

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 990C, AFSCME, AFL-CIO

and

KENOSHA COUNTY

Case 263

No. 67405

MA-13869

(Payroll Specialist Grievance)

Appearances:

Mr. Nicholas Kasmer, Staff Representative, AFSCME Council 40, Southeast District, 8450 82nd Street #308, Pleasant Prairie, Wisconsin, appearing on behalf of Local 990C, AFSCME, AFL-CIO.

Ms. Lorette Pionke, Senior Assistant, Kenosha County Corporation Counsel, Courthouse, 912 – 56th Street, Kenosha, Wisconsin, appearing on behalf of Kenosha County.

ARBITRATION AWARD

Local 990C, AFSCME, AFL-CIO hereinafter “Union” and Kenosha County, hereinafter “County,” mutually requested that the Wisconsin Employment Relations Commission provide them a list of arbitrators from which to select assign an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. From said list, the parties selected Lauri A. Millot to hear the dispute. The hearing was held before the undersigned on April 1, 2008, in Kenosha, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and notified the Arbitrator on September 22, 2008 that they did not intend to file reply briefs whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

Does Denise Krahn's work hours, work location and/or job assignment violate the collective bargaining agreement?

If so, what is the appropriate remedy?

The County frames the issues as:

Whether the County of Kenosha violated the collective bargaining agreement with the Local 990C when it changed the work hours of the payroll specialist?

If so, what is the appropriate remedy?

I do not accept either the Union or the County's framing of the issue in that the Union's issue is broader than the grievance and the County's issue fails to include all the Union's contractual challenges. I therefore frame the substantive issues as follows:

Did the County violate the collective bargaining agreement when it modified the work hours and work location of the payroll specialist position held by Denise Krahn?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I - RECOGNITION

Section 1.1 Bargaining Unit. The County hereby recognizes the Union as the exclusive agent for Kenosha County Courthouse employees and Job Center/Human Services Clerical employees, and such other employees referenced in this Agreement, excluding elected officials, County Board appointed administrative officials, and building service employees for the purposes of bargaining on all matters pertaining to wages, hours and all other conditions of employment.

Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, abolish a job classification; to establish qualifications for various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of

this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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ARTICLE III - GRIEVANCE PROCEDURE

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Step 5. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision to an impartial arbitrator within ten (10) working days following receipt of the County's answer to Step 4 above. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after notice of appeal to arbitration, the Union or the employer may request one (1) panel of seven (7) arbitrators from the WERC. The arbitrator shall be selected from the panel by each party alternately striking a name from the panel until one (1) name. Expenses of the arbitrator shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the County.

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ARTICLE V - HOURS

Section 5.1. Workday and Workweek - Defined.

(a) Courthouse. The standard workday shall not exceed eight (8) hours, and the standard workweek shall not exceed five (5) days, or a total of more than forty (40) hours in any one (1) workweek from Monday to Friday inclusive. The Courthouse shall be opened for business and service at 8:00 a.m. to 5:00 p.m. from Monday through Friday. Offices that remain open during noon hours shall stagger employees' lunch hours. The Union agrees that the above hours of work may be changed to meet County requirements. Such changes will be discussed with the Union and the Union shall not unreasonably withhold its consent. For any employee in the Information Services Department, the starting and quitting time may fall between 8:00 a.m. and

9:00 p.m. depending on the needs of the County. For Information Services Department employees, no split shifts shall be permitted. Hours of work shall be consecutive with a 1 hour meal period. Employees shall be notified in writing of their scheduled hours of work for the succeeding week as of the Monday of the preceding week unless an emergency situation occurs beyond the employer's control.

...

(b) Job Center/Human Services. The standard workday shall not exceed eight (8) hours, and the standard workweek shall not exceed five (5) days, or a total of more than forty (40) hours in any one (1) workweek from Monday to Friday inclusive.

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ARTICLE VII – JOB POSTING

Section 7.1. Procedure. Notice of vacancies which are to be filled due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards within five (5) working days; and employees shall have a minimum of five (5) workdays (which overlap two (2) consecutive weeks) to bid on such posted job. The successful bidder shall be notified of his selection and his approximate starting date within five (5) workdays.

Section 7.2 Contents of Posting. The job requirements, qualifications, shift and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting, or they may in writing notify the department head of their application. When an employee is absent from work, his steward may sign posting for such absent employee.

BACKGROUND AND FACTS

This grievance was filed by local 990C as a result of the County's reconfiguration of the Payroll Specialist position held by Denise Krahn.¹

Denise Krahn is a 20 year employee of the County and a member of the Local 990C bargaining unit. Krahn was originally a County employee at Brookside Nursing Home, a County owned facility, and a member of another bargaining unit. In 1987 or 1988, the County

¹ The grievance alleged that the Grievant and the County engaged in individual bargaining and Union witnesses identified this as a concern. The Union did not present this issue when the parties were framing the issue, and it has not argued in its brief that unlawful individual bargaining has occurred. Given this, I conclude that the Union has abandoned this claim and I therefore will not address the issue.

consolidated satellite operations and Krahn was accreted into the 990C bargaining unit. Krahn's work location and hours changed and she became a member of the Finance Department with her primary work location at the County Administrative Building, although she continued to work a couple days a week at Brookside. Krahn continued to perform all payroll functions for Brookside's 170 employees.

Krahn's Payroll Specialist position was a full-time 8 a.m. to 5 p.m. Monday through Friday position. As a result of the Brookside assignment, Krahn worked at two different locations. She worked three days per week at the County Administration Building located in downtown Kenosha and her work hours were from 8 a.m. to 5 p.m. The other two days of the week, she worked at Brookside Nursing Home and her work hours were 8 a.m. to 4:30 p.m. In addition to her Brookside duties, Krahn provides back-up for central accounts payable.

In early 2007, Vicky Gallisch, a bargaining unit member, was promoted in the Division of Highways thus vacating her Account Specialist bargaining unit position in the Department of Public Works. Gallisch's position was located at the Kenosha County Center (hereinafter, "Center") and the work hours were either 7:30 a.m. to 3 p.m. or 8 a.m. to 4:30 p.m. The Center is geographically located at the intersection of highways 45 and 50 and is a desirable work location for some employees due to its close proximity to the highways and its convenience for those who reside in the western part of the county.

Upon learning of the impending vacancy/posting for Gallisch's position, Krahn went to her supervisor, Terry Niesen, and informed her that she intended to post for the vacancy due to its desirable location and work hours. At that time, Krahn was one of four employees in the Finance Department at the County Administration Building. Niesen was immediately concerned that Krahn's departure would exacerbate an already serious staffing situation in the Finance Department. Another Finance Department payroll was suffering from a serious medical condition that caused her attendance to be sporadic and she was on the "list" waiting for liver transplant surgery which would necessitate an extended medical leave. Niesen was concerned that she would have an insufficient number of employees to timely process payroll checks.

Niesen approached David Geertsen, Finance Department Director, and explained her concerns. Geertsen contacted personnel and he and Robert Reidl, Personnel Director, discussed Niesen's concerns and considered various options to address those concerns.

On April 13, Geertsen and Reidl went to the Center to view potential office space for Krahn and ultimately decided that Krahn would share office space within an elected official's office.²

² The County initially intended to place Krahn in the Department of Public Works office at the Center, but the department director and the fiscal services manager informed Reidl on April 13 that they believed it would cause a conflict since Krahn would be supervised by Niesen and the other staff would be supervised on site.

Krahn's office base location moved to the Center effective May 7, 2007. Krahn's work hours at the Center are 7 a.m. to 3:30 p.m. Krahn shares office space with another 990C employee, Karen Rudie. Rudie does not work the same hours as Krahn, but there are 990C employees in the highway department located at the Center that work the same hours as Krahn.

Additional facts, as relevant, are contained in the DISCUSSION section below.

ARGUMENTS OF THE PARTIES

Union

The County violated the collective bargaining agreement when it unilaterally changed the work hours and work location for Denise Krahn.

The County was obligated to discuss the potential change in the Payroll Specialist work hours. The Personnel Director and the Finance Director made the decision to change the position on April 13, but did not contact or consult with the Union until after that date when Reidl discussed the possible changes with Ms. Theresa Hannes in a telephone call. Hannes advised Reidl the Union would oppose the changes.

Krahn began working the new hours at the new location on May 7, 2007. Hours of work are a mandatory subject of bargaining and the County failed to bargain the new work hours. The Union became aware that Krahn was working the new hours and location when Union members observed Krahn in the Center and informed the leadership after the changes were implemented. The County and Union had met, discussed and agreed to changes in work hours in the past. The County should have met with the Union in this case also and it failed to do so.

The County should have posted the Payroll Specialist position after it decided to change the working hours and working location. The new hours and location made it desirable and therefore were substantial enough to make it a new position. This case is just like the facts in HOWARD-SUAMICO SCHOOL DISTRICT, MA-5896, (Miller, 4/24/90) where the arbitrator found that "when the change results in substantially different hours, i.e., shifts, or a different location" the employer must post the position.

The grievance should be sustained and the County should be required to either post the position or restore the position to the status quo ante.

County

The County did not violate the collective bargaining agreement when it relocated a payroll supervisor, out of necessity, and changed her work hours.

Consistent with the management rights clause, the County assigned “the work to be done and the location of the work.” The county had every right to move Krahn from the Administration Building to the County Center. The County was presented with an unusual circumstance. There was a potential crisis in the Payroll Department as a result of one of the payroll specialist’s health emergency. The County consulted with the Union as to the situation, but the Union was not sympathetic. It became clear to the County that the Union was opposing the move. The County concluded that the situation that would result in the Payroll Department necessitated the changes.

Krahn did not assume a new position when she was relocated to perform her duties as a payroll specialist. The relocation and change in hours did not require that the position be posted. The county posts positions when they are newly created or vacated because posting is the means by which the Union membership are notified that the position is open. Krahn simply moved her desk to the other location and her hours were changed while keeping the same position and job duties.

The collective bargaining agreement states the “courthouse shall be opened for business and service at 8:00 a.m. to :00 p.m. from Monday through Friday.” The payroll employees at the Administration Building work these hours. The agreement allows the County to change the hours of work to meet County requirements.

Had the County not changed the hours of work and location of Krahn’s position, she would have posted for the position in the Public Works Department. The County was interested in maintaining the status quo and avert a crisis in the Payroll Department that would have resulted in the County not meeting payroll deadlines!

The grievance should be denied.

DISCUSSION

This case arises as a result of the County’s decision to change the work hours and work location of an employee.

I start with the Management Rights clause which provides the County “all the normal rights and functions of management”. The agreement further states that management has “the right to decide the work to be done and location of work”. The Union argues that County violated the contract when it moved Krahn’s work location from the County Administrative Building to the Center. The plain language of the agreement provides the County the right to make the location change. The Union has not presented any argument or evidence to negate the plain language of the agreement and therefore, I do not find a violation of the labor agreement on this issue.

Moving to the change in work hours, I initially note that the management rights clause does not contain a reference to the right of management to schedule work. This does not

create an outright restraint on the County because the scheduling of work is a function of management except if it is otherwise limited by specific terms in the labor agreement. But, the fact that scheduling work hours is not an expressed management right establishes that other sections of the agreement must be considered, in addition to extrinsic evidence, to determine the intent of the parties' language.

I next move to Article V, Hours. The first sentence of 5.1 states that the work hours for employees in the Courthouse are 8 a.m. to 5 p.m.³ This language is clear and unambiguous and would support the Union's position if the section did not continue stating:

The Union agrees that the above hours of work may be changed to meet County requirements. Such changes will be discussed with the Union and the Union shall not unreasonably withhold its consent.

Thus, the parties contemplated that an employee's work hours could be changed, but created a process to follow when a change was desired. The process has three components, all of which must be fulfilled in order for the change to be effectuated.

First, the County must discuss the changes with the Union. County Personnel Director Reidl testified that he first presented the issue of changing Krahn's work hours and location to Union representatives, Kim Peters and Val Jensen in a meeting that was scheduled to address a different issue and that he spoke to Peters at various other times about the issue prior to the change being made. Theresa Hannes, Union officer, confirmed that while not lengthy, she and Reidl discussed the County's desire to change Krahn's hours of work and location. The record establishes that the County communicated to the Union its desire with regard to moving Krahn on multiple occasions including March 26, and again after Reidl and Geertsen visited the Center on April 13, in search of potential work locations for Krahn. These conversations occurred both in person and by telephone and were of sufficient length and substance such that the Union understood the circumstances and rationale for the County's desired action and the County was aware of the Union's opposition.

The Union attempts to differentiate between formal and informal communications concluding that since no formal meeting was scheduled, then there was no discussion. I find the Union's argument to be a distinction without a difference. The record establishes that the Union and County engaged in communications regarding the change in work hours which fulfills the first requirement of 5.1.

Moving to the second component, the change in work hours must be initiated in order "to meet County requirements". The parties did not define or explain what constituted a

³ The Union and the County were engaged in communication regarding flexible work schedules as a result of numerous requests from employees. Those discussions were placed on hold pending the completion of a companion arbitration case that addressed the County's right to offer flexible schedules to various 990C employees at the Job Center and other locations.

“County requirement”, but a practical interpretation would require that the desired work hour change was designed to meet a legitimate objective of management.

The County justified Krahn’s move for numerous reasons including the County’s fear that the payroll portion of the Finance Department would be seriously harmed by Krahn’s departure due to the medical needs of another payroll employee, Krahn’s sole knowledge of Brookside payroll and her knowledge and experience working with the Kronos computer system. While I find truth in all of the County’s reasons, it is clear that the County’s fear that the payroll area would be cut in half was the impetus for its decision. This is a valid concern. The County employed four payroll specialist type employees and one of the four was already causing the County concern. That employee was unable to perform her work responsibilities on a regular basis due to her serious medical condition. The County knew that if a liver was located, she would undergo an acute surgical procedure and would not return to work for quite some time. In the face of this scenario, Krahn, who was the only employee that had performed the Brookside payroll for greater than 20 years, informed her supervisor that she intended to post for another position.

In retrospect, it is possible to second guess the County’s decision and decision-making process. The Union correctly points out that County is to blame for this scenario since it did not cross-train all of its payroll employees. But, even if the County had cross-trained its employees, it would not have been able to envision or prepare for the possibility that it would lose two long-time payroll employees at about the same time. Once that became a reality, the County was sufficiently anxious of its ability to timely distribute employee pay checks.

I find the County’s request to change Krahn’s work hours was to ensure that the County could continue to timely process and distribute employee payroll checks. This is a legitimate objective and therefore I find that it fulfills the designed “to meet County requirements” test.

I now move to the third component, “the Union shall not unreasonably withhold its consent”. This component must be read in conjunction with the preceding sentence wherein the parties recognized that work hours would change if the County’s motive was legitimate. The County’s rationale for proposing the work hour change was to protect the continued processing and distribution of employee payroll. Once the Union was presented with the desired work hour change and its rationale, it was obligated to consider and evaluate the legitimacy of the County’s requirement and offer its consent if the County’s request was designed to meet a legitimate object of the County. Thus, while the Union may withhold its consent, its decision to do so must satisfy a “reasonableness” standard.

Reasonable is a limitation generally imposed on management when evaluating the manner in which it has exercised a right. Reasonable has been found in an arbitral context to also mean “sensible”. INTERTEC SYS. LLC, 114 LA 1785 (Skulina, 2000).

It is clear in this situation that the Union leadership was caught in a tough spot. The Union membership was fully aware of Krahn’s situation and was very vocal with its opposition

to agreeing to the location and work hour change. After the initial two meetings when the Krahn move was discussed (along with other issues), the County did not keep the Union informed as to its intentions or the timeframe for the Krahn move. As a result, the rank and file were aware of Krahn's movements before the leadership.

It was against this backdrop that the Union leadership was expected to evaluate the County's desire requested hours change and make a decision. There is nothing in this record to suggest that the County was anything but truthful with the Union as to its desires. The Union opposed the proposed work hour changes because the new hours and location at 45 and 50 was desirable to the membership and therefore, it believed that the County should post the position and allow bargaining unit seniority determine the successful candidate. The Union's position, while reasonable in the context of responding to the membership's wishes, was not a valid evaluation of the County's request.

At no time did the Union consider the merits of the County's professed need. Testimony was offered at hearing that if the County had met formally with the Union and presented the issue in the manner the Union desired and "if there is logical reasoning for it, if there is a true discussion going on, ..." then the Union would have seriously considered the County's request. Tr. p. 85 This position ignores the fact that the Union fully understood the reasons for the County's request and did not fulfill its contractual obligation to consider and evaluate the County's request. The Union's refusal to consider the County's request was unreasonable. Moreover, I find that it was unreasonable for the Union to withhold its consent given the circumstances.

The Union leadership takes issue with the fact that the County never formally notified it that Krahn's work location and hours would change. While it is true that it would have been the respectful and proper for the County to notify the Union of the effective date of the change, it is not required by the labor agreement.

The Union argues that the County has a practice of meeting with the Union regarding work hour changes and reducing to writing the terms of an employee's modified work schedule. The Union presented two documents, one of which contained a specific clause indicating that it was not precedential, to support its position. Acknowledging the non-precedential language, these agreements show that the parties have established a methodology to document those situations when the Union was agreeable to the work hour change process contained in 5.1. But, these agreements have no bearing on what occurs when the Union does not consider or agree to a proposed work hour change.

Finally, the Union cited BROWN COUNTY, MA-11308, (Shaw, 10/29/01) and WISCONSIN RAPIDS SCHOOL DISTRICT, A/P M-85-191 (Vernon, 12/31/85) in support of its position. In BROWN COUNTY, the County changed the work hours for the library employees during the summer months and the Union grieved. In that labor agreement, the language specifically stated that the "present employee work schedule and work week" could only be changed "by mutual agreement". Similarly, in WISCONSIN RAPIDS SCHOOL DISTRICT, Id. the labor

agreement required the employer to obtain the Union's approval before a work schedule could be changed. These cases are distinguishable because the language of 5.1 does not give the Union the unfettered right to deny its consent, with or without a reason.

AWARD

No, the County did not violate the collective bargaining agreement when it modified the work hours and work location of the payroll specialist position held by Denise Krahn. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 16th day of January, 2009.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator