BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPACA COUNTY

and

WISCONSIN COUNCIL 40 AFSCME-AFL-CIO LOCAL 2771

Case 152
No. 65561
MA-13252

(Brenda Rice Overtime Grievance)

Appearances:

Alyson K. Zierdt, Davis & Kuelthau, S.C., 219 Washington Avenue, Post Office Box 1278, Oshkosh, WI, appearing on behalf of Waupaca County.

Houston Parrish, Staff Representative, AFSCME District Council 40, 1457 Somerset Drive, Stevens Point, WI, appearing on behalf of Wisconsin Council 40, AFSCME-AFL-CIO Local 2771.

ARBITRATION AWARD

Waupaca County, hereinafter County or Employer, and Wisconsin Council 40, AFSCME-AFL-CIO Local 2771, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission provide a list of five WERC commissioners/staff arbitrators from which they could jointly request an arbitrator to hear and resolve a dispute between them. Commissioner Susan J.M. Bauman was selected. A hearing was held on August 23, 2006 in Waupaca, Wisconsin. The hearing was transcribed, with the transcript being filed on September 8, 2006. The record was closed on December 15, 2006, upon receipt of all post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to agree to a statement of the issue, but agreed that the arbitrator could frame the issue based upon the parties' proposed issues and the evidence presented. The Union frames the issue as:

> Whether the employer violated the grievant's contractual right to a 36.25 hour weekly schedule when it forced her to work over that amount against her objection when no emergency existed.

The Employer frames the issue as:

> Did the County violate the Labor Agreement on September 25, 2005, when it scheduled the Grievant, Brenda Rice, to work more than 36.25 hours per week in order to address a work backlog?
>
> If so, what is the appropriate remedy?

Based upon the evidence and arguments presented, the undersigned adopts the following statement of the issue:

> Did the County violate the Labor Agreement on September 25, 2005, when it ordered the Grievant, Brenda Rice, to work between 36.25 and 40 hours per week?
>
> If so, what is the appropriate remedy?

BACKGOUND AND FACTS

Grievant Brenda Rice has been employed by the County since January 1, 1981. Most of that time, she was in the economic support division of the Department of Health and Human Services. Although she has since started a new position in the division, she was a child care specialist at the time of the events giving rise to the grievance herein, September 25, 2005. The responsibilities of her position at that time included preparing child care certifications, child care authorizations and processing, kinship care and resource specialist (RS) appointments. When Ms. Rice began as a child care specialist, approximately nine years before the events in question, she only had child care related responsibilities. She was the only person in the division that performed these duties. Ms. Rice's normal work schedule was Monday through Friday, from 8:00 am to 4:00 pm, for a total of 36.25 hours per week. Initially, she had no difficulty in completing the duties of her position within the 36.25 hour work week. After the RS duties were assigned to her position, Rice was often unable to perform all of her duties within 36.25 hours a week. At all times relevant hereto, Rice's supervisor was Christine Machamer.

Child care authorizations are required to release the payments of County subsidies to providers of day care who care for children of low to moderate income individuals. Child care authorization regulations are established by the State of Wisconsin Department of Workforce Development. The Day Care Manual promulgated by the State provides that

> For authorization and reimbursement purposes, all W-2 agencies, county agencies and tribal agencies are using CARES and the Child Care Payment System (CCPS). Child Care authorizations must be issued to the parent and provider within two days of the confirmation of eligibility or there must be a case comment indicating the reason for delay.

The Manual also provides a timeline for authorization changes:

> Families must report any changes in their circumstance that would effect [sic] their eligibility and authorization for child care. When a family has reported a change that requires the authorization to be changed, local agencies must take action on the reported change within 10 working days of receiving either verbal or written notice as well as any required verification relating to the change from the family. If a change is reported by the provider regarding a family's circumstance, the local agency must confirm this information with this family and take the appropriate action within 10 working days.

On September 3, 2004, Rice's supervisor, Chris Machamer, had a meeting with Rice in which Rice's workload situation was discussed. As described in Machamers' contemporaneous notes:

> Told Brenda that she need to get her work caught up to within the 10 working day requirement before going on vacation, and that if necessary, that she take a day of her vacation to work instead. She said that she would refuse. I told her that I am requiring her to do it, and as her supervisor, I can require it. She said she insists on getting it in writing. She said she will grieve it. I told her that I expect her to comply with it until the grievance is settled.
>
> Brenda said that she had been telling me that she was behind, but that in August, I did not allow her to put in overtime. She had told me that she was getting caught up near the end of July, the last time she asked to put in extra time. I allowed her to put in up to 40 hours then, and asked that she stay within 36.25 hrs. after that. She told me on 8/10 that she was behind. I took some of her attendance forms to enter for her, saving her about 1 hour or more of work.
>
> On 8/31/04, Brenda told me she was behind. I asked if she could put in extra time to get caught up. She said no. I told her I did not think I would have time to help her that week. She told me she is getting some calls from people who are upset that she is behind. I told her that we will need to find a way to deal with this problem, and that I will touch base with her several times this week to monitor how it is going.
>
> On 9/1/04, I got a complaint from a child care provider who said she has not gotten an authorization from Brenda for a parent that the provider is giving a 2 week notice to, and she wants to get the authorization before they leave so she can bill them for what they owe. I told Brenda to bring that one to the top of the priority list because of the circumstances.

> On 9/2/04, I had a complaint from a child care provider who Brenda told she would not get an authorization done until about 3 weeks after Brenda got the information. I asked if Brenda was able to get it done any sooner, and Brenda said she had too many ahead of that one and she is going to be gone on vacation, so it probably won't get done before she is on vacation.
>
> Today, on 9/3/04, I told her she needs to put in the time necessary to get caught up.

Ms. Rice filed a grievance about being mandated to put in time in excess of 36.25 per week. During a September 20, 2004 discussion with Rice and her union representative, Tracy Wisner, Machamer again told Rice that she, as the supervisor, could require Rice to put in the extra time if needed, and she (Machamer) could not guarantee Rice or anyone in the division that they could work just 36.25 hours/week. As Machamer's contemporaneous notes indicate:

> We don't have the staff to do that. I said that we need to have open communication about just how far Brenda is behind on her work. I would agree to giving Brenda 1 ½ - 2 hours each week that she can work over 36.25 w/o requesting permission each time, if she needs it to keep up. I would also expect that she not allow this situation to get to this point again. I would never wish to tell someone they have to cancel a vacation day or that they must work extra, but in this case I needed to.
>
> Brenda and Tracy questioned whether being over the 10-day deadline for getting authorizations done is an emergency that warrants putting in overtime. I said that it does because it is a state requirement and child care providers depend on it in order to get paid. . . .

Thereafter, Rice often worked an additional 1 ½ to 2 hours per week over the 36.25 without requesting permission to do so, whenever her workload warranted her doing so. At times, Rice requested permission to work up to 40 hours per week. As an example, on August 8, 2005, Rice e-mailed Machamer and stated:

> Chris,
> May I put in up to 40 hrs this week?
> I will probably need to extra time for the next two weeks also.
> thanks,
> Brenda

Rice's workload continued to grow. On September 27, 2005, Machamer had a normal meeting with Ms. Rice. After discussing and addressing a number of issues that Rice had, Machamer asked about Rice's workload. Machamer's contemporaneous notes of September 27, 2005 recount what transpired thereafter as follows:

> I asked how she is doing on her workload – how many cc [childcare] authorizations are overdue? She grabbed a pile and counted. She told me there are 27 overdue cc authorizations1, going back to Sept. 4. I said that this needs to get caught up. We dealt with this issue last year too, and she knows she needs to stay current on these.
>
> . . .
>
> I said I want her to put in 40 hours this week. She said she can't. I said she needs to because she has to get caught up, and she will need to find a way. She said she would not and I cannot require her to work more that 36.25 hours because that is the standard work day [sic]. I said no, that is not correct. I can require it and I am requiring it. She said that if this conversation goes any further, she wants a union steward. I said no, and you need to understand that this work needs to be done and if I need to require her to work 40 hours, I can do that. She interrupted me and repeated that if this conversation goes any further . . .
>
> . . . My position is that Brenda needs to work 40 hours this week, and maybe more next week to get this caught up.

A grievance was filed over the question of whether Machamer has the authority under the collective bargaining agreement to require Rice to work more than 36.25 hours under the circumstances.

Additional facts, including information regarding the bargaining history of the relevant portions of the collective bargaining agreement, will be presented and discussed in the Discussion section, below.

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[1] At hearing, Rice indicated that she miscounted the number overdue inasmuch as she made the determination based on a 10 calendar day requirement to complete the work rather than the State mandated 10 working day requirement. While this miscalculation might have added to Machamer's discomfort with the amount of work that was behind, it has no bearing on the question of whether Machamer could order Rice to work in excise of 36.25 hours for the next two weeks.

RELEVANT CONTRACT PROVISIONS

Article 2 – **Management Rights**

2.01 The Employer possesses all management rights except as otherwise specifically provided in this agreement and applicable law. These rights include, but are not limited to the following:

A) To direct all operations;

B) To establish reasonable work rules and schedules of work;

C) To hire, promote, transfer, schedule and assign employees;

D) To suspend, demote, transfer, discharge, and take other disciplinary action against employees for just cause;

E) To layoff employees because of lack of work or other legitimate reasons;

F) To maintain the efficiency of operations;

G) To take reasonable action, if necessary, to comply with state or federal law;

H) To introduce new or improved methods or facilities or to change existing methods or facilities;

I) To determine the kinds and amounts of services to be performed as pertains to the operations and the number and kinds of classifications to perform such services;

J) To contract out for goods and services, provided, however, that no employee shall be on layoff or laid off or suffer a reduction of hours as a result of such subcontracting;

K) To take whatever action is necessary to carry out the functions of the County in situations of emergency;

L) To designate a person in charge to manage that department in the absence of the department head.

2.02 It is further agreed by the Employer that management rights shall be exercised reasonably.

2.03 Nothing in this Agreement shall preclude the Employer from enacting its responsibilities under the Americans with Disabilities Act.

Article 10 – **Grievance Procedure**

. . .

10.02 Step 4.

. . .

Arbitration proceeding shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. In rendering his/her decision, the arbitrator shall neither add to, detract from, nor modify any provisions of this agreement. The arbitrator shall be requested to render his/her decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.[2]

Article 13 – **Normal Work Week and Work Day/Overtime**

13.01 The normal work week and the normal work day shall be as follows: The normal work week shall be 36.25 hours per week to be worked in five (5) consecutive 7.25 hour days, Monday through Friday. The normal hours of work shall be from 8:00 a.m. to 4:00 p.m., 45 minute duty-free lunch.

. . .

13.03 In emergencies, a department head may prescribe reasonable periods of overtime work to meet operational needs. Complete records of overtime of employees shall be maintained by each department head.

13.04 Employees shall be paid at their regular hourly rate for any hours worked in a normal work week in excess of 36.25 hours up to 40 hours per week, or compensatory time at the straight time may be taken. Employees shall be compensated at the rate of time and one-half the employee's hourly rate of pay for all hours worked in excess of 40 hours per week. In lieu of said overtime pay (time and one-half), employees may receive compensatory time off. Such compensatory time shall be granted at time and one-half for time worked in excess of 40 hours in the normal work week. Scheduling of such compensatory time shall be arrived at mutually between the employee and department head. All time paid shall be considered time worked for overtime pay and compensatory time purposes, including time and one-half.

. . .

[2] At hearing, the parties agreed to waive this 30 day requirement.

13.07 The parties recognize that certain groups of employees may have different work schedules than set forth herein. During the term of this contract, the County shall continue to maintain such schedule(s). By mutual consent in writing between the employee and Employer, certain employee's schedules may vary provided that during discussion of said schedule variations a Union representative is available to the employee.

Article 28 – **Entire Memorandum of Agreement**

28.01 This agreement constitutes the entire agreement between the parties and no verbal statement or practice shall supersede any of its provisions. Any amendment to this agreement shall be effective only when placed in writing and signed by the Employer (or designee) and the Union (or its designee).

To the extent that the provisions of this agreement are in conflict with the existing ordinances, resolutions or rules, the agreement controls.

28.02 The Employer and Union waive the right to bargain collectively on any subject during the term of the agreement, except as set forth in the article captioned "Severability" and wage rates for positions not currently set forth in Schedule A.

POSITIONS OF THE PARTIES

It is the position of the Union that the Employer cannot require an employee to work in excess of 36.25 hours in the absence of an emergency. Article 13.03 of the agreement mandates that an emergency exist prior to ordering overtime, which is anything in excess of the normal workweek of 36.25 hours. The dictionary definition of an "emergency" is "an unexpected, serious occurrence or situation urgently requiring prompt action." A backlog of child care authorizations does not constitute an emergency. Thus, the Employer could not demand that the Grievant, Brenda Rice, work in excess of 36.25 hours a week.

The Union also cites the dictionary definition of "overtime" as "time beyond an established limit, such as: a. Working hours in addition to those of the regular schedule . . ." and "after regular working hours; beyond the regular fixed hours." Inasmuch as the established limit, the regular fixed hours, was 36.25 hours per week, absent a contractual definition of overtime, any time worked in excess of 36.25 hours must be considered overtime and cannot be ordered in the absence of an emergency. The fact that the contract does not require payment of time and one-half for less than 40 hours of work does not change the fact that anything worked in excess of 36.25 hours constitutes overtime. As the Union explains the effect of the emergency doctrine and the straight time pay between 36.25 hours and 40 hours:

> The emergency doctrine protects the employee from abuse and saves the employer from time and one-half in the event exigent circumstances that arise that make overtime up to 40 hours necessary.

> Interpretation to the contrary sets the employer up for a double penalty because it would have to prove an emergency and pay overtime every single time it needed an employee to work over 36.25 hours. That is illogical, unprecedented and unsupported in the record. It is logical for the parties to have agreed to only pay time and one-half for hours over 40 hours based on past practice and because 40 hours is a universal threshold for paying premium wages. (Union Brief, at p. 11, emphasis in original)

The Union also relies on Article 13.07 for the proposition that an employee must have union representation when the employer wants to modify the employee's schedule. This article does not state that short-term scheduling changes of two weeks or less are exempt from its restrictions. Thus the changes Machamer sought in Rice's schedule could be accomplished either in the event of an emergency or by mutual agreement, in writing, provided that a Union representative was present (upon request) during the discussion of the schedule change.

Finally, the Union argues that the employer's contention that is routinely had employees work more than 36.25 hours is an attempt to circumvent the collective bargaining agreement. There is no document signed by the union and the employer that modifies the terms of Article 13.07. Accordingly, relying on Article 28 of the contract, the Union argues that the fact that employees work over 36.25 hours many weeks does not change the normal work hours to something over 36.25 hours, nor does it change the provisions of Article 13.03 with respect to the conditions to be met in order to unilaterally require overtime.

The Employer contends that the contract is clear and unambiguous in reserving to the County the right to schedule an employee for more than 36.25 hours, citing various portions of Article 2 of the collective bargaining agreement, Article 2. The County argues that none of the provisions of Article 13 limit management's right to schedule work. With respect to Section 13.01 that defines a "normal work week" contains no limitation on the County's ability to schedule employees outside of the "normal work week." The Employer cites a number of arbitrators in support of its position that it is a management right to increase or decrease "normal" hours of work for legitimate business reasons.

It is the County's contention that the language of Section 13.04 which delineates how employees are to be paid in a normal work week in excess of 36.25 hours up to 40 hours demonstrates that the parties contemplated that employees would, from time to time, work more than 36.25 hours in a week. Further, the Employer takes that position that this section makes clear that "overtime" means "all hours worked in excess of 40 hours per week" inasmuch as the section refers to the rate that will be paid for all hours worked over 40 as "overtime pay." The term "overtime" is not used in connection with the straight time payment for hours worked in excess of 36.25 up to 40 hours. Grievant, Brenda Rice, was not required to work overtime.

With respect to Section 13.03's provision that "[i]n emergencies, a department head may prescribe reasonable periods of overtime to meet operational needs," the County first argues that the provision does not apply because the time at issue here is not overtime in that it will not exceed 40 hours in a week. The County does, however, contend that the failure to comply with State-mandated timeliness regarding child care authorizations could jeopardize both the County's contract with the State and child care for low income County clients, thereby constituting an "emergency" that warrants a department head to direct overtime to meet operational needs.

The Employer contends that Section 13.07 is inapplicable to the instant situation. The final sentence of that provision, "By mutual consent in writing between the Employee and Employer, certain Employee's schedules may vary provided that during discussion of said schedule variations the Union representative is available to Employee" refers, according to the County, to the initial sentences of the section which relates to employees who were accreted to the bargaining unit and, at that time, worked schedules that differed from those in the bargaining unit. The final sentence was an addition proposed by the County during the negotiation of the 1990-1992 contract and was intended to address prospective variations of those employees who were already working schedules that differed from the "normal work week" and "normal work day" as defined in Section 13.01. Although the Union contends that this last sentence is "unrelated" to the first two sentences of Section 13.07, the bargaining history and the practice of the Union and County do not support the contention that this sentence restricts management's right to assign an employee to work in excess of 36.25 hours per week, and does not impose its provisions on changes to the schedules of any employees other than those working an alternative schedule.

Finally, the County argues that the assignment of additional hours to the grievant was a reasonable exercise of its management rights and does not violate any terms of the collective bargaining agreement.

DISCUSSION

The collective bargaining agreement between the parties contains a fairly broad management rights clause which includes, among other rights reserved to management, the right to direct all operations; to establish reasonable work rules and schedules of work; to maintain the efficiency of operations; to take reasonable action, if necessary, to comply with state or federal law; and to take whatever action is necessary to carry out the functions of the County in situations of emergency. These rights are absolute, except as otherwise specifically provided in the agreement and applicable law. Thus, we must look to various sections of the bargaining agreement to determine whether management has the right to direct Brenda Rice to work up to 40 hours in a particular week in order to get caught up with her work, specifically with childcare authorizations.

The parties have negotiated a normal work week of 36.25 hours. Testimony at hearing established that the length of the normal work week predated the initial collective bargaining agreement between the parties and resulted as a means to increase hourly wages without increasing costs to the Employer. The contract language, Article 13.01, states:

> The normal work week and the normal work day shall be as follows: The normal work week shall be 36.25 hours per week to be worked in five (5) consecutive 7.25 hour days, Monday through Friday. The normal hours of work shall be from 8:00 a.m. to 4:00 p.m., 45 minute duty-free lunch.

From this language, it is clear that there is an expectation on the part of the parties that employees will normally work 36.25 hours in a week. What is not clear from this language is what "normal" means. In daily usage, normal means conforming to the usual standard, typical, or customary. Article 13.01 is not a guarantee that employees will work 36.25 hours per week. Rather it is a statement that the general expectation is that employees will work that many hours, no more and no less.[3] Thus, Article 13.01 does not limit the Employer's ability to require Brenda Rice to work up to 40 hours in a given week in order to complete her work assignments.

Article 13.03 addresses the circumstances in which a department head may prescribe overtime:

> In emergencies, a department head may prescribe reasonable periods of overtime work to meet operational needs. Complete records of overtime of employees shall be maintained by each department head.

The contract does not provide a direct definition of overtime, and this particular provision does not provide a context from which to determine if overtime constitutes hours worked in excess of 36.25 hours or hours worked in excess of 40 hours. As will be seen, because I find that overtime occurs only after 40 hours of work, which is not the case here, there is no need to reach the question of whether the backlog of childcare authorizations not completed on a timely basis, even in light of the State mandates and the potential problems with childcare providers receiving payment, constitutes an emergency.

Article 13.04 provides the context from which I conclude that overtime means hours worked in excess of 40 hours per week. This article provides as follows:

> Employees shall be paid at their regular hourly rate for any hours worked in a normal work week in excess of 36.25 hours up to 40 hours per week, or compensatory time at the straight time may be taken. Employees shall be compensated at the rate of time and one-half the employee's hourly rate of pay

[3] Article 13.02 specifically addresses the process to be utilized in the event that there is a necessity to reduce the number of hours of work per day and/or per week from the normal. There is no parallel language to address the process to be utilized in the event there is a necessity to increase the number of hours of work per day and/or per week.

> for all hours worked in excess of 40 hours per week. In lieu of said overtime pay (time and one-half), employees may receive compensatory time off. Such compensatory time shall be granted at time and one-half for time worked in excess of 40 hours in the normal work week. Scheduling of such compensatory time shall be arrived at mutually between the employee and department head. All time paid shall be considered time worked for overtime pay and compensatory time purposes, including time and one-half.

At hearing, Union witnesses attested to the fact that this language was a compromise that was deemed to be acceptable in light of the unlikelihood that an interest arbitrator would find in its favor in the event it submitted a final offer that called for the payment of time and one-half for all hours worked in excess of 36.25 hours per week. The bargaining history reveals that the Union sought overtime pay for hours in excess of 36.25 per week, rather than the industry standard of overtime pay for hours worked in excess of 40 hours per week. The bargaining history presented at hearing did not specifically address the question of whether the parties bargained about the applicability of Article 13.03 requiring the existence of an emergency in order for the Employer to order an employee to work more than 36.25 hours in a week. The concern was, apparently, whether overtime pay was applicable to hours over 36.25.

The Union attempts to distinguish between overtime worked, in its view any hours beyond 36.25 in a week, and overtime pay (time and one-half) to be paid for hours over 40. This distinction is not supported by the language of Article 13.04 which clearly ties the concept of overtime pay of time and one-half to an employee who works in excess of 40 hours in a given week, and this is the only place that the word overtime is used. Overtime pay is, using normal rules of contract interpretation, associated with overtime. In the absence of overtime pay, time worked is not overtime. Accordingly, hours worked between 36.25 and 40 hours per week are not eligible for overtime pay and do not constitute overtime. To give meaning to the contractual language, overtime cannot include any hours worked for which overtime pay is not provided.

The Union argues that the emergency provision of Section 13.03 was negotiated to provide some protection to both the Employer and the employee in that an emergency must exist if the Employer is to require an employee to work beyond the normal work week of 36.25 hours, but that the Employer need not pay time and one-half until the employee has worked in excess of 40 hours. The Union contends that the emergency provision, in essence, was a quid pro quo for not requiring the payment of time and one-half for hours worked between 36.25 and 40. The contract language, as indicated above, does not support such an interpretation. There is nothing illogical, or any ignoring of any contract language, to require both an emergency and time and one-half for hours in excess of 40 hours, but no requirement of an emergency to require an employee to work for more than 36.25 hours. The Employer's attempt in this proceeding to characterize the backlog of childcare authorizations as an emergency requiring the extra hours confuses the issue.[4]

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[4] It is completely understandable that the Employer would argue both that it has an unfettered right to require Rice to work more than 36.25 hours (but no more than 40) and, in the alternative, that the situation was an emergency thereby allowing it to order Rice to work in excess of 36.25 hours

The Union also considers the demand to work additional hours for a two week period to get caught up as a deviation in schedule that requires mutual consent. In this argument, the Union references Article 13.07, and particularly the last sentence of that article which, in its entirety, reads:

> The parties recognize that certain groups of employees may have different work schedules than set forth herein. During the term of this contract, the County shall continue to maintain such schedule(s). By mutual consent in writing between the employee and Employer, certain employee's schedules may vary provided that during discussion of said schedule variations a Union representative is available to the employee.

Both the Union and the County agree that the first two sentences of this Article were incorporated into the collective bargaining agreement to accommodate individuals accreted into the bargaining unit who worked a four-day week and/or had work schedules that ran into the evening. The parties agreed that such schedules could be maintained when the employees were covered by the bargaining agreement, and that Article 13.01 defining the normal work week and the normal work day did not apply to all members of the bargaining unit. During bargaining for the 1990-1992 collective bargaining agreement, the last sentence of Article 13.07 was proposed by the County and accepted by the Union. County witness Dornfeld testified that the intent of the proposal was to deal with employees who worked the aforementioned alternative work schedules such as four days a week or into the evening, and that changed circumstances resulted in a desire on the County's part to be able to change such schedules, when mutually agreed upon by the employee.

Union witness Phelan testified that the Union agreed to this language, but that it was not related to the first two sentences of Article 13.07, that it should have been a separate paragraph rather than part of the same paragraph, and that it applied to all employees in the bargaining unit, including himself. Indeed, Phelan testified that he was an original member of the bargaining unit and covered by the normal work week/work day language but that until recently he had worked an alternative schedule, with Friday off. The Employer has since changed that and Phelan agreed that it was within the Employer's right to do so.

General rules of contract interpretation are clear that if language is clear and unambiguous, extrinsic evidence such as bargaining history should not be considered. Here, regardless of what the Union thought it was agreeing to in bargaining the 1990-1992 contract, the sentence, "By mutual consent in writing between the employee and Employer, certain employee's schedules may vary provided that during discussion of said schedule variations a Union representative is available to the employee" is part of the same paragraph as the rest of Article 13.07. The reference to "certain employees" refers back to the "certain groups of employees" and the schedule variations referenced are to those alternative schedules that these employees maintained when they were accreted to the bargaining unit. The addition of the last sentence allows those on alternative schedules such as four days a week or into the evening, to be changed (presumably to a "normal work week") but only in the event the employee and the Employer mutually agree to the change.

Article 13.07 is not applicable to the case at bar. The modification of Rice's schedule on a temporary basis to complete a backlog of work is not the type of schedule modification contemplated by Article 13.07. Even if the change were a permanent change, the last sentence of Article 13.07 would not come into play because Rice was not an employee who worked an alternative schedule that the Employer was seeking to modify and which change would have to be a mutual change.

Phelan's testimony regarding his own schedule is interesting in that if Article 13.07 was applicable to him (and Rice), the change from a four day schedule that he had on a temporary basis would have required a mutual agreement to change. Phelan testified that because the Employer no longer wanted him to work a four day schedule, it had the unilateral right to change his schedule to the normal work week of 36.25 hours over five (5) days. If Article 13.07 was applicable, both Phelan and the Employer would have had to agree to a change from his four day a week schedule to the normal schedule. In fact, only if Phelan had been accreted to the bargaining unit while working the four day schedule would the contract language require the mutuality specified in Article 13.07. Phelan's testimony regarding his own schedule supports the Employer's view of this Article, which I find to be the correct reading of it.

It is uncontested that since September 2004, Rice regularly worked more than 36.25 hours per week. After a discussion regarding the fact that Rice was behind in her work, and Rice's complaint that Machamer refused to authorize additional hours, Machamer agreed that Rice could work up to two (2) additional hours per week, as needed, to complete her work without requesting permission to do so. To some extent, the County relies on this fact as a basis for arguing that it could insist that Rice work up to 40 hours per week in September 2005. The Union argues, correctly, that the fact that Rice voluntarily worked in excess of 36.25 hours per week on a regular basis, does not modify the definition of what constitutes Rice's normal work week. To that end, the Union cites Article 28.01 which states:

> This agreement constitutes the entire agreement between the parties and no verbal statement or practice shall supersede any of its provisions. Any amendment to this agreement shall be effective only when placed in writing and signed by the Employer (or designee) and the Union (or its designee).
>
> To the extent that the provisions of this agreement are in conflict with the existing ordinances, resolutions or rules, the agreement controls.

This language makes clear that, absent a writing signed by representatives of both the Union and the Employer to the effect that Rice's work week is 38.25 hours, Rice's normal work week is the same as that of the other members of the bargaining unit, 36.25 hours. The practice of extending Rice's work week so that she can complete her work stands for the proposition that

she had more work than she could do within 36.25 hours per week,[5] not for the proposition that Article 13.01 has, in any way, been modified.

Although the Union is correct that the past practice of Rice having worked in excess of 36.25 hours per week is not relevant, the Union's reading of the contract, particularly the various parts of Article 13, cannot be reasonably construed to limit the Employer's ability to require an employee to work in excess of 36.25 hours per week, up to 40 hours per week.

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

AWARD

The Employer did not violate the collective bargaining agreement on September 25, 2005 by requiring Rice to work more than 36.25 hours.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 7th day of February, 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

[5] Testimony was introduced, and arguments made, regarding the fact that one or both parties have, from time to time, made bargaining proposals to increase the normal work week to 40 hours. Inasmuch as such proposals have not found their way into the bargaining agreement, they are irrelevant to this Award. The Arbitrator must interpret the contract as it exists, not as it might be.

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