

Glazer #14

IN THE MATTER OF THE VOLUNTARY ARBITRATION BETWEEN

EMPLOYER,

-and-

UNION,

GR: Employee 1

ARBITRATION OPINION AND AWARD

ISSUE

WAS THE CONTRACT VIOLATED WHEN EMPLOYEE 1 WAS NOT SCHEDULED FOR HOLIDAY WORK ON THURSDAY AND THE DAY AFTER IN 1998?

Employee 1 is a waste water Plant Operator II. Person 1 is his supervisor. Employee 1 filed a grievance on December 28, 1998, contending that he was improperly bypassed for work over the Thanksgiving holiday, when he told his supervisor that he would work only if he wasn't harassed. The grievance requests 16 hours of premium pay and states:

Date of Occurrence: November 17, 1998

Statement of Facts: Grievant was unfairly skipped over to work the Thanksgiving Holiday. Management asked grievant if he would like to work. Grievant stated he would under the condition he would not be harassed (sic). Management got upset and stated he would be skipped.

Articles Violated: XV; XXII.

Suggested Adjustment. Pay back on 16 hours at overtime rates and any and all things to make grievant whole.

The Employer answered the grievance as follows:

EMPLOYER
REPLY TO STEP 2 GRIEVANCE

GRIEVANCE NO: 91-98

DATE STEP 2

GRIEVANCE

RECEIVED: 12/29/98

Employee's Name: Employee 1

Employee's Classification: Wastewater Plant Operator H

Department/Division: Environmental Protection /WWTP

REPLY: The above referenced grievance has been received and reviewed at Step 2 by the Labor Relations Office. Upon the Employer's request, the Union has agreed to extend the time limits to respond at Step 2 until 5:00 PM on Friday, January 15, 1999.

It is contended that Employee 1 was unfairly skipped for the opportunity to work on Thanksgiving and the day after Thanksgiving (both contractual holidays). The Union cites a violation of Article XV-Overtime and Article -1E-Holidays and requests that Mr. Employee 1 be paid sixteen (16) hours at this overtime rate and any and all things be done to make Employee 1 whole.

The facts show that the parties do not consider scheduling employees to work holidays to be distributed overtime governed by Article XV, Section 6(a), but instead to be "premium pay". At Step 1 it was confirmed that the method of scheduling for holidays is to approach employees in seniority order within the classification needed and ask if he/she wants to work. That was done in this case by Person 1, Employee 1's supervisor. The facts further show that Employee 1 conditioned his willingness to work on either a commitment from Person 1 not to harass him (thus admitting that he does) or receipt of an apology. According to Person 1 after asking Employee 1 some three times and receiving a conditioned response each time, he told Employee 1 he was being skipped (as he was previously advised) and went to the next senior employee.

Under Article XXII, Section 2(i) the parties have agreed that:

On general paid holidays only those employees shall be on duty whose services are necessary.

Employee 1 was asked if he wanted to work on the holidays. He conditioned his acceptance on the precondition that Person 1 admit he was harassing him and/or

apologize for doing so. When he could not get an unconditioned acceptance, Person 1 determined he did not need Employee 1's services if that was what was necessary to get an acceptance. Under those conditions it was reasonable to advise Employee 1 that he would be skipped if he did not give a "yes" or "no" answer without conditions. After that advisement was given and a "yes" or "no" answer without conditions was still not received, it was further reasonable to pass over Employee 1 for the scheduling and proceed with the others in the classification of Wastewater Plant Operator II.

Based upon the above, it is determined that Person 1's decision to pass over Employee 1 in scheduling overtime for Thanksgiving and the day after Thanksgiving was reasonable. Therefore, this grievance and its requested adjustment at Step 2 are denied as being without merit.

An arbitration hearing was held on April 6, 2000. Testifying for the Association were: Person 2, Association President and Employee 1, Grievant. Testifying for the Employer were: Person 1, Supervisor and Person 3, Wastewater Plant Superintendent. Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

Person 2, the president of the Union, testified that the practice at the Wastewater Treatment Plant is to offer Thanksgiving and the day after, which are contractual holidays, to employees on the basis of seniority: an employee can either accept or decline this premium work at time and one-half; if he declines, the next senior employee is asked.

Employee 1 has been an operator for 23 years and is a steward. Person 1 has been his supervisor since the 1980s. Person 2 says that Employee 1 and Person 1 have had a rocky relationship over the years.

In 1984, the Grievant received a one day suspension, which was reversed in the Shaw Award. In 1985, Employee 1 received a five day suspension for the use of abusive and threatening language, which was reduced to a one day suspension, although Arbitrator Roumell

indicated that Employee 1 was the wrongdoer. Person 2 states that Person 1 provides Employee 1 with lower evaluations than other supervisors.

Employee 1 testified that on November 17, 1998, Mr. Person 1 approached him about working the Thanksgiving holiday. The Grievant said that he responded "Yes, if you stop your harassment."

Employee 1 said that Person 1 blew up and yelled at him. The Grievant said that he used a regular tone of voice, but that Person 1 went "ballistic". Employee 1 testified that he never expected to be skipped over for Thanksgiving and the day after, yet he was, and this grievance follows. He adds that Person 1 never specifically asked him if he wanted to work the day after Thanksgiving.

Employee 1 testified that Person 1 has been abusive to him in the past, that he doesn't value him, and that he doesn't hold him in high regard. He adds that Person 1 gives him the worst assignments.

Employee 1 agrees that he put a condition on his acceptance of Thanksgiving work. Mr. Employee 1 says that he didn't simply say "yes", because of his history of problems with the supervisor.

Supervisor Person 1 states that he goes by seniority to ask employees if they want to work Thursday and the day after, which are premium holidays. In November of 1998, he testified that he asked Employee 1 if he wanted to work the holidays.

The Grievant is said to have responded, "Yes, if you agree to stop harassing me." Person 1 said that he wouldn't accept that condition, and that he wanted a yes or no answer. The Grievant is quoted as saying, "Only if I get an apology." Person 1 says that he again asked for a

yes or no answer, but received no response. He then went on to ask other employees about working the holiday.

Person 1 says that he asks employees if they want to work the Thanksgiving holiday in the plural. He adds that he asked if Employee 1 wanted to work the holidays, and not simply if he wanted to work Thanksgiving Day. The supervisor states that the Grievant never approached him to say that he wanted to work either on Thanksgiving or the day after. Person 1 also denies that he became upset; however, he says that the Grievant did get "under my skin".

Person 1 agrees that there has been a strained relationship with the Grievant, but he denies harassing him. He also denies giving the Grievant worse assignments than other employees. Person 3, the Wastewater superintendent, testified that the Grievant had a difficult relationship with all of his supervisors.

PERTINENT CONTRACT PROVISIONS ARTICLE XXII. HOLIDAYS

Section 1. Holiday Pay

Holiday Pay is compensation paid for time during which work would normally be performed, said work having been suspended by reason of a general holiday.

Section 2. Holidays

- a. The following shall be general paid holidays for employees:

January 1	Presidents' Day
Martin Luther King Jr. Day	Thanksgiving Day
Memorial Day	Day after Thanksgiving
July 4	Christmas Eve
Labor Day	December 25
Veterans Day	

The days on which the above holidays are celebrated shall be the same as those observed by the United States Government unless the parties agree otherwise.

- b. Whenever any of the above holidays falls on Saturday, the Friday immediately

preceding shall be considered as the holiday.

- c. Whenever any of the above holidays falls on Sunday, the Monday immediately following shall be considered as the holiday.
- d. In the event December 25 (Christmas Day) falls on Saturday, the Christmas Eve Holiday shall be considered as the immediately preceding Thursday. In the event December 25 (Christmas Day) falls on Monday, the Christmas Eve holiday shall be considered as the immediately preceding Friday.
- e. All Employer employees shall be credited with the number of hours in their normal work shift for each of the above holidays except as further provided herein; provided that no employee shall receive credit for more than eleven (11) holidays in any calendar year.
- f. To be eligible for holiday pay credits, an employee shall have worked his/her scheduled workday immediately preceding and immediately following any general paid holiday.
- g. An employee on formal unpaid leave of absence or layoff (removed from the payroll) shall not receive holiday pay credits during such leave.
- h. On general paid holidays only those employees shall be on duty whose services are necessary.

Section 3. Method of Compensation for Holiday Work

- a. Employees eligible for overtime pay as provided in the overtime provisions who are required to work on a 'general paid holiday shall be paid at one and one-half (1 1/2) times their hourly rates for such hours worked, in addition to the number of work hours recited as provided in "e" above.
- b. If any of the above holidays fall on an employee's regular day off, the employee will be credited with the number of work hours for such day as provided in "e" above. In such cases, the unworked holiday hours shall not be included as hours worked for the purpose of computing overtime.
- c. General paid holidays shall not be charged as vacation or sick leave.
- d. Employees absent unexcused on a general paid holiday on which they are scheduled to work shall receive no pay for that day.

ARTICLE XXXIV, MAINTENANCE OF STANDARDS

Section 1. Management agrees that all conditions of employment not otherwise

provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

POSITION OF THE UNION

It is asserted that the Employer violated the past practice of the parties by skipping over the Grievant for holiday work. The Grievant is said to have agreed to work the holidays, and the Employer is argued to have violated the established past practice.

The Grievant's response "if you stop harassing me" in addition to his acceptance is argued to be irrelevant. It is emphasized that all employees are entitled to a workplace that is free of harassment, and that the Grievant's condition was reasonable, considering the difficult relationship between himself and Person 1. The Union notes that other employees have been allowed to condition their acceptance only on working the stations.

The Union further contends that Person 1 improperly denied the Grievant the opportunity to work the day after Thanksgiving, since he only mentioned the Thanksgiving Day.

The Union also believes that the Maintenance of Standards clause has been violated, and that its proposed remedy is appropriate.

POSITION OF THE EMPLOYER

Initially, it is argued that no provisions that were listed in the grievance were shown to have been violated. It is emphasized that the Maintenance of Standards clause was not mentioned in the grievance.

The Employer argues that it was reasonable for Person 1 not to tacitly admit that he was harassing Employee 1. It is further argued that the Grievant admitted that he was being passed over for both the Thursday and the day after.

DISCUSSION

There is clearly a past practice of asking the most senior employee if he wants to work holidays, and then moving on to the next senior employee if he declines. This practice defines the operation of Article XXII on holidays. That article was listed in the grievance, and therefore the grievance properly listed the article at issue.

The crucial question is the effect of the Grievant's statement that he would work on the condition that his supervisor stop harassing him. The Union argues that the Grievant's comment was mere surplusage, since all employees should be permitted to work in an environment that is free of harassment. The Union also believes that the Grievant's conditional acceptance was reasonable, because of the previous harassment that he had received from Person 1.

As an arbitrator, I am required to follow accepted contractual standards. Person 1's "offer" of Thanksgiving work, required an acceptance by Employee 1 to constitute a binding agreement.

Black's Law Dictionary defines an acceptance as:

Compliance by offeree with terms and conditions of offer would constitute an "acceptance".

Employee 1 did not accept Person 1's offer. Instead, he made a counteroffer rather than an acceptance, when he added the "no harassment" condition *Black's* states:

Qualifications or conditions make a "counteroffer" not an acceptance.

Therefore, when Employee 1 said that he would only work if he wasn't harassed, he didn't accept the Thanksgiving work.

The Union argues that the counteroffer is irrelevant, since all employees must work free of harassment. However, the Grievant's harassment statement was reflective of his subjective

requirement that Person 1 somehow alter his prior behavior, whether that be his selection of assignments or his overall demeanor. Therefore, if Person 1 had accepted the Grievant's condition, he would have been required to change his behavior based upon the Grievant's expectations. If he didn't, the Grievant would be in a position to walk off the job over the holidays or least not to work the second day, since his acceptance was conditioned on "no harassment".

The best way to understand the relevance of the Grievant's "no harassment" condition is to reverse the situation. Employees are required not to harass their supervisors. However, if Person 1 had said to the Grievant, "You can work Thanksgiving, if you don't harass me", this would be a clear violation of the practice of the parties, where the senior employee gets to work the holidays, without conditions. A supervisor could not require an employee to tacitly admit that he was a prior harasser, in order to be eligible for holiday work.

Similarly, the Grievant could not condition his work on "no harassment", which would require his supervisor to tacitly admit that he had been a harasser in the past. Employee 1 statement represented a counteroffer and not an acceptance, and therefore the supervisor was free to move on to the next senior employee.

I understand and appreciate that Mr. Employee 1 feels that he has been mistreated by Person 1 for years. However, his remedy is not to force special conditions on Person 1 when he works premium time; rather, his remedy is through normal channels.

Based upon the evidence, the supervisor did not violate the contract and practice of the parties by bypassing the Grievant after Employee 1 made a counteroffer rather than an acceptance of Thanksgiving work.

The next issue is whether the Grievant was offered the work on the day after

Thanksgiving. Person 1 says that he offered the Grievant to work the holidays in the plural; the Grievant says that he was only offered the opportunity to work Thanksgiving.

There is no easy way for me to resolve this discrepancy in testimony. However, there is no indication that the Grievant would have eliminated the "no harassment" condition for the day after Thanksgiving. Accordingly, even if it were unequivocal that the second day had been offered, it appears that the Grievant would have attached a condition on working it, which would have relieved the Employer of an obligation to call him in. As a result, there is no basis for awarding a remedy to the Grievant.

It is unfortunate that there is a difficult situation between the Grievant and his supervisor; however, this case must be decided, consistent with my authority as an arbitrator, on strict contractual grounds. As a result, the grievance should be denied.

AWARD

For the foregoing reasons, the grievance is denied.

Mark J. Glazer Arbitrator

July 21, 2000