies, chemistry, or other disciplines requiring laboratory work. The internship counts towards class requirements at the respective colleges. The hours required by the educational institutions for the internship varies from 80 hours to over 216 hours, depending on the program. The internships offered by the City typically exceed those numbers of hours, sometimes by a considerable amount but, not more than the number of hours that qualify for the state retirement system. The internships do not exceed 4 months. Part of the written job duties of the interns includes being responsible for all weekend laboratory duties performed by the STO. The program is not built around any extra work that needs to be done at the plant, and interns are not hired to do menial work such as cutting grass or painting, although their duties include things such as scum pit cleaning, belt cleaning and belt lubrication. Interns are paid an hourly wage at a higher rate than seasonal/temporary employees, but do not receive any fringe benefits. They are not in the bargaining unit. The plant operations manager signs off on all required laboratory tests performed in the lab, including those done by the interns.

The City normally hires two interns in the summer when the students are between classes. The City has hired interns during winter breaks or on weekends through out the fall to fit the student's scheduling or to complete an internship. The City attempts to keep the summer interns gainfully employed for the whole summer in view of the commitment, rather than only provide 80 hours and then have them out of a job for the rest of the summer. Normally interns receive an initial two or three week training in the lab from the Chemist and Lab Technician. They perform lab duties Monday through Friday, and also rotate working in the lab on weekends. They do not work more than 40 hours per week and do not earn overtime.

The internship program has been essentially the same since at least 1981. Some former interns have been hired by the City as regular employees at the plant.

At no time has the scheduling of an intern, in the lab on weekends or at any other time, caused a regular bargaining unit employee to loose any regularly scheduled work or work less that a full schedule of hours. The scheduling of interns for weekend or other lab work does result in STOs not being needed to work in the lab during some of those times, and in there being no need for the City to have STOs work some overtime. The use of interns does not alter the work schedule of the other plant employees.

The City and the Union have entered into a memorandum of understanding that sets out a manner of distributing and equalizing overtime hours when overtime is available to be worked by bargaining unit members. There are some specific references to the seasonal or temporary employees in the parks division, but no reference to the interns at the wastewater treatment plant.

In December of 2003 the City rehired interns who had worked the previous summer and those interns performed lab work on December 24 and December 31, which are holidays recognized in the collective bargaining agreement. The interns were given the option of working the full shift at straight time or taking some of the time off without pay, and they elected to work. No overtime was scheduled for any employee in those instances. On May 23, 2004 a STO took a day of vacation and the City assigned an intern to work that day. No overtime was scheduled for any bargaining unit member, or anyone else, to fill in for the vacation time. On or about August 2, 2004, and May 6, 2005, interns were working on an on-going basis in the internship program, which included working weekends. No overtime opportunities were present during the times the interns were working. On or within 10 days of the preceding described circumstance the Union filed grievances contending, in effect, that the interns were being used on weekends, holidays, and other times as unsupervised seasonal or temporary employees which displaced regular bargaining unit employees from overtime opportunities and as such denied overtime in violation of the collective bargaining agreement and the overtime memorandum of understanding. On July 31, 2005 the Union filed a grievance regarding the absence of the substitute Laboratory Technician on July 2 and July 3, 2005, and the City's assignment of lab work to an intern thus denying overtime opportunities to a member of the bargaining unit. All of the grievances were denied by the City which led to this arbitration.

Other matters appear as in the discussion.

POSITIONS OF THE PARTIES

The Union

In summary, the Union believes that the dispute is not complicated, and one that can be decided on the basis of the language in the collective bargaining agreement. Contrary to the assertions of the City at the hearing, the Union does not seek to prohibit the City from

operating an internship program. The Union recognizes the value of such a program to the City in terms of potential employment relationships, the individual students, and the community at large. What the Union does insist upon however, is that such an internship program be conducted in a manner that is consistent with both the letter and spirit of the agreement between the parties. The Union asserts that the City has transformed the internship program into nothing more than a seasonal or temporary work program, and that doing so is a violation of the agreement. Furthermore, the City is displacing bargaining unit members from their regular duties and in some instances denying them the opportunity to work overtime.

The Union argues that the City's current internship program far exceeds the requirements of educational institutions with regard to the number of hours interns are assigned to work and when those hours are worked. The City is using interns in the capacity of temporary/seasonal employees. Interns were recalled to work in December of 2003 and in fact worked on two holidays, December 24, and December 31, for reasons not required by their internship program. They were recalled so they could make extra money. It is not in dispute that during the times interns were assigned to work, there was no increased work or special projects at the wastewater treatment facility. When an intern performs lab work on weekends, the STO is displaced. Using interns as if they are seasonal or temporary employees is a violation of the agreement, citing Article III Section 2. During the 2003 holiday season and at numerous other times during the three year period in question, bargaining unit employees were denied overtime that they otherwise would have been eligible for because of the presence of interns. The employer is violating the overtime provisions of the agreement and of the overtime equalization agreement between the City and the Union.

The Union believes that the employer has violated Article III, Section 2 and Article VII, section 5 of the agreement, as well as provisions of the overtime equalization agreement between the parties. While some would argue that individual employees should be compensated for lost overtime opportunities, the Union is aware that given the "chain reaction" nature of the process of overtime availability, acceptance, and refusal, it is probably impractical at this juncture to try to determine which employees are entitled to lost overtime. Therefore, as a remedy the Union asks that the employer be enjoined from the further usage of interns to displace bargaining unit employees from performing their regular job duties at any time in general, and specifically from displacing bargaining unit employees from performing lab work. In addition, the Union asks that the employer be directed not to assign interns to perform work that would otherwise result in overtime for a bargaining unit member.

The City

In summary, The City argues that since the specific use of the term "intern" is not found anywhere in the collective bargaining agreement, the City maintains the right to hire interns and has done so according to a long-standing practice. Alternatively, if the term "intern" is covered by the collective bargaining agreement, the City did not violate the contract.

Since the contract is silent with respect to interns, Article XXVII of the agreement (management rights) vest in the City the authority to utilize interns. The City has the authority to provide an internship program and there is a distinction between intern and temporary/seasonal employees. The City, not the Grievant, possesses the right to assign employees to positions. In the alternative, even if interns are covered by the contract, the language is ambiguous. The City followed the parties long-standing, mutually agreed upon past practice with respect to the employment of interns. The City's practice regarding interns rises to the level of a condition of employment as binding as any provision in the contract, and the City has met the burden to establish a binding past practice.

The City also argues that the Union waived its right to grieve the use of interns and that the Grievant does not have a right to schedule himself to lab duties on the weekend. Grievant was not denied overtime or otherwise disaffected through the use of interns. The overtime equalization memorandum of understanding is irrelevant to this case.

The City argues that a review of the individual grievances reveals deficiencies which prove that the City did not violate the contract and the grievances should be denied. As to the grievance dated December 23, 2003, the use of interns on December 24 and 31 was an anomaly. This was the first time the City had utilized interns on holidays. All the employees in the bargaining unit were working the jobs that they were assigned to work. No displacement occurred and no overtime was created by the use of the intern. No regular employee was disaffected by the use of the intern.

As to the grievance dated May 25, 2004, the Union is not in a position to force or require the City to replace an STO substituting as a Lab Technician. The intern's normal duties included being assigned lab duties on the weekend. This has been the constant practice through the 25 year practice. The duties of the summer intern were clearly spelled out in the written duties. Weekend lab duties were an integral part of the summer intern's job responsibilities.

As to the grievance dated August 2, 2004, while lab duties are certainly within his job description as an STO, Kloske does not have the power to assign himself to those lab duties. Only the City can assign him to those duties based on the need. Because the interns were performing lab duties pursuant to the long-standing practice, there was no need to assign Kloske to the summer lab duties. Therefore, he continued working for the City in the capacity as he was originally hire – an STO.

Concerning the grievance dated May 6, 2005, the grievance predates the beginning of the summer internship program in 2005, and therefore, it is not timely. The Union seeks to overturn a 25 year practice by forbidding the City to utilize interns on weekends.

Concerning the grievance dated July 31, 2005, the interns have always worked the weekend and the substitute laboratory technician was not needed. Therefore, no overtime would be incurred given the presence of the intern scheduled on weekends in the lab. This

grievance is not timely. It concerns events on July 2 and 5, 2005. Under Article XXV, Section B, grievances must be initiated within 10 working days of the aggrieved being aware of such incident.

The City also argues that an earlier arbitration between the parties determined that lab work is not exclusively bargaining work and the City retains the right to determine when particular work needs to be done. Both principles support the City's use of interns.

Union Reply

In summary, the Union replies that it does not argue that the City does not have the right to have an intern program. The Union contends the internship program as currently operated violates the labor agreement because the City is using it for purposes that go far beyond that required by the educational institutions, and the City is using interns as seasonal or temporary employees.

The Union does not argue that lab work could only be performed by bargaining unit members. The previous arbitration (City of Fond du Lac, MA-12112, Emery, 9/18/03) related to whether lab work could be performed by management in a setting that could result in overtime. That is not the issue in this case. Here, the interns are being used as seasonal or temporary employees and there is specific contract language that prohibits displacing bargaining unit members from their regular duties, citing Article III, Section 2. It is true that interns do not meet the definition for a seasonal/temporary employee as spelled out in the working conditions agreement, and from the Union's perspective, that is the problem. The employer is assigning work to interns far beyond that required for a normal internship program and in a manner very similar to that of other seasonal or temporary employees. The contract is not ambiguous and is very specific with regard to the circumstances under which the city may hire a seasonal or temporary employee. The use of interns in this manner is prohibited by the contract because there is no extra work and there are no special projects. The use of interns displaces bargaining unit members from lab work on weekends.

The Union notes the City asserts that the grievant seeks to self assign job duties because he does not want to work outside during the summer months, and this is most questionable and unsupported by the testimony. The grievance belongs to the Union, not the employee who filed the grievance on behalf of the bargaining unit. Although most employees would prefer to work indoors in the summer with air conditioning, there was no testimony that any unit member refused to perform any assigned duty. Grievant is entitled to his leave during the summer and was never denied requested time off. The Union does not argue that bargaining unit members should be able to assign their own job duties and this is not the issue in this case. Also, past practice does not address any gap in the current labor agreement. The contract is clear and unambiguous with regard to the circumstances under which the employer can hire and assign work to temporary or seasonal employees – the status that interns find themselves in. The agreement is effective January 1, 2003 through December 31, 2005, the period

covered by the grievances. Even if one were to determine that a practice has existed prior to 2003, the Union served notice to the Employer by filing the grievances in the instant case that it no longer was willing to waive its contractual rights in this matter, thereby ending the practice. And, the overtime provisions in the working conditions agreement are relevant, so the overtime equalization agreement must also be considered. The purpose of the agreement is to see that employees have the opportunity to work overtime on an equal basis. The use of interns denies overtime to bargaining unit members that would otherwise exist in their absence.

As to the individual grievances, no procedural objections were raised at prior steps or at the hearing. The working conditions agreement defines a grievance as "matters of interpretation, application, or enforcement of the terms of this Agreement." The Union has met any burden required of it in that regard. There is a consistent theme that is prevalent through each of the grievances. It is that theme, the use of interns as seasonal employees in a manner that violates the agreement, which is at the heart of this dispute and as such constitutes the larger issue that should be addressed by the arbitrator.

City Reply

In summary, the City replies that the Union ignores the management rights provision of the labor agreement and the 25 year past practice regarding the use of interns at the plant. The City contends the Union statement of the issue is misleading, and that the union misstates the facts.

The City argues that no bargaining unit employee has been displaced from their regular duties. Kloske does not have a right to work in the lab on weekends filling in for the Lab Technician. Contrary to the Union's argument, the number of hours interns are assigned to work has remained consistent since the internship began. The City has never employed interns for the minimum requirement set by educational institutions but rather wanted to provide and intern with a quality, fulfilling work experience. Interns are not the same as seasonal or temporary employees despite the Union's attempt to equate the two. The intern program is separate and distinct from the seasonal or temporary employees and has been treated as such between the parties for over 25 years. Contrary to the Union's version regarding the use of interns on December 24 and December 31, 2003, no regular employee was denied overtime. There was no overtime to be accorded. The Union's reliance on increased work or special projects is completely misplaced. The City has never utilized interns because of increased work or special projects. The increased work or special project language in the contract cannot be read as applying to the internship program. Contrary to the Union's argument, no secondary treatment operator is displaced from the laboratory during the summer. The City has never assigned the STO to summer lab duty in the first place. Contrary to the Union's contention, the use of interns does not violate the contract. A specific project may be the internship program itself. And, displacement in the contract means that an employee would lose his/her job. The interns simply augment the workforce. Employees have not been denied overtime through the use of interns. If the department is fully staffed there is no need for

overtime. Contrary to the Union's contention, the memorandum of understanding on overtime equalization has no relevance to this case. The use of interns has not caused and loss of overtime to regular employees. The Union's summary and remedy are misplaced. Deciphering overtime would be difficult, if not impossible. What the real issue in this case boils down to is who has the right to assign job duties to employees. The City has properly assigned employees to positions and has not violated the contract.

DISCUSSION

The Union contends in all five grievances that the City is violating the collective bargaining agreement and the memorandum of understanding for overtime equalization in the manner it uses the interns. Although there are five separate and distinct grievances here, the Union correctly points out that there is a consistent theme that is prevalent throughout each of the grievances. The Union states it is that theme, the use of interns as temporary/seasonal employees in a manner that violates the agreement, which is at the heart of this dispute and as such constitutes the larger issue that should be addressed. The Union's phraseology places an answer into the theme that the manner violates the contract. While the question of violation of the contract is the ultimate issue to be decided in each grievance, the basis for the theme is correct and forms the basis for the issues to be decided. That is, did the City violate the 2003-2005 contracts when it utilized interns in the laboratory on weekends and other specific days as alleged in the various grievances. Although the Union does state in its reply brief that the interns do not meet the definition for a temporary/seasonal employee as spelled out in the contract, it is the Union's contention that the interns were used as temporary/seasonal employees which ties the grievances together and ties all of them to the language of the collective bargaining agreement. Thus, determining if the interns are the same or equivalent to temporary/seasonal employees, as the Union maintains, or rather, are separate and unique from the contract and also supported by 25 years of past practice as the City maintains, must first be decided.

In the first instance both parties argue that the clear and unambiguous language in the contract supports their contentions. The collective bargaining agreement makes several references to temporary/seasonal employees but none to interns. Similarly, the overtime equalization agreement references some temporary/seasonal employees, but not interns. The contract has a wage rate for temporary/seasonal employees, but does not have a wage rate for interns. The collective bargaining agreement does define a temporary/seasonal employee and obviously does not define an intern. Article III of the agreement provides:

PROBATIONARY PERIOD – EMPLOYMENT STATUS

. . .

Section 2 – A permanent employee is hereby defined as a person hired to fill either a permanent full-time or permanent part-time position. A temporary/seasonal employee is one who is hired for a specific time or for a

specific project (not to exceed 4 months) except in the parks Division (or other divisions or projects when specifically agreed to by the Union and City) where temporary/seasonal positions of up to eight (8) months duration will be permitted between April 1 and December 1. A temporary/seasonal employee will be separated from the payroll at the end of such period or project. The intent of this section is to permit the use of temporary/seasonal employees during period of increased work, but temporary/seasonal employees, after completing their employment, will not be replaced until the next season or project. The City shall inform the Union of the status at time of hire of all temporary/seasonal employees and shall indicate to the Union when such employees have been removed from the payroll. Temporary/seasonal employees, of less than six (6) months duration, are not subject to the terms and conditions of this Agreement; however, temporary/seasonal employees will not be utilized to displace regular employees but rather to augment the work forces. Seasonal/temporary employees of six (6) months or more duration in the Parks Department shall be given first preference for re-hire the following year.

. . .

Section 4 – Personnel records indicating the status of the employee shall be completed at the time of employment and a copy of the PERSONNEL ACTION FORM, indicating such status, shall be provided the employee. Any future changes of employee status such as change of classification, promotion, etc., shall be treated in a similar manner.

The City shall inform the Union of the status at time of hire of all temporary/seasonal employees and shall indicate to the Union when such employees have been removed from the payroll. Temporary/seasonal employees of less than six (6) months duration, are not subject to the terms and conditions of this Agreement; however, temporary/seasonal employees will not be utilized to displace regular employees but rather to augment the work forces.

In addition the employer shall send copies of all personnel forms on all employees moving through the pay scales and longevity steps, and on all seasonals upon their hire and termination to the President of Local 1366.

The facts of the case must be first applied against this contractual language in determining if the interns in each of the grievances are being used as a temporary/seasonal employee in a manner that violates the contract.

The first relevant part of Article III is:

A temporary/seasonal employee is one who is hired for a specific time or for a specific project (not to exceed 4 months) except in the parks Division (or other divisions or projects when specifically agreed to by the Union and City) where temporary/seasonal positions of up to eight (8) months duration will be permitted between April 1 and December 1.

The interns are not in the parks Division or any other division or project specifically agreed to by the Union, so those parts of the contract do not apply. That leaves "hired for a specific time or for a specific project (not to exceed 4 months)". The placement of the 4 month limitation after specific project rather than after specific time is an indication that the 4 month limitation applies to both those hired for a specific time or specific project not to exceed 4 months.

There was no specific project for which the interns were hired or the internship program was used to address. The work at the plant and in the laboratory was always the same, and the volume of work was consistent. Thus, the interns were not hired for a specific project and they would not be a temporary/seasonal employee on that basis. The internships were for varying lengths of time, and occurred not only in the summer but, also into the fall and over semester or holiday breaks from school. The educational requirements varied from 80 to 216 hours. However, as the City correctly points out, the educational requirements of the institutions are not controlling on the City. The City certainly must meet those minimum requirements in order to have the quality internship which it and the educational institutions expect. But that does not mean that the City must limit the number of hours of the internship program to any minimum number the institutions require. The City is free to set the number at what it feels appropriate. The real question is whether that triggers any contractual provision that makes the use of interns in this manner subject to the collective bargaining agreement as temporary/seasonal employees as the Union contends. There is no clear record as to how long any given internship has lasted or how many total hours are involved in an internship, although they are less than state pension reporting requirements, which is generally understood to be 600 hours. In this regard both the nature of a summer internship program or one that can be complete at various times throughout the fall and over semester breaks strongly indicates that the internships do not exceed 4 months. Both witnesses Leonhard and Barrett agreed the length of the internships was, essentially, less than four months. Thus, interns are hired for a specific time that does not exceed 4 months. As such, they meet that part of the definition of a temporary/seasonal employee.

This does not end the inquiry, however. Article III contains additional references to temporary/seasonal employees:

> The intent of this section is to permit the use of temporary/seasonal employees during period of increased work, but temporary/seasonal employees, after completing their employment, will not be replaced until the next season or project.

As to this language, since at least 1981 it is recognized that the internship program work was not during periods of increased work. This is an important and distinguishing feature of the program. Under the agreement, temporary/seasonal employees are intended to be used during periods of increased work. The internships occur when there are students available and are not dependent on any change in work flows or work demands. Even though the program is known

as a summer internship program and most internships are over the summer, the internship program operates over more than just the summer season and is not seasonal in the sense that work demands are seasonal. This indicates there is no intention that interns be considered temporary/seasonal employees under the agreement.

The lack of reference to interns and these two competing and conflicting interpretations of the contract language presents an ambiguity as to whether the interns are or are not temporary/seasonal employees. If they are, then further analysis is needed to determine if the manner of their use violates the agreement. To resolve the ambiguity is helpful to look to the past practices of the parties in regard to the internship program. It is widely held that

> [O]ne of the most important standards used by arbitrators in the interpretation of ambiguous contract language is the custom or past practice of the parties. Indeed, use of past practice is to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary.
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> *HOW ARBITRATION WORKS,* Elkouri & Elkouri, 5th ed. p. 648.

The internship has been in existence since at least 1981 in essentially the same form. It has existed unchanged through many collective bargaining agreements between the parties and there is no evidence that it has been the subject of bargaining over the collective bargaining agreement. Interns are not mentioned in the overtime equalization memorandum, which is evidence that they were not bargained over concerning that document. There is also no question that the Union has been aware of the nature and use of the interns and the internship program throughout its existence. The interns and bargaining unit members work side by side in many instances and the duties of the interns are spelled out in written form available to anyone.

A threshold question as to the use of past practice is raised by the Union wherein the Union argues that these instant grievances are the Union's notice to the City that it is no longer willing to waive its rights in this matter, thereby ending the practice. This argument is not persuasive. Again, Elkouri & Elkouri is instructive:

> Where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice. It has been stated:
>
> There would have to be very strong and compelling reasons for an arbitrator to change the practice by which a contract provision has been interpreted in a plant over a period of several years and several contracts. There would have to be a clear and unambiguous direction in the language used to effect such a change.
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> Id., at pp. 648,649.

The task in this grievance arbitration is to apply these principles to determine if the internship program is covered by the contract and if its use is violating the contract. This is a different issue than the renunciation of a past practice.

There are two types of past practices which are separate and distinct.[1] One type of practice is not addressed in the labor agreement; it exists apart from any provision of the labor agreement. This type of practice may be revoked by either party upon timely notice of repudiation. The other type of practice, a "contract-based" past practice, concerns subject matter covered by the contract; it exists to clarify some contractual ambiguity. Such contract-based practices are essential to an understanding of ambiguous contractual provisions. Over time the contract-based practice becomes an integral part of the ambiguous provision; and it will be binding on the parties during the life of the agreement even though the practice is not explicitly stated anywhere in the contract. "Contract-based" past practices cannot be revoked by mere timely repudiation. Rather, such a practice can only be terminated by mutual agreement of the parties to rewrite the ambiguous provision to clearly eliminate the practice or to eliminate the ambiguous provision entirely.

The clearest, most persuasive description of the operation of a contract-based past practice *vis a vis* one parties' attempted repudiation thereof was written by Arbitrator Richard Mittenthal.[2] That description reads in relevant part as follows:

. . .

> Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.
>
> It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc.

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[1] See, Pinelawn Memorial Park (overtime grievance), Case 3, No. 60446, A-5966 (Gallagher, 1/02).

[2] Past Practice and the Administration of Collective Bargaining Agreements, 14th Annual Meeting of the National Academy of Arbitrators, pp. 30-58 (BNA, 1961).

In addition, WERC arbitrators have adopted Mittenthal's analysis in cases involving the attempted repudiation of a contract-based practice by one party to a labor agreement. Brown County (Sheriff's Department), Case 567, No.52381, A-8942 (Buffett, 12/95); Barron County (Sheriff's Department), Case 118, No. 50790, MA-8382 (McLaughlin, 6/95). These cases hold that a contract-based past practice which fills in the blanks in an ambiguous contract provision cannot be eliminated except by mutual agreement to change the contract language. See also, Wood County (Nurses), Case 113, No 48253, MA-7555 (Greco, 6/93); Douglas County (Middle River Health Care Center), Case 177, No. 44909, MA-6453 (Engmann, 8/91).

As to the internship program, the Union clearly raises a contract based issue. The Union alleges the manner of the use of the interns violates Article III, Section 2 of the agreement. That is also where the ambiguity arises as to whether the interns are being used as temporary/seasonal employees and thus limited by the contract. Thus, this is a contract based ambiguity. It cannot be repudiated or renounced by the Union merely by the filing of the grievances.

The past practice of the parties as to the internship program will now be reviewed. The program has existed in essentially the same form for over 25 years. There are no factual issues in serious dispute as to the program. The City has scheduled interns to work in the lab on weekends during that time as part of the program. The STOs and OCLs have always worked their full, scheduled shifts –at least as far as the interns are concerned. Interns have not worked overtime or been paid overtime. They are paid at a different wage rate than temporary/seasonal employees and do not have fringe benefits. They do not work in response to special projects, increased work demands, or seasonal work demands. Their status has not been reported to the Union. As the City points out, the program in its current form 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. These are the classic elements in establishing a binding past practice and all are present within the confines of the internship program. Given this past practice, the parties have not considered interns in the internship program to be temporary /seasonal employees. Added to this is the absence of periods of increased work or specific projects while using interns. The conclusion is that the interns in the internship program are not temporary/seasonal employees under the contract and their scheduling for lab work on weekends or other times is a prerogative of the City not limited by the collective bargaining agreement. The interns are not being used as temporary/seasonal employees.

The Union argues that the use of the interns violates that provision of the contract which provides in Article III, Section 2 that:

> Temporary/seasonal employees of less than six (6) months duration, are not subject to the terms and conditions of this Agreement; however, temporary/seasonal employees will not be utilized to displace regular employees but rather to augment the work forces.

The Union maintains that the interns are displacing regular employees, not augmenting the work forces. The Union's argument is not persuasive. First, as set out above, interns are not temporary/seasonal employees subject to the terms and restrictions on use as set out in this part of the contract. Secondly, the interns have not displaced any regular employee from any work they are otherwise entitled to. Further, the past practice of the parties establishes that for 25 years the internships have not been considered as displacing bargaining unit work from bargaining unit members. Finally, the management rights clause of the contract provides that the City does have the right to schedule the work of all employees. The City is not required to schedule work so that overtime in the lab must be offered to any bargaining unit member. See, City of Fond du Lac, Case 181, No. 61947, MA-12122 (Emery, 9/19/03). The Emery decision dealt with this same bargaining unit and same plant concerning overtime being assigned to a management employee rather than to a bargaining unit member. Arbitrator Emery determined that weekend lab work is not exclusively bargaining unit work in interpreting the overtime provisions of the contract and overtime equalization memorandum. He reasoned that there was no specific language in the contract which made weekend lab work exclusive bargaining unit work, nor was there any past practice that supported a different result. Here there is no overtime scheduled to be worked by an intern, but the same reasoning applies, although in interpreting Article III, Section 2, rather than Article VIII. Because this is not exclusively bargaining unit work it is of little or no distinction if it is done by management or interns. No provision in the collective bargaining agreement or even in the overtime equalization memorandum requires overtime to be scheduled. If the City determines overtime is needed and is scheduled then the contract and memorandum have terms that apply. However, that is not the case with the interns. Although scheduling them to work meant that some overtime was not needed to be worked by bargaining unit members, this is not a violation of any provision of the contract or memorandum. The City does retain the management right to schedule work in such a way that does not require overtime. The City also retains the right to direct and schedule the duties performed by the employees within their job description. That is what the City did. Using interns in the lab on weekends or anytime for that matter did not deprive any other employee of a full schedule of hours. It did not displace any bargaining unit member from any work that employee would otherwise have been entitled to.3 And, as noted above, past practice is to treat the internship program as outside the provisions of the collective bargaining agreement.

Temporary/seasonal employees under the contract do not include interns and the use of interns did not displace bargaining unit members from bargain unit work. No overtime is required to be scheduled by the City and the internship did not displace any bargaining unit member from contractually required overtime. This makes the overtime equalization memorandum irrelevant to these grievances. For much of the same reason that a consistent theme is prevalent throughout each of the grievances, each grievance needs to be considered in view of this.

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[3] Rather, the internship program does indeed augment the work force. That is not to say that this then renders them subject to the terms of the collective bargaining agreement. But even if they were covered by the agreement they would not have been used in violation of it because the contract allows for augmentation.

In the grievance dated December 23, 2003, the Union alleged that "summer help for the lab was rehired 12-19-03 when there was no need". At the hearing the Union argued this grievance also concerned interns working the one-half day holidays on December 24th and on December 31st. The Union has not proved a violation of the collective bargaining agreement. The internship program has operated during semester breaks such as this. All bargaining unit employees worked their full schedule over that time period. No overtime for anyone was scheduled or worked on the days in question. The City was fully staffed and no grievant would have earned overtime because the lab would have used on–duty staff in the lab if needed. The City had the right to schedule the interns as it did and to give them the option of working the holidays at straight time. The contract does not prevent the interns from being used or scheduled in this fashion.

In the grievance dated May 25, 2004, the Union alleged that "Joe O'Boyle on vacation 5-23-04, which created OT for Lab work. OT was not offered to low man. Summer help did lab work unsupervised." There is no requirement in the contract that interns be supervised while in the lab. More importantly, there is no requirement that overtime be scheduled or offered when there is an intern available to perform the lab work. This was on a weekend and interns, as established by past practice, work weekends. No overtime was created so there was no displacement of a bargaining unit member from overtime work they would be entitled to. The contract was not violated.

In the grievance dated August 2, 2004, the Union alleged the "[e]mployer is using seasonal help to perform bargaining unit work and displace regular employees". The grievance appears to be a general grievance over the use of interns in the internship program, and at the hearing the Union alleged an incident in early August of an intern performing lab duties while a substitute Lab Technician was absent was a violation. But, the interns are not seasonal help. The City can schedule them to perform lab duties in the absence of other employees. No work was lost to a bargaining unit employee to which they were entitled. All other employees worked their full schedule. No one was displaced from work or overtime. There was no violation of the contract.

In the grievance dated May 6, 2005 the Union alleges "[s]ummer help hired for Lab when there is no increase in workload, and will replace Lab Tech on weekends rather than augmenting work force. In past summer help were not connected to wastewater program". This appears to be a general grievance regarding the City's ability to use interns in the lab. There was not an internship operating at the particular time the grievance was filed. However, interns by past practice were not hired for periods of increased workload. They are not temporary/seasonal employees and, thus, their use is not limited to times of increased workload. The program has always operated in part on the weekends as established by past practice. Operating the internship program in the summer of 2005 as it did in prior years is not a violation of the contract.

In the grievance dated July 31, 2005, the Union contends that "[s]ubstitute Laboratory Technician missing on 7-2 & 3-05. Instead of filling with OT, had seasonal help do Lab Work." This grievance was filed more than 10 days after the incident or the aggrieved party being aware of the incident. The grievance was filed by Grievant on behalf of the Union and the bargaining unit. The schedules are made a year in advance and would have been known to everyone at the time O'Boyle, a STO, was on vacation. The only reasonable conclusion that can be drawn is that Grievant knew of the incident well before the ten working day limit in Article XXV, Section B. This would render the grievance untimely and unsustainable on that basis. Moreover, the incident concerned a weekend and interns have worked weekends as part of the internship. The City can schedule them for that and need not schedule overtime or lab work for bargaining unit members if the work is being done by scheduling an intern. No bargaining unit member lost any scheduled time. No overtime was required to be worked. All employees performed duties within their job descriptions. This is not a violation of the contract.

The City has made a repeated argument that the Grievant, Walter Kloske, was merely seeking to determine his own schedule with the ability to work in the air conditioned lab during the summer. This is not sustained by the evidence. Kloske is a Union Steward and has an obligation to file grievances on behalf of the Union, which actually owns the grievances. Not all of the factual incidents grieved over would result in Kloske getting to work in the lab. He was entitled to the vacation and leave days he scheduled and cannot be criticized for that. The City's arguments in regard to Kloske wanting to schedule his hours and duties as being the real basis for the grievances is not persuasive and are not part of the reason the contract was not violated in each of the instances for which grievances were filed.

The interns are not subject to the collective bargaining agreement and were not used as temporary/seasonal employees in violation of the collective bargaining agreement or the overtime equalization memorandum. Accordingly, base upon the evidence and arguments in this case, I issue the following

AWARD

All five grievances are denied. The City of Fond du Lac did not violate the 2003-05 collective bargaining agreement when it utilized student interns in the laboratory of the wastewater treatment facility on weekends in the summer and fall of 2003, 2004 and 2005, on two holidays in December of 2003, and on a holiday in July of 2005. There being no violation, no remedy is made.

Dated at Madison, Wisconsin, this 21st day of November, 2006.

Paul Gordon /s/
Paul Gordon, Commissioner

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