BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF MONROE

and

LOCAL 3760, AFSCME, AFL-CIO

Case 42
No. 66555
MA-13555

(Tim Kundert Grievance)

Appearances:

Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, WI 53511-3808, appearing on behalf of Local 3760, AFSCME, AFL-CIO.

Daniel D. Barker, Murphy Desmond S.C., 2 East Mifflin Street, Suite 800, P.O. Box 2038, Madison, WI 53701-2038, appearing on behalf of the City of Monroe.

ARBITRATION AWARD

The City of Monroe, hereinafter City or Employer, and Local 3760, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement covering the period January 1, 2006 through December 31, 2008 that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on March 26, 2007 in Monroe, Wisconsin. A transcript of the hearing was filed on April 12, 2007. The record was closed on May 30, 2007, after the parties advised the undersigned that they would not be filing reply briefs.

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 stipulate to the issue to be decided, and agreed to allow the arbitrator to frame the issue based upon the parties' proposed issues and the evidence and arguments presented. The Union's suggested statement of the issue is:

> Did the employer violate the collective bargaining agreement by unilaterally changing the work hours of the Grievant on October 30, 2006? If so, what is the appropriate remedy?

The Employer suggests that the issue to be decided is:

1. Is the grievance time barred?
2. Did the city violate Section 9.02 or 9.10 of the labor agreement when it directed the grievant to cease work after eight hours? And if so, what is the remedy?

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

> Did the employer violate the collective bargaining agreement by requiring the Grievant to leave work after eight (8) hours on October 30, 2006? If so, what is the appropriate remedy?[1]

BACKGROUND and FACTS

The facts of this case are not in dispute. The Grievant, Tim Kundert, is an employee of the City Street Department and, in accordance with the collective bargaining agreement between the parties thereto, his regular hours of work are 7:00 a.m. to 3:30 p.m., with a half hour unpaid lunch period. The Daily Work Schedule for October 30, 2006 was completed by Kundert's supervisor, Tom Boll, prior to October 30 and called for Kundert to "Drive for County" on that date. In addition, Boll directed, by inclusion on the Daily Work Schedule, that Kundert was to "Leave after 8 hrs. if not working for the County."

The direction to "Drive for County" meant that Kundert was assigned to drive a City vehicle and haul blacktop for the Green County Highway Department. As is the custom when performing such work, Kundert did not take his 30 minute unpaid lunch during the period that he was hauling blacktop. According to the timecard that Kundert turned in for that day, he hauled for Green County for 7.5 hours and performed equipment maintenance, cleaning his truck, for half an hour that day. Having completed eight hours of work, and pursuant to the instruction Boll left on the Daily Work Schedule, Kundert left at 3:00 p.m., rather than his normal quitting time of 3:30 p.m. He was paid for 8 hours of work.

On November 2, 2006, the Union filed a grievance on Kundert's behalf stating:

> On the job sheet (10-30-06) Tim was told to work with Green Co. Hwy. Dept. and if they did not need him all day, then he was to leave after 8 hrs. They did not need him all day and he worked through his lunch. He had to leave at 3:00 and our scheduled hours are until 3:30. This was not mutually agreed upon.

[1] Although the Employer raised a timeliness question in its statement of the issue at hearing, it put in no evidence regarding this matter and did not argue it in its brief. Accordingly, the undersigned considers the matter dropped and that the grievance was timely.

The grievance contended that Sections 9.02 and 9.10 were violated:

Section 9.02 –	Shifts Street Department 7:00 am – 3:30 pm ½ duty free lunch
Section 9.10 -	Changes in work schedule may be made by mutual agreement of the parties.

The corrective action sought was:

Pay ½ overtime and abide by union contract section 9.02 and 9.10

The grievance was denied by the City and the matter was appealed to arbitration.

In addition to the facts surrounding the instant grievance, testimony was offered at hearing regarding negotiations for the current collective bargaining agreement. The initial proposal of the City to the Union, dated November 3, 2005, included the following language:

> Clarify that when employees are called in to work during hours other than their normal shift, may be sent home at times other than the times set forth in Section 9.02.

Howard Goldberg, chief negotiator for the City, testified that there had been some confusion in the Department, but that it was the City's position that the existing language in the collective bargaining agreement provided that employees could be sent home at times other than stated in the collective bargaining agreement, when called in at times other than stated therein. There had been a point in the past when a supervisor did not send employees home when they were called in early and had completed eight (8) hours of work. The City did not make a proposal to change the language in the agreement, but it wanted to clarify its interpretation of the existing language. According to Goldberg, the Union did not agree with this interpretation, and was told that it should file a grievance if it was not willing to accept the language interpretation that the City espoused. No changes were made to Section 9.02 with respect to this issue in bargaining the current collective bargaining agreement.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

Article 2 – Management Rights

2.01 Statement of Principle: The Employer retains the sole right to plan, direct and control the working force, to schedule and assign work to employees including overtime work, to determine the size of the work force and the means, methods and schedules of operation, to establish reasonable standards, work

rules and regulations, and to promote methods to maintain or improve the efficiency of its employees. The Employer also has the sole right to require employees to observe its reasonable rules and regulations, to hire, promote, lay off or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause; however, the Employer shall not take any action which would be in violation of state or federal laws. The above itemization is not deemed to be any kind of limitation on the general powers that the Employer has to regulate its employees and it is agreed and understood that the Employer has retained all rights relating to the planning, direction and control of the employees in this bargaining unit to the extent that such rights are not expressly amended or altered pursuant to the terms of this Agreement. If bargaining work is subcontracted, it shall not result in the layoff or reduction of regular hours of regular employees. No employee shall suffer a reduction in his or her wage rate as the consequence of any subcontracting. Any employee displaced as the result of subcontracting shall be entitled to exercise bumping rights, pursuant to Section 11.10 – Layoff, without a reduction in pay. If an employee(s) so displaced is unable to bump, the City shall reassign said employee(s) to other duties, without a reduction in pay.

. . .

Article 9 – Workday and Workweek

9.01 Defined: The normal workday for full-time employees shall be eight (8) hours. The normal workweek for full-time employees shall be forty (40) hours, Monday through Friday.

9.02 Shifts: The normal shift schedules are: (Lunch period are non-paid.)

Street Department: 7:00 a.m. to 3:30 p.m. (1/2 hour duty free lunch period).

. . .

9.06 Overtime: Employees will be compensated at the rate of time and one-half (1 - 1/2) their normal hourly rate for all hours worked in excess of eight (8) per day or forty (40) per week. All time paid shall be considered time worked for overtime purposes. There shall be no pyramiding of premium pay or overtime pay. Employees shall have the option of receiving overtime compensation either as pay or as compensatory time off. Employees shall earn compensatory time off at the rate of one and one-half hours off for each hour worked. Police Department Employees compensatory time shall be cumulative up to a total of forty (40) hours. All other employees shall be cumulative up to a total of twelve (12) hours. Compensatory time off shall be taken, with proper

notice, at the discretion of the employee, subject to the approval of the supervisor. Such approval shall not be unreasonably withheld. Accumulated compensatory time cannot be converted to pay except that such accumulated compensatory time shall be converted to pay when the employee retires, terminates employment or leaves the Department. Compensatory time shall only be accumulated in one half hour increments.

. . .

9.10 Changes in Schedule: Changes in work schedules may be made by mutual agreement of the parties. Such change in schedule will not result in an employee earning overtime premium for hours in excess of eight (8) per day..[sic]

POSITIONS OF THE PARTIES

It is the position of the Union that Section 9.10 provides that changes in work schedules cannot be made without mutual agreement. It was a non-mutual agreement that required the Grievant to leave prior to the completion of his scheduled work day. The Supervisor anticipated that by assigning Kundert to work with the County Highway Department, he would not receive his half hour duty free lunch period, a fact that would normally result in the payment of overtime for the half hour in excess of the eight hour day provided for in Section 9.01. Utilizing this approach, the City benefited by the Grievant giving up his lunch period, and it avoids the payment of overtime by sending the Grievant home early.

The Union states that the City raised the issue of being able to send employees home prior to the completion of their regular shift in bargaining, but the City did not seek a modification of language to allow this. The parties did not reach an agreement that would allow the City to send employees home early under these circumstances. Both the Union and the Employer agree that this was the first time that Boll attempted to send somebody home before the end of the regular shift without a mutual agreement.[2]

The Union acknowledges that the Employer generally has the right to schedule and assign work, but such right is not unfettered. The parties negotiated a normal work day of 7:00 a.m. to 3:30 p.m., with a half hour unpaid lunch. The nature of work in the Street department is such that employees will have, on occasion, to work outside those hours, but in such cases, the employees have a right to expect to receive overtime pay. The same is true here where the employee had to work through his lunch period and should receive overtime pay for doing so. He should not have been required to leave the work place until 3:30 p.m.

[2] Reference is made to the case of Weckerly who agreed to start street sweeping at 4 a.m. and leave at Noon.

The Union requests that the grievance be sustained; that the Employer be ordered to cease and desist from unilaterally sending employees home prior to the completion of their scheduled shift; and that the Grievant should be made whole for the loss of half an hour of overtime on October 30, 2006.

The Employer, on the other hand, argues that it has the right to occasionally deviate from the normal work schedule. The management rights clause of the collective bargaining agreement expressly reserves to management the right to schedule work and to relieve employees from duties. The work scheduling clause establishes the "normal" workday and workweek. The word "normal" establishes that the schedule is not immutable, and it may be occasionally changed by the Employer as circumstances dictate.

According to the City, the Union is asking the undersigned to add to the contract the concept of a "guaranteed" workday, something that is not provided by the contract and must be achieved, if at all, at the bargaining table, not through the arbitration process.

Referring to the language of Section 9.10, the City argues that the changes in schedule referenced therein do not refer to minor, *ad hoc* schedule changes. If the Union's interpretation were to prevail, the City would need to get the Union's prior agreement every time it needed an employee to work outside of normal work hours to respond to an emergency, and would severely limit the City's ability to respond. Section 9.10 addresses the manner in which the normal schedule may be changed, such as going from a week of five (5) eight (8) hour days to a week of four (4) ten (10) hour days. The portion of Section 9.10 that provides "[s]uch change in schedule will not result in an employee earning overtime premium for hours in excess of eight (8) per day" confirms that this was intended to apply to a change such as going to four (4) ten (10) hour days per week.

Turning to the specifics of this grievance, the Employer points out that the Grievant could have taken his half-hour duty free lunch after he finished working for the County. At that time, he had not worked a full eight (8) hours and was not under an instruction to leave. The fact that the Grievant chose not to take a lunch break at that time, and chose to finish his eight (8) hours straight through, should not result in a penalty to the City which did not deprive the Grievant of his duty free lunch period.

The City also contends that the bargaining history between the parties supports its position that the grievance is without merit. In bargaining the current collective bargaining agreement, the City did not propose a change in contractual language. Rather, it informed the Union of its interpretation of the existing language. Thus, the fact that there was a discussion regarding the hours of work clause at the bargaining table, without the City seeking a language change, does not mean that the Union's interpretation is correct.

Further, the City argues that the fact that a supervisor may have voiced schedule changes as more of a request than a management directive in the past does not establish that management has relinquished its right to schedule. There is no evidence of a consistent, mutually agreeable, and readily ascertainable practice. Even if one supervisor had consistently acted in a manner contrary to the clear and unambiguous language of the contract, the clear language would trump a past practice. The Employer asks that the grievance be denied.

DISCUSSION

This grievance asks the question of whether the Employer has the right to vary the work schedule such that an employee may be sent home after he or she has completed eight (8) hours of work. The Union relies on Sections 9.02 and 9.10 of the collective bargaining agreement for the proposition that the hours of work in the Street Department are to be 7:00 a.m. to 3:30 p.m., with a half hour duty free lunch, and that changes to this schedule must be based on mutual agreement with the employee. The Employer, on the other hand, contends that the management rights clause of the contract, Article 2, and the clear and unambiguous language of Sections 9.02 and 9.10 permit minor variations in the work day, such as that which occurred on October 30, 2006, when the Grievant was required to leave work at 3:00 p.m. without earning overtime.

In accordance with the collective bargaining agreement, the City has retained

> . . . all rights to the planning, direction and control of the employees in this bargaining unit to the extent such rights are not expressly amended or altered pursuant to the terms of this Agreement.

Thus, absent any portions of the contract that address the question of scheduling, the City would have the unfettered right to schedule employees as it sees fit. However, Article 9 of the collective bargaining agreement is precisely on point. It is entitled "Workday and Workweek." Section 9.01 thereof defines the "normal" workday and "normal" workweek:

> The normal workday for full-time employees shall be eight (8) hours. The normal workweek for full-time employees shall be forty (40) hours, Monday through Friday.

Section 9.02 defines the "normal" shift schedule for the Street Department:

> **Street Department**: 7:00 a.m. to 3:30 p.m. (1/2 hour duty free lunch period).

Key to the interpretation of this grievance is the word "normal." Numerous arbitration awards have made clear that the normal workday or normal workweek language in a collective bargaining agreement is not a guarantee that every workday or every workweek will consist of

that number of hours. SEE, E.G., JACKSON COUNTY, MA-12338 (HOULIHAN, 3/05), MARATHON COUNTY, MA-12932 (GORDON, 11/05), WAUPACA COUNTY, MA-13252 (BAUMAN, 2/07), FOND DU LAC COUNTY, MA-13502 (BAUMAN, 3/07). Thus, it is clear that the Employer may make temporary variations to the normal workday of 7:00 a.m. to 3:30 p.m. with a half hour duty free lunch, provided, however, that there is no other contractual clause that prevents such modifications.

The Union contends that Section 9.10 is such a clause. This section provides that "Changes in work schedules may be made by mutual agreement of the parties." The section also contains a caveat that "[s]uch change in schedule will not result in an employee earning overtime premium for hours in excess of eight (8) per day." The Union appears to argue that an individual employee's hours of work cannot be changed from that indicated in Section 9.02 without the consent of the employee. However, the language of this section refers to "mutual agreement of the parties." The "parties" to the collective bargaining agreement are the Union and the Employer, not an individual representative of the Employer (such as a supervisor) and an individual employee. This section of the contract most logically was included for the purposes the Employer contends: for a mutual agreement between the Union and the Employer that employees work, for example, four (4) ten (10) hour days during a period of the year, rather than five (5) eight (8) hour days that constitute the normal schedule. Such an example is supported by the language providing that overtime will not be paid for work in excess of eight (8) hours per day. Another possible example of such mutual agreement could be that all Street Department employees start their eight (8) hour day at 5:00 a.m. in the winter to clear snow before peak hour traffic begins. The Employer could not unilaterally make such a change for an extended period of time, but neither Section 9.02 nor 9.10 prevents the Employer from varying the normal schedule in the event of some special occurrence or emergency.

The Union interpretation that there must be mutual agreement to deviate from the normal work schedule would imply that there must be such an agreement any time an employee is asked to come in early to, for example, clear snow or assist in the repair of a broken water pipe. This flies in the face of logic as there is no way the consent of the Union can be sought every time an emergency requires deviation from the normal work schedule. In fact, it appears that the Union doesn't really argue for this. Rather, the Union argues that when there is a deviation in work schedule causing an employee to start his or her shift early, the Union contends that the employee must be allowed to work until 3:30 p.m., the normal time for the employee's shift to end.

The contractual language here is clear and unambiguous. The bargaining history that was presented at hearing, while interesting, adds nothing to support the Union's contention that the grievant should have been allowed to work until 3:30 p.m. and be paid one half hour of overtime. The Union did not provide any evidence of a past practice of employees being allowed to complete their regularly scheduled shift, even if they were called in to start earlier.

The Employer acknowledged that, at one time, a supervisor interpreted the collective bargaining agreement to require that employees be allowed to stay until their regularly scheduled shift ended, regardless of when they started. In bargaining for the current collective bargaining agreement, the City put the Union on notice of its interpretation of the language in the Agreement. Even if there had been a past practice of allowing employees to stay to the end of their shifts, the clarification by the Employer during bargaining put the Union on notice that such a past practice would end with the commencement of the successor collective bargaining agreement.

The City did not propose new language that allowed it to dismiss employees after eight (8) hours of work. Rather, it advised the Union that it was going to follow the existing language of the collective bargaining agreement. The Union did not propose any new language that would have prevented the Employer from sending employees home after eight (8) hours. The Union did not agree with the City's interpretation of the existing language. Apparently, the parties agreed to disagree about the meaning of Sections 9.02 and 9.10 and determined that the instant grievance would be the avenue for resolving the matter. As already indicated the undersigned finds the language to be clear and unambiguous and permits the Employer, on a limited basis, to vary the normal work schedule and send employees home after they have completed eight (8) hours of work.

This is not really a case involving the ability of the Employer to send an employee home after eight (8) hours of work when he or she was called in early to start work. With respect to the Grievant herein, Kundert started work at the normal work time, 7:00 a.m. When he completed the 7.5 hours of work hauling blacktop for the County, he had a choice of whether to take his 30 minute duty free lunch period or clean his truck and leave at 3:00 p.m. Admittedly, lunch at 2:30 p.m. is not ideal, but it was his decision. He could have taken a 30 minute break at that time and stayed until the end of his normal shift, 3:30 p.m. In accordance with Section 9.01 that defines the normal workday as being eight (8) hours, the Grievant worked and was paid for eight (8) hours. There was no change in schedule for him, other than the timing of his 30 minute unpaid duty free lunch. The collective bargaining agreement does not specify the time that the unpaid duty free lunch is to be taken. The Grievant could have taken it after completing his work hauling for the County. He chose not to do so. Instead, he opted to leave at 3:00 p.m., essentially taking his 30 minute unpaid duty free lunch at the end of the workday. Thus, there is no violation of the collective bargaining agreement[3] and no remedy is appropriate in this case.

The Union has requested that the Grievant be paid one-half hour of overtime to which he would be entitled had he completed his normal shift, staying until 3:30 p.m., presupposing that he would have worked until that time rather than utilizing the last 30 minutes as his unpaid

[3] If the collective bargaining agreement specified the time, or a range of times, that the duty free lunch was to take place, this would be a different case!

duty free lunch. Section 9.06 of the collective bargaining agreement is clear that overtime is to be paid for all hours worked in excess of eight (8) hours per day or forty (40) hours per week. Inasmuch as the Employer had the right to send the Grievant home after the completion of eight (8) hours of work, and the Grievant did not work more than eight (8) hours, he is not entitled to any overtime.

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

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of July, 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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