

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

AFSCME LOCAL 990C, AFL-CIO

Case 279

No. 68720

MA-14327

(Flexible Hours)

Appearances:

Ms. Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912- 56th Street, Kenosha, Wisconsin 53140, appeared on behalf of the County

Mr. Nick Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 580734, Pleasant Prairie, Wisconsin 53158, appeared on behalf of the Union.

ARBITRATION AWARD

On March 12, 2009 Kenosha County and AFSCME Local 990C, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. In lieu of an evidentiary hearing the parties submitted a stipulated record, which was received on September 8, 2009. Briefs and reply briefs were filed and exchanged by October 5, 2009.

This dispute involves the creation of adjustable/flexible work schedules.

BACKGROUND AND FACTS

The parties to this dispute are signatories to a series of collective bargaining agreements, relevant portions of which are set forth below. For purposes of this dispute, the parties entered into the following stipulation:

STIPULATED FACTS

1. Kenosha County (“the County”) is a municipal employer under the Wisconsin Municipal Employer Relations Act (“MERA”).
2. AFSCME, Local 990C, AFL-CIO, Courthouse and Social Services Clerical Employees (“the Union”) is a labor organization under MERA.
3. The County and the Union have been parties to a Collective Bargaining Agreement (“the Agreement”) for a number of years with the current Agreement being in effect from January 1, 2007 until December 31, 2009. (Exhibit 1.)
4. In or around September/October of 2007 a supervisor at the Job Center allowed a 990C member to change her work schedule from 8-5. to 7:30-4:30 to accommodate a family scheduling issue. The Union was not contacted about this change, did not negotiate on the employee’s behalf for this change, or agree to this change.
5. The Union and the County had a step one grievance meeting regarding the aforementioned change in hours on October 2, 2007 and a written grievance was later filed. (Exhibit 2.)
6. The Union and the County met on a series of dates in late October and early November in an attempt to agree to a flexible/adjustable scheduling policy that would satisfy both sides. However, said efforts were unsuccessful.
7. At the close of the aforementioned meetings the County issued a memo titled DHS Adjustable Scheduling Guidelines (“Guidelines”). (Exhibit 3.) The Union did not agree to the Guidelines.
8. Since the issuance of the Guidelines other bargaining unit members who work at the Job Center have changed their scheduled working hours according to the Guidelines, but without the consent of the Union.
9. Prior to October/September of 2007 bargaining unit members at the Job Center worked from 8-5 with the exception of a couple of positions which worked different hours. (Exhibit 4.) These exceptions were agreed to by the Union and the County on a non-precedential basis. (Exhibit 5.)
10. Both parties have raised the issue of flexible/adjustable scheduling in prior contract negotiations, but no agreement has ever been reached.

The guidelines referenced in Par. 7 above consisted of the following:

DHS ADJUSTABLE SCHEDULING GUIDELINES (11/2/07)

- 1) Requests for adjustable scheduling should be made in writing by workers to their immediate supervisor at least 5 calendar days prior to the desired date of the work schedule adjustment. Adjustable schedule requests will be done on a voluntary basis.
- 2) All schedule adjustments outside of the operating hours of 8:00 a.m. to 5:00 p.m. must have advance written approval from the supervisor. The Division Director will be notified of all approvals and denials for adjustable schedules.
- 3) Adjustments to the eight-hour work schedule may occur up to one hour before (7:00 a.m.) and one hour after (9:00 a.m.) the 8:00 a.m. start time on Monday through Friday, not to exceed a forty hour work week.
- 4) Approved schedule adjustments may be approved for a maximum of 90 days. Continuances beyond 90 days must be requested in writing to the immediate supervisor at least 5 days prior to the end of the 90-day period.
- 5) Requests for adjustable scheduling shall be reviewed on a fair and equitable basis with seniority being given priority consideration. Management approval of staff requests for adjustable scheduling will be dependent upon operational needs as determined by management. There are some work units that will not meet the criteria for approval of adjustable scheduling.
- 6) Requests for adjustable scheduling will be approved/denied based upon the needs of the Division operations first and the needs of the requestor second. All scheduled appointments must be completed within the approved adjusted hours unless there are extenuating circumstances beyond the worker's control. If this occurs the worker will need to get prior approval from their supervisor to work outside of their schedule.
- 7) At least one management person from the Division must be onsite during the times that flexible scheduling is approved for staff within that Division.

- 8) If an employee is approved to begin the work day outside of the 8:00 a.m. start time it is expected that the person will work a full eight-hour day that includes a one-hour lunch, i.e. 7:00 a.m. - 4:00 p.m., 7:30 a.m.- 4:30 p.m., etc.
- 9) Adjustable scheduling may be suspended during vacations, holiday periods or A&S leaves exceeding five consecutive days, subject to staff availability in relation to the needs of the Division or Department. Adjustable scheduling may be cancelled altogether or temporarily discontinued at the discretion of management based upon operational considerations.
- 10) The last quarter of 2007 will be the trial period for adjustable scheduling for staff who voluntarily request to adjust their schedules with approval from their supervisor.

Two memos were made a part of the record. The first included the following:

From: Ed Karmin
To: DWD/ES Clerical* DWD/ES Staff*
Date: 01/06/2004 9:18:19 AM
Subject: Reminders for the new year

Here are some procedural reminders for 2004

1. All requests for Maintenance and IS must go through your supervisor do not email them directly.
2. All requests for time off, OT, and adjusted lunch hours must be pre-approved.
3. Staffings begin at 8:15 am
4. The work day begins at 8:00 am and ends at 5:00 PM

...

The second provided:

From: Adelene Robinson
To: DWD; DWD-.KCC Cluster IV - LF
Date: 04/15/2004 5:07:39 PM

Subject: Work Hours

It has been brought to my attention that some employees have been repeatedly observed coming to work late, taking extended breaks, long lunch hours and leaving early without prior supervisory approval. This is a reminder that all employees are obligated to comply with the Local 990C negotiated Labor/Management Agreement pertaining to the work day.

The standard work hours at KCJC are 8:00 a.m. to 5:00 p.m. with the exception of some upfront reception and two child support staff. Also, the lunch period is not to exceed one hour taken between the hours of 11:00 a.m. and 2:00 p.m. Lunch hours can be adjusted with prior supervisory approval.

If the observed violations continue, those employees who are violating the standard work hours will be subject to appropriate disciplinary action by supervision. Thanks for your cooperation.

ISSUE

The parties did not stipulate the issue for decision. The Union frames the issues for decision as follows:

- 1) Did the County violate the Collective Bargaining Agreement between itself and AFSCME 990C when it bargained with a bargaining unit member and later members on their hours of work without the Union? If so, what is the appropriate remedy?
- 2) Did the County violate the CBA between itself and AFSCME 990C when it allowed an employee(s) at the Job Center to work outside of the hours of 8 a.m. to 5 p.m. without the Union's consent? If so, what is the appropriate remedy?

The County frames the issue as:

Whether the County of Kenosha violated the Collective Bargaining Agreement when it offered flexible scheduling options to the Job Center employees in Kenosha County Local 990 American Federation of State, County and Municipal Employees, AFL-CIO Courthouse and Social services clerical (990C), and if not, what is the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

Section 1.1. Bargaining Unit. The County hereby recognizes the Union as the exclusive bargaining 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, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; . . . The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. . . .

Section 1.3. Other Employee Groups. The County shall not initiate, create, dominate, aid or support any employee group for any bargaining during the term of this Agreement.

. . .

ARTICLE II - REPRESENTATION

Section 2.1. Union. The Union shall be represented in all such bargaining or negotiations with the County by such representatives as the Union shall designate. The County will allow up to seven (7) members of the Bargaining Unit necessary time off with pay to attend meetings for the negotiation of this contract.

. . .

ARTICLE III - GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure: . . .

...

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.

...

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 am. 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.

Sheriff's Department. The standard workday and workweek as defined above shall also apply to Sheriff's Department employees; however, it is understood that certain employees here may be required to start their regular workday at 7:00 a.m or 7:30 a.m. and all Sheriff's Department employees shall receive one-half (1 1/2) hour off for lunch.

In the event more than one (1) shift becomes necessary for clerical employees in the Kenosha County Sheriff's Department during the term of this Agreement, the parties agree to negotiate and utilize section 111.70(4)(cm)7 (dispute resolution), if necessary, on the shift hours, workweek, assignment to shift, and the shift differential.

- (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.

...

POSITIONS OF THE PARTIES

It is the position of the County that the contract does not specify hours of work for the Job Center/Human Services employees. This contrasts with the treatment of the Courthouse and Sheriff's Department. It is the view of the County that the language of the contract is explicit and not ambiguous. It sets an 8 hour day and a 40 hour week. The flexible schedule guidelines comply with the contract.

The County contends that Article 5.1 sets forth hours for the Courthouse and the Sheriff's Department. Par. (b) of the same article is silent with respect to the work day, and so is more open to the possibility of change. It is the view of the County that the clause treats hours of work differently for the different operations because of the differences in the nature of the work in those Departments. The Job Center work is such that schedules are more amenable to flexing than are those in the Courthouse or Sheriff's Department.

The County rejects the notion that there exists a past practice relative to the hours of work. It contends that the two memos served merely to reiterate the hours of work to employees and are being taken out of context in this proceeding.

It is the view of the County that it possesses the contractual right to arrange for flexible work schedules and so there exists no duty to bargain.

It is the view of the Union that the County violated both the contract and the Municipal Employment Relations Act (MERA) when it allowed Union members to work outside the hours of 8 to 5, because change was never bargained with the Union. The Union cites a number of statutory provisions in support of its claim that MERA was violated. The Union also points to Section 1.1 of the contract in support of the same claim. By entering into an agreement with an individual employee over her hours of work, the County is alleged to have violated Sec. 1.1. The parties met and were unsuccessful in negotiating over flexible scheduling. It is the view of the Union that by issuing guidelines and allowing bargaining unit employees to modify their work schedules the County has committed additional violations of the contract and the law.

The Union cites Arbitral authority for the use of custom and past practice as an aid in interpreting a contract provision. It is the view of the Union that the clause is ambiguous, and so a look at the history of hours and the two memos is appropriate in construing the parties' intent.

It is the view of the Union that that the parties met and attempted to negotiate over flexible scheduling. They failed to come to an agreement. The County now is alleged to be seeking something they sought, and failed to achieve, in negotiations.

The Union argues that neither the Courthouse section nor the Sheriff's section state that the hours of work are 8 to 5. The only reference to 8 to 5 is for the hours of operation at the Courthouse. It is the view of the Union that the hours of work provisions applicable to all groups reflected in Sec. 5 is the same. It is the view of the Union that distinctions drawn between par.'s (a) and (b) do not exist.

The Union contends that its construction of the Agreement is reasonable and that of the County is not. Hours of work is too critical an employment matter to be left to the discretion of the County.

DISCUSSION

The Union contends that there have been statutory violations of the duty to bargain. Such claims fall outside the scope of the submission in this matter. While the parties did not stipulate the issue for decision, each of the issues framed are limited to the question of whether or not the contract was violated. Article III defines a grievance as "Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement..." Article III goes on to define the authority of the Arbitrator as follows; "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..." Under the terms of the contract and the submission, I believe my authority is limited to the interpretation and application of the terms of the contract.

The union advances a parallel individual bargaining claim as an alleged breach of Sec.1.1 of the contract. Sec. 1.1 reflects the exclusive status of the Union. If there is a duty to bargain, that duty is to be discharged with the Union. However, if the contract controls the subject matter of the dispute, the duty to bargain has been satisfied. It is the applicability of the contract that forms the essence of this dispute.

I do not regard Section 5.1 (b) as ambiguous. The Section identifies the workday as not to exceed 8 hours. The workweek is not to exceed 5 days. The total is to be no more than 40 hours. The workweek is to consist of Monday-Friday. The Section is silent as to the hours of the day that comprise the workday.

Section 5.1 (b) is a subsection of Article V-Hours. Section 5.1 defines the Workday and the Workweek. Par (a) of the Section begins with the workday and workweek of the Courthouse employees. Par. (a) has considerable detail, including lunch breaks, changing hours, notice, restrictions on split shifts, exceptions, adding shifts. None of this appears in Par. (b).

Par. (a) has a reference to the hours the Courthouse is open for business, 8:00 a.m. to 5:00 p.m. from Monday through Friday. The parties dispute whether or not the reference sets the work hours, but other contractual provisions refer back to it as a basis of the work day, and there is no parallel reference in Par. (b).

Par. (a) continues with a definition of the workday and workweek of the Sheriff`s Department. The workday and workweek are “as defined above”; a reference to the Courthouse paragraph. The Sheriff`s Department paragraph specifies that there may be earlier starting shifts, and provides a mechanism to create an additional shift. Both provisions suggest a core shift.

The parties have separated Par.s (a) and (b). The structure and detail of Par. (a) is not repeated or incorporated by reference in Par. (b). That portion of Par. (a) which addresses the Courthouse implies that 8:00 a.m. - 5:00 p.m. is the work day. The paragraph goes on to provide “that the above hours of work may be changed...”. The reference to the above hours must have some meaning, and a point of reference.

Similarly, in the Sheriff`s Department paragraph, immediately following the reference to the “workday and workweek as defined above...”, there is an understanding expressed that certain workers may have to start work at 7:00 or 7:30 a.m. The provisions also need a point of reference, which appears to be the 8:00 – 5:00 work day.

Par. (b) has none of this. There are no hours identified in par. (b). Par. (b) has no reference back to Par. (a). Par. (b) is identified as a separate provision of the Article. There is no language setting forth exceptions to any standard, nor any detail as to the work day. On its face, Par. (b) sets parameters for the work day, that do not include specific hours of the day, obviating the need for the kind of detail found in Par. (a).

The Union points to years of the Job Center operating on an 8:00 a.m. - 5:00 p.m. schedule, and contends that it forms a practice, interpreting the otherwise ambiguous contract language. The fact that the hours have traditionally been 8:00 - 5:00 does not establish that those hours have been determined by the collective bargaining agreement. It is as easy to conclude that the hours have been set by management, with an eye to honoring the contractual standards set forth in Par. (b).

There are two negotiated memos, which set forth schedules which deviate from the 8:00 - 5:00 work day. One sets the schedule as 7:45 - 4:15, and the other sets the day as 8:15 - 5:15. Both of these schedules fall within the contractual definition of the work day and work week. The Union argues that an implication arises from the existence of the schedules that the parties understood that there exists an established work day, and that any exception must be negotiated. However, the record is silent as to what dispute or facts gave rise to the memos. Additionally, both documents are described as “Non-Precedential”. As such, I am reluctant to assign them any interpretive value, either direct or implied.

The Union points to the two memos from 2004, and contends that they acknowledge an 8:00 to 5:00 work day. The memos both appear designed to remind staff of what the work day is. Neither is particularly revealing as to whether the work day has been set by Management, within the parameters set by contract, or is the product of a practice which has developed to interpret an ambiguous contract provision. Neither of these memos suggests an origin of mutuality or common understanding underlying the hours.

The Union points out that the parties attempted and failed to bargain over a flexible hours provision. The County then acted unilaterally. I am to infer from this fact that the only reason the County would enter into a mid term bargain such as this is a perceived legal obligation to do so. While that may well be the case, it may also be that the County attempted to accommodate the input and needs of its employees before proceeding further. Whatever the motive, I do not regard it as determinative.

The Union seeks to have me conclude that there is a practice or a series of admissions which construe the words of the contract to define the work day as 8:00 a.m. – 5:00 p.m. in the Job Center. Such a construction has significant operational consequences. I am not prepared to do so in the face of a contract which is silent on the hours of the day which constitute the work day in the Job Center. This is particularly so where the paragraph applicable to the Job Center stands in contrast to the provisions applicable to the Courthouse and Sheriff`s Department.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 3rd day of December, 2009.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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