

IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN FEDERATION OF)	MINNESOTA BUREAU OF
STATE, COUNTY AND)	MEDIATION SERVICES
MUNICIPAL EMPLOYEES,)	CASE NO. 11-PA-0824
COUNCIL 65,)	
)	
Union,)	
)	
and)	
)	
THE CITY OF CHISHOLM,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On July 26 and August 19, 2011, in Chisholm, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties, as modified through past practice, by refusing to permit members of the bargaining unit to obtain overtime pay by working all of

a previously scheduled eight-hour shift on days when they were directed to work two hours just before the start of that shift. The last of post-hearing written argument was received by the arbitrator on November 7, 2011.

FACTS

The City of Chisholm (the "Employer" or the "City") is located in northern Minnesota. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer, including those who work in the City's Street Department in several classifications, including that of Heavy Equipment Operator and of Working Foreman. Employees who work in the City's Street Department usually work on five weekdays per week from 7:00 a.m. till 3:30 p.m.

Mark C. Casey, City Administrator, testified that two days before Thursday, January 20, 2011, he directed the Street Department's Working Foreman, Larry Pervanenze, to inform employees 1) that they were to begin work at 5:00 a.m. on January 20, removing previously plowed snow from the City's streets, and 2) that they were to quit work at 1:30 p.m. rather than at their usual quitting time, 3:30 p.m.

Bruce W. Anderson, a Street Department employee, testified that he learned of the early work order* from Pervanenze on

* Hereafter, for ease of reference, I may use the term "call-in" to refer to an order to begin work before the usual starting time of a shift. I do not use that term to signify when the order was issued or that it was issued by telephone.

January 19, either when Pervananze told him or by a message Pervananze left on the Street Department's bulletin board. Donald R. Haenke, also a Street Department employee, testified that he did not remember whether he was informed of the call-in two days before January 20, but that he might have been informed then if the call-in was for the purpose of removing previously plowed snow. Anderson and Haenke agreed, however, that the directive they received from Pervananze was to start work at 5:00 a.m. and quit work at 1:30 p.m. rather than at 3:30 p.m. The Street Department employees complied with the directive. Pervananze did not testify.

On February 1, 2011, the Union initiated the present grievance in behalf of the Street Department employees who were directed to work from 5:00 a.m. and to quit at 1:30 p.m. on January 20 (hereafter, the "grievants"). The grievance alleges that the requirement that the grievants quit work at 1:30 p.m. violated "a clearly established past practice of not altering the normal work schedule to avoid paying overtime."

At the hearing before me, much of the evidence presented consisted of data concerning prior examples of early call-ins. The parties disagree whether the evidence shows a contract-altering practice. I discuss their arguments about that evidence below, but, before doing so, I note that the arguments make the following provisions of the labor agreement relevant:

Article 4. Management. The Union recognizes the right and obligation of the Employer to efficiently manage and conduct the operation of the City within its legal limitations and with its primary obligation to provide adequate and proper municipal service for the citizens of the City.

The Union recognizes that the Employer has certain inherent managerial rights which are not subject to negotiations including, but not limited to, the selection, direction and number of personnel, the overall budget, the management of the property and equipment of the City, the right to hire, promote, suspend, discharge or otherwise discipline employees, the laying off and calling to work of employees in connection with reduction of or increase in the working force, the scheduling of work and the control and regulation of the use of all equipment and other property of the City, provided, however, that in the exercise of such functions, the Employer shall not alter any of the provisions of this Agreement.

Article 7. Salary Schedule. Section C(2). Shift differential pay in the amount of thirty cents (\$.30) per hour for the 3:00 p.m. to 11:00 p.m. shift, and forty cents (\$.40) per hour for the 11:00 p.m. to 7:00 a.m. shift. Differential pay shall be paid in conjunction with and at the same time as pay for the shift during which the differential was earned.

Article 8. Hours of Work. Section A. The normal hours of work shall be eight (8) hours per day and forty (40) hours per week. All hours worked in excess of eight (8) hours per day or forty (40) hours per week shall be compensated for at one and one-half (1-1/2) times the regular rate of pay. . . .

Section B. The Employer shall not change the work schedule of any employee during the 72 hours immediately preceding a holiday or said employee's vacation if the employee has scheduled his/her vacation at least one month in advance of the date of commencement of that vacation. In the event of emergency, the above provisions are waived, and the City may change the employee's schedule of work during the week preceding the start of said employee's vacation. In the event of a disagreement regarding the emergency, an employee may grieve as provided for in Article XVI of the Agreement.

Section C. The Employer agrees that split shift work will not be scheduled for employees of any department, excluding custodians and janitors.

Article 9. Overtime Hours. Section C. Minimum Call-out. Employees called out to work either prior to a shift or on a day off shall receive a minimum of two (2) hours pay for said call-out.

The Employer makes the following primary argument. When Casey told Pervanze that Street Department employees were to come in at 5:00 a.m. on January 20 and then work until 1:30 p.m.

rather than 3:30 p.m., Casey was changing their work schedule -- something permitted by the labor agreement.

The Employer argues 1) that "the scheduling of work" is one of the rights expressly reserved to management by Article 4 of the agreement, and 2) that only one limitation on that right is expressed elsewhere in the agreement -- in Article 8, Section B. The Employer notes 1) that the first sentence of that section provides that the Employer "shall not change the work schedule of any employee during the 72 hours immediately preceding a holiday or said employee's vacation if the employee has scheduled his/her vacation at least one month in advance of the date of commencement of that vacation," and 2) that the second sentence of the section provides relief from this limitation in an emergency, permitting the Employer then to "change the employee's schedule of work during the week preceding the start of said employee's vacation."

According to the Employer, the express reservation of the right to schedule work in Article 4 is restricted only in the single circumstance described in Article 8, Section B -- a change of schedule made just before a holiday or a vacation, a circumstance not relevant here. The Employer argues that the management right to schedule work, as reserved in Article 4, should be construed to exclude any limitation other than the one expressly stated in Article 8, Section B, in accord with the principle of contract interpretation that the expression of one thing implies the exclusion of all others.

The Union makes the following primary argument. It concedes that the Employer had the right to have Street Department

employees come to work early on January 20 for snow removal. Nevertheless, the Union argues that, as evidenced by past practice, the parties have agreed that, when the Employer makes the kind of schedule change at issue here, employees have an option. They may choose to work only the new eight-hour schedule proposed by the schedule change, or they may choose to work ten hours, i.e., their original eight-hour schedule plus the additional two hours that precede that eight-hour schedule, thus providing them with two hours of overtime pay at the overtime rate.

DECISION

I set out below the parties' differing statements of the issue presented in this case, which are derived from the differences in their primary arguments:

The Employer's Proposed Issue Statement. Did the City have the right to change the hours of work for [Street Department] employees on January 20, 2011, and if not what is the remedy?

The Union's Proposed Issue Statement. Have the City and the Union mutually created a long standing and consistently followed past practice of allowing employees who are called in to come to work early by the City to finish their normally scheduled shift?

As noted above, the parties presented a substantial amount of information concerning prior examples of early call-ins. They disagree whether those examples show a relevant contract-altering practice. In addition, they presented evidence about three past grievances, one initiated in 2004 and two others initiated in 2006. I summarize the evidence relating to those grievances as follows.

On February 2, 2004, Joseph Pershern, a Union representative, sent the following letter enclosing a grievance to David Carlstrom, who was then the City Administrator:

Enclosed is a grievance filed on behalf of employees Bruce Anderson and Alan LaBarge. On January 26, 2004, due to miscommunication between LaBarge and his supervisor, Mr. Podlogar, LaBarge informed Anderson that they were to report to work at 5:00 a.m. on January 27, the same as they had on January 26th. Podlogar had asked Larry Pervananze to start early on January 27th and LaBarge, who was also present, said he would also report early at which time Podlogar did not indicate that he wanted only Pervananze to start early. LaBarge believed then that all employees were starting early and he called Anderson who had left early for an appointment and told him of the early start. On January 27th, Pervananze, LaBarge and Anderson started early and the rest of the crew started at 7:00 a.m. Anderson and LaBarge were sent home at 1:30 p.m. after completing 8 hours of work, but had not yet completed their plow routes. At 3:30 p.m., two of the employees who had started at 7:00 a.m. were asked to work overtime to complete routes that other employees had not completed.

It has previously been the option of the employee to quit work after eight hours or to continue working until their normal quitting time. Should the City wish to change this practice, they must notify the Union of their intent and allow for the negotiations of something different. As indicated on the grievance form, we request that Anderson and LaBarge be reimbursed for two hours of overtime at the appropriate rate, the same as Pervananze has been.

The grievance form that was enclosed with this letter alleges a violation of "Article 7, Hours of Work -- Failure to allow employees [Anderson and LaBarge] to complete their scheduled hours of work in order to avoid paying overtime." The remedy sought by the grievance was payment to Anderson and LaBarge of "2 hours overtime at the appropriate rate for the hours between 1:30 p.m. when they were sent home and 3:30 per the normal quit time and make the employees whole."

Carlstrom's response to the 2004 grievance is set out below:

Response to Grievance: Anderson and LaBarge

The official grievance states that Article 7 "Hours of Work" Section A was violated.

Section A. The normal hours of work shall be eight (8) hours per day and forty (40) hours per week. All hours worked in excess of eight (8) hours per day or forty (40) hours per week shall be compensated for at one and one-half (1 1/2) times the regular rate of pay. An employee may choose to take compensatory time off at the rate of one and one-half (1 1/2) hours off for each hour of overtime worked. The maximum accumulation of compensatory time off shall be thirty (30) straight time or forty-five hours of time off work. Scheduling of compensatory time off shall be by mutual agreement between the employee and the employer.

I can see no other sub-section that would be applicable. Management's understanding of the issue:

Two employees started their work day early on snow removal. One other employee was scheduled out early to remove snow on Main Street before the traffic could park on the street. The two employees were asked by their supervisor why they started early on the January 27, 2004 and there seemed to be a communication problem as to who was to start early. The supervisor requested the employees leave work after completing an eight hour shift, per my direction. The reason for this direction was:

- A. Management did not authorize the early schedule.
- B. Management did not have control of the work being performed by the individuals during the time they started work and the scheduled start time of 7:00 a.m.
- C. Scheduling of manpower and the work to be completed is the responsibility of the supervisor.

As to the overtime that was involved for that day, it was reported to me that at the end of the shift the supervisor made the decision to continue work to complete snowplowing areas that were not finished during the normal course of the work day. At the time this decision was made it was well past the time the two individuals completed their 8 hour shift.

Based on the information presented, this grievance is denied by management.

Pershern testified that a settlement of the 2004 grievance gave Anderson and LaBarge two hours of overtime pay. The Union argues that this settlement was made because the Employer acceded to the Union's position -- the same position the Union asserts in the present case -- that employees called in early have the right to work, in addition, their usual eight-hour shift. The Employer argues that the reason the grievants were paid overtime was based on their seniority right to work the overtime that was later assigned to junior employees after Anderson and LaBarge had gone home.

The two grievances of 2006 were initiated in behalf of Anderson and Haenke, both on January 23, 2006. The allegations made in each grievance are set out below:

Anderson's Grievance. Grievant was told to start work 5AM 1-10-06 2 hrs. prior to his regular shift which is a 2 hr. call out Art. 8 Sec C. At 1:40 PM grievant took 2 hrs sick leave for drs. appointment for a workers comp. injury. City Eng. Jason Fisher said he would not be paid for the overtime callout of 5AM. The City and the Union had a grievance with the same circumstance on 12-04 and was settled in Unions favor. Pay the 2 hrs overtime and make grievant whole.

Haenke's Grievance. On 1-19-06 grievant was told at 3:15 pm to start work 4:30 am on 1-20-06 at City Hall as Janitor as has been done in the past. This constitutes a callout situation Art. 8 Sec. C. At 11:00 am grievant was told to go home. In the past grievant has stayed past 8 hrs period and received the overtime worked. This is a similar grievance that happened 2-04 and was settled in the Unions favor.

The Employer denied both grievances for reasons similar to those asserted in the present case -- that "according to Article 4 Management has the right to schedule work, Art. 7 Sec. A. The normal hours of work shall be 8 hours per day."

In grievance processing, the Union alleged that the grievances were based on violation of particular contract provisions and upon "past practice."

The parties met with a mediator on April 5, 2006, and, in June of 2006, they signed the following written settlement of the two grievances (hereafter, the "Settlement"):

Mediator Proposal -- Settlement of Grievances

1. Pay Bruce Anderson two hours of straight time.
2. Pay Don Haenke 2 hours at 1 1/2.
3. With 48 hours notice, the City may change an employee's normal shift. Shift means the normal start time.
4. This mediator's proposal will not establish past practice or future precedent with respect to items 1 and 2.
5. This agreement shall sunset and have no further [effect] at close of business December 31, 2006.

In subsequent bargaining about the terms of the parties' labor agreements, neither party proposed an amendment to the labor agreement that would be relevant to the issue resolved in the Settlement of the 2006 grievances. Nevertheless, in the present case both parties make arguments that relate to that Settlement.

The Union argues that the Settlement recognized a past practice by providing that Haenke should receive two hours of overtime -- an indication that he was entitled to that payment because of his early call-in even though he did not work his usual eight hour schedule. The Union also argues that the payment to Anderson of two extra hours at only straight time pay is consistent because he had used sick leave, which is payable only at the straight time rate. In addition, the Union argues

that, if the Employer wanted to negate the future recognition of such a past practice, it had the burden of proposing a contract amendment to that effect.

The Employer argues that Item 4 of the Settlement expressly states that the payments made to Anderson and Haenke under Items 1 and 2 will not "establish past practice or future precedent." As I interpret the Employer's position, it argues that the express recognition that the payments to Anderson and Haenke do not "establish past practice or future precedent" shows that the the burden of obtaining a change in the contract by amendment rests with the Union and not with the Employer.

The Employer presented evidence that, notwithstanding Item 5 of the Settlement, which states that the Settlement will "sunset" at the end of 2006, it has continued to use the forty-eight hour notice procedure set forth in Item 3 -- just as Casey testified was done in the present case.

I interpret the relevant provisions of the labor agreement as written -- i.e., irrespective of any effect that past practice may have on the meaning of those provisions -- as follows. I agree with the Employer that Article 4 reserves to management the right of "scheduling work" (subject of course to the Hours of Work limits established in Article 8, Section A). Only one exception to that right of "scheduling work" is set out expressly in the labor agreement -- in Article 8, Section B, which requires notice of a stated length for a schedule change before vacations and holidays.

Over the two days of hearing in this case, the parties presented a substantial amount of testimony and written data

pertaining to days when employees started work early before the usual start of a shift. That information shows many examples of the payment of overtime after an employee performed two hours of early work and then worked all of his usual shift hours. It also shows examples when employees started work two hours earlier than the usual start time and then stopped work two hours before the usual shift end, resulting in no overtime pay. The Employer presented testimony that, in many cases when employees worked all of their usual shift hours after starting work early, 1) management wanted them to work the additional hours because those hours were used to accomplish needed tasks or 2) management was not aware that the employees worked their usual shift in addition to the early work hours.

In grievances requiring contract interpretation, one party or the other may present evidence of past practice to show that both parties to a contract have, by their conduct, made the same interpretation of ambiguous language. In such a case, arbitrators may use such evidence to resolve the ambiguity.

In rare cases, arbitrators may rule that the parties to a contract have shown by their conduct -- i.e., by practice -- an intention to amend contract language that is not ambiguous. In such a case, however, arbitrators require a showing, beyond mere practice, that the parties have a mutual intent to amend clear, unambiguous language. Arbitrators require not only a showing of longstanding and consistent conduct, but, in addition, some indication that both parties have understood that the practice conforms to an intended amendment of that clear language.

As I have ruled above, the contract language at issue in the present case is not ambiguous. It clearly provides management with the right of "scheduling work," and it limits a change in previously scheduled work only before holidays or before an employee's vacation.

The parties' disposition of the grievances of 2004 and 2006 have some relevance. Though the evidence shows that Anderson and LaBarge were each paid two hours of overtime as a consequence of their 2004 grievance, it is not clear either that those payments were made because, as the Union argues, the Employer conceded that they had a right to decide to work their usual shift hours after an early start or that those payments were made because, as the Employer argues, they were deprived of a seniority right to work overtime hours that junior employees were later assigned to.

The Settlement of the two grievances of 2006 implies that the parties reached a compromise with the following relevant features. First, the Settlement expressly states that the payments made to Anderson and Haenke were not made to "establish past practice or future precedent," thus indicating that, despite the agreement to pay, the Employer rejected what the Union seeks here, a determination that the Employer has accepted a past practice that amends Article 4.

Second. The Settlement expressly states that "with 48 hours notice, the City may change an employee's normal shift [i.e.,] the normal start time." This provision of the Settlement indicates an agreement that a call-in shift change made with

forty-eight hours notice would not be challenged by the Union. The forty-eight hours notice provision shows that the parties did not reach an agreement during mediation about the use of a call-in shift change made with less than forty-eight hours notice.

Third. Item 5 of the Settlement provides that it "shall sunset and have no further [effect] at [the] close of business December 31, 2006." Notwithstanding this provision, Casey testified that, in the present case, he gave forty-eight hours notice of the call-in shift change. In addition, Jason J. Fisher, who was the Employer's Director of Public Works from March of 2005 till November of 2008, testified that he continued to give forty-eight hours notice of call-in shift changes after December 31, 2006 -- though Union witnesses testified that they knew of no instance when Fisher gave forty-eight hours notice of a call-in shift change. On its face, Item 5 applies to Item 3, the forty-eight hours notice provision, which has prospective use. The other parts of the Settlement, Items 1, 2 and 4, are not prospective. Thus, Item 1 provides for the immediate payment of two hours of overtime to Haenke, Item 2 provides for the immediate payment of two hours of straight time to Anderson, and Item 4 is an express negation that those payments establish a past practice.

The Settlement shows a three-part negotiated compromise -- 1) payments to Haenke and Anderson in accord with the Union's theory, 2) a denial by the Employer that the labor agreement has been changed by past practice to require those payments, 3) the Employer's temporary concession, to expire at the end of 2006,

that, despite contract language, it will give forty-eight hours notice of a call-in shift change.

Thus, the Settlement shows that, as of June of 2006, the Employer refused to accept past practice as having amended the broad reservation in Article 4 of its authority to schedule work. The question remains whether occurrences since 2006 show acceptance of a limitation on that broad authority. The evidence about practice shows that employees who have begun work early have often, but not always, worked their full eight-hour shift in addition to the early work, thus earning overtime pay. Even if the evidence showed that employees always or almost always worked their full shift hours in addition to the early hours, that evidence alone would not imply that the Employer has agreed to change unambiguous contract language, relinquishing its broad authority to schedule work, as established by that language.

The Settlement shows that, in 2006, the Employer did not accept practice as evidencing an intention to amend the labor agreement. Nothing in the evidence shows that, since 2006, the Employer has decided to accept the limitation of its broad authority to schedule work.

AWARD

The grievance is denied.

March 5, 2012


Thomas P. Gallagher, Arbitrator