VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

Employer **Case: Beitner #1**

-and- Arbitrator:
ELLIOT I. BEITNER

Union

Grievant: K. L.
Grievance No. SE---------

OPINION AND AWARD

An arbitration hearing was held on February 4, 2000 at the offices of the Association in Lansing, Michigan. At the hearing, the parties had an opportunity to present sworn testimony, to cross-examine witnesses and to offer documentary exhibits into evidence. The parties also filed post-hearing briefs that were received by March 6, 2000 at which time the hearing was declared closed.

Present for the Employer, were:

S. W., Labor Representative
R. D., Labor Relations Representative
J. O., Engineer of Traffic Safety
J. D., T&S Division Office Manager
S. B., Safety & Tech Services Section Manager

Present for the union, hereinafter referred to as the "Association" were:

C. K., Labor Relations Representative
K. L., Grievant, Transportation Engineer

BACKGROUND

Pursuant to a Letter of Understanding dated August 30, 1991 between the parties and incorporated in the contract as Appendix B, the Grievant, K. L., a Transportation Engineer Specialist 13, was allowed to have an Alternate Work Schedule Program which allowed her to work eight nine-hour days, one eight-hour day and one day off per each 80 hour pay period. By memo dated July 26, 1999, she was advised by M. K., Supervising Engineer, that she would no longer be permitted to continue on the Alternate Work Schedule Program and would be required to work eight hours for each 10 days of the 80 hour pay period. On August 5, 1999, K.L. filed a timely grievance which was denied. The Step 1 answer reads:

> K. L. was working on alternate work schedule prior to transferring from the Engineering Services Division, and continued with that schedule in the Traffic and Safety Division. When two people in my unit requested alternate work schedules, I checked with Traffic and Safety Division management regarding division policy. J. O., Division Engineer, informed me that work schedules, other than ten eight-hour days would not be permitted unless it would be of clear benefit to the department. Since no clear benefit was evident, I verbally responded to the inquiry from unit staff and notified K.L. that her alternate work schedule was being terminated.
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> Likewise her Step 2 appeal was denied as follows:
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> As indicated in the Step 1 response, other employees within the Unit have requested alternate work schedules similar to that of Ms. K.L. It is not possible to operate the Unit efficiently when more than 30% of the staff is absent on a regular basis. Therefore, to provide consistency throughout the division and adhere to direction provided by the department's upper management, all alternate work schedules that were in effect in the Traffic and Safety Division have been rescinded. Only individuals currently working overtime hours are allowed to work outside the three schedules allowed by department management. Those allowances will be terminated when the overtime is discontinued.
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> The department raises a threshold issue that the Letter of Understanding regarding the Alternate Work Schedule Program is not a grievable issue. Appendix B-5, Section F, in the Letter of Understanding in relevant part states:
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> > Participation of any bargaining unit member in the AWS is subject to the immediate supervisor's approval, based on E above. However the denial of the AWS for an individual bargaining unit member is subject to a labor/management meeting including the Society, the immediate supervisor and the Personnel Office.

Requests by other employees within the division were made to participate in a modified work schedule arrangement. However due to the downsizing of staff from 106 to 88 and the rising cost of paid overtime/comp time, coupled with the fact of shortage of supervisory personnel, management could not continue the program. Management noticed all employees within the division its intention to terminate all "modified/alternate" work schedule plans. Article 30, Section A.2 state that management has a right to:

> Utilize personnel, methods and means in the most appropriate and efficient manner as determined by the Employer.

This language supports the action taken by management. however if conditions change, management will consider re-activating the program for Traffic & Safety Division personnel.

The current labor agreement became effective for no economic provisions on May 20, 1999 and expires on December 31, 2001. The pertinent Letter of Understanding contained in the contract as Appendix B is signed by representatives of the Association, and the Employer. It reads:

Appendix B

LETTER OF UNDERSTANDING
August 30, 1991

The association and employer agree to implement an Alternate Work Schedule Program for Scientific and Engineering bargaining unit members in accordance with the following terms and conditions:

A. The Alternate Work Schedule Program (AWS) shall be initially implemented within the Design Division and the Materials and Technology/Secondary Complex for a twelve (12) month pilot program commencing within two pay periods of Civil Service ratification of this Agreement.

B. The program will be limited to the one work schedule option of eight nine-hour days, one eight-hour day and one day off per eighty-hour pay period (8 x 9 = 72 + 8 hours). Additional schedule options may be offered subject to mutual agreement between the Department and the Society.

C. The program will be available exclusively to bargaining unit members at the journey level (VI) and above.

D. Subject to operational needs and/or employee performance consideration it is recognized that the program may not be available to all Society bargaining unit members.

E. Approval of Alternate Work Schedules and approval of schedules for specific "flex days" off shall be subject to the Department's operational needs and ability to maintain a balanced staffing pattern with an adequate coverage in all necessary areas within the Division. In the event a conflict arises regarding a specific "flex day" off, approval shall be governed by bargaining unit seniority within the Division.

F. Participation of any bargaining unit member in the AWS is subject to the immediate supervisor's approval, based on E above. However, the denial of the AWS for an individual bargaining unit member is subject to a labor/management meeting including the Society, the immediate supervisor and the Personnel Office.

G. At the completion of the twelve (12) months pilot program, the Employer retains the right to terminate the AWS subject to any of the following operational considerations:

1) the Department's inability to provide adequate supervision or
2) the Department can demonstrate a significant adverse financial impact.

In addition, at the completion of the twelve (12) month pilot program, the Society, and the Employer agree to meet in a labor/management conference to address any problems or complaints arising from the program.

/s/ W. W., EMPLOYER /s/ P. T., ASSOCIATION
/s/ J. L., EMPLOYER /s/ F. S., ASSOCIATION

K.L. testified that she has worked for the Department for 16 years and is a Department Risk Management Specialist in the Traffic and Safety Division. Previously, she worked the same type of position for the Engineering Services Division which was disbanded. The Grievant was allowed to have an Alternate Work Schedule in the Engineering Services Division and was allowed to continue that schedule when she transferred to the Traffic and Safety Division in March of 1997. She testified that she handles half of the Department's highway litigation. This requires working with the Attorney General's office and outside attorneys handling litigation. She stated she works independently in performing her duties and that she is unaware that there were any operational problems with her working only nine days every ten-day work period. She stated that under her prior schedule, she worked eight shifts from 7:00 a.m. to 5:00 p.m., which was beneficial because the Attorney General's office remains open until 5:00 p.m. Her current work shift is 7:00 a.m. to 4:00 p.m., Monday through Friday of each work week. She stated that she cannot think of any problems that developed in the past as the result of her Alternate Work Schedule.

The Grievant testified that other benefits derived to the Employer from her working an Alternate Work Schedule including using less paid leave time and working less overtime. She testified that she was told that she was being taken off the Alternate Work Schedule because two other employees had requested being placed on a similar work schedule and were told they could not. She stated that she was told that she was being removed in the interest of fairness.

J. O., Engineer of the Traffic Safety Division, is the division head. He stated that he told the Grievant's supervisor, M. K., that the division would no longer allow Alternate Work Schedules because it wanted to be uniform in the way it treated all employees. He testified also that he wanted to be consistent with the Letter of Understanding. He stated that the number of supervisors have decreased but acknowledged also that the number of employees have decreased. He stated that he was unaware of any problems that existed because of the Grievant's Alternate Work Schedule.

The grievance remained unresolved in the grievance steps and was processed to this arbitration hearing.

OTHER RELEVANT CONTRACT PROVISIONS

Article 9
GRIEVANCE PROCEDURE

A. A grievance is a written complaint alleging a violation of a specific term or provision of this Agreement.

G. STEP FOUR: ARBITRATION

1. * * *

e. The Arbitrator will conduct the hearing in accordance with the Rules of the American Arbitration Association (AAA). Expenses for the Arbitrator shall be borne equally by the parties; however, each party shall be responsible for the costs of its own representatives and witnesses. Any cancellation or rescheduling fees shall be the responsibility of the requesting party. In the event that both parties mutually request a cancellation or rescheduling, any associated costs shall be borne equally.

f. The Arbitrator's authority will be confined to the specific written provisions of this Agreement. The Arbitrator shall have no authority to add to, subtract from, modify, ignore, or otherwise amend any term of this Agreement and Civil Service Rules and Regulations. The authority of the Arbitrator shall remain subject to and subordinate to the limitations and restrictions on subject matters and personal jurisdiction in the Civil Service Rules and Regulations.

Article 30
MANAGEMENT RIGHTS

A. It is understood and agreed by the parties that the Employer possesses the sole power, duty and right to operate and manage its departments, agencies, and programs and carry out constitutional, statutory and administrative policy mandates and goals. The powers, authority and discretion necessary for the Employer to exercise its rights and carry out its responsibilities shall be limited only by the express written terms of this Agreement, and then only to the extent so specifically limited. Any term or condition of employment other than the wages, benefits, and other terms and conditions of employment specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to determine, establish or modify.

POSITION OF THE PARTIES

The Association

The Association first argues that the grievance is arbitrable and that the reference in Appendix D to a labor management meeting does not preclude arbitration. The Association points out that in other areas of the contract where the parties intended to restrict an employee's right to an administrative meeting, the parties put in express language indicating that the dispute was not subject to the grievance procedure.

With regard to the merits, the Association points out that the Grievant's position (a Specialist 13) requires working at a "highly independent level". It cites the Guide to Classifying Program and Staff Specialists which states:

> Definitions
> A staff or program specialist position is one-of-a-kind within a department, agency, or the equivalent in scope, or has state-wide responsibility for a program or service area. The program or service area must be unique and of paramount significance to the department's primary mission or operation. Staff and program specialists are responsible and accountable for the full range of services or subject matter areas associated with the work. Such responsibilities are not shared. Specialists are recognized as the persons most knowledgeable about a particular professional area and are considered by the agency to be the exclusive subject matter experts for a difficult, complex, and highly technical area. Specialists must be designated as such by the appointing authority; i.e., it is not a responsibility one assumes.

The Association points out that since the Grievant was required to discontinue her work program, another employee was allowed to work eight eight-hour days and two four-hour days in a ten day pay period. The Association argues that the Employer has acted in a discriminatory fashion in favor of this employee over the Grievant.

The Association also filed a letter dated March 6, 2000 with the Arbitrator and copied to the Employer representative asserting that it was improper for the Department to include facts in its brief that were not elicited at the hearing to explain why it allowed an employee to work an AWS after the Grievant was discontinued from her AWS.

The Association argues that there was no showing that operational efficiency was adversely effected by the Grievant's Alternate Work Schedule. Instead, her schedule provided advantages for the Employer. Also, the Employer did not

establish any operational need to rescind her work schedule and that the rescission was in violation of the contract. The Association seeks as a remedy:

1. That K. L. be returned to the approved Alternate Work Schedule that she previously worked;
2. That the Employer cease and desist in engaging in disparate treatment;
3. That Ms. K.L. otherwise be made whole.

The Department

The Department argues firstly that the grievance is not arbitrable because the parties designated a labor management meeting as the remedy for a bargaining unit employee who is denied access to the AWS. Neither the Grievant nor the ASSOCIATION requested such a meeting. The Employer argues that the Arbitrator would be acting beyond the scope of his authority if he grants the grievance.

The Employer states that management did not forfeit its right to discontinue the Grievant's Alternate Work Schedule and it has established that it wanted to insure uniformity in the way the division treated its employees.

The Employer states that it was required to grant an AWS to the employee who was allowed such a work schedule after the Grievant was removed from her schedule because of the requirements of the FMLA (Family Medical Leave Act) and that employee's request was required to be granted for at least 480 hours in a 12 month period.

DISCUSSION AND DECISION

Initially, the threshold issue of whether the grievance is arbitrable must be decided. It is true that paragraph F of Appendix B does state "... the denial of the AWS for an individual bargaining unit member is subject to a labor/management meeting including the Society, the immediate supervisor and the Personnel Office." However, it does not state that this is the exclusive remedy for an employee who is denied an AWS. The parties have demonstrated in other Letters of Understanding that they know how to draft language excluding a dispute from the grievance procedure. For example, an October 5, 1984 Letter of Understanding with the Department of Natural Resources, states:

> C. * * *
> 3. The decision of the Personnel Committee shall be final binding on both parties, and not subject to appeal or the grievance procedure.

Likewise, in the "Voluntary Work Schedule Adjustment Program" also contained in Appendix A, the parties provided: "Termination of the agreement by the Appointing Authority shall not be grievable."

Article 9, "Grievance Procedure", defines a grievance as a written complaint alleging a violation of a specific term or provision of this agreement. The grievance alleges violations of Article 2, 30 and of the Letter of Understanding. Article 30, "Management Rights", grants the Employer broad managerial authority except as restricted by specific provisions of the labor agreement. I conclude that the grievance meets the definition of the Collective Bargaining Agreement and is not barred by the Letter of Understanding. Moreover, the third step grievance meeting was substantially the same as a labor/management conference.

I conclude further that Article 9, Section G, "Step Four: Arbitration", 1 f, which restricts the Arbitrator's authority does not preclude my deciding this grievance because what is alleged is a violation of a Letter of Understanding and of the Management Rights section of the labor agreement.

With regard to the merits of the grievance, it is clear that the reason the Grievant was required to discontinue her Alternate Work Schedule was because other employees had requested permission to work on an Alternate Work Schedule. The Employer decided that it was in the interest of the Department to have uniformity and that to allow the Grievant to continue her AWS and deny AWS requests from other employees was unfair. The Employer's reasoning is understandable. However, the Letter of Understanding states specifically in paragraphs D and E that it is the operational needs and employee performance considerations that are the criteria to be used in approving or not approving AWS. In its step 1 answer, the Employer improperly adds a third criteria requiring "clear benefit to the department". However, the criteria specified in the Letter of Understanding are controlling.

Here, there has been no showing that the Grievant's performance was adversely effected by her working nine days a pay period instead of ten. J.O. was quite forthright in stating that he was unaware of any performance problems with the Grievant.
Also, there was no showing that the operational needs of the Department were adversely effected. Instead, the unrebutted testimony of the Grievant was that there were operational benefits that inured to the Employer. For example, by working until 5:00 p.m., she could call within the office hours of the Attorney General and of outside counsel handling Department litigation and communicate with them by telephone between 4:00 p.m. and 5:00 p.m.

The requirements in subparagraph G dealing with the Department's inability to provide adequate supervision is also not pertinent. Firstly, there was no showing that the reduction in supervisors effected the Grievant. She held a Specialist 13

position which, according to the Employer's own guidelines, required a significant amount of independent work. Also, equally important, is that paragraph G deals with the reasons that the Department can discontinue the 12 month pilot program and not specifically with whether an individual employee should be granted or disallowed the right to have an AWS.

Because the Employer had authorized the Grievant to be on the program and because she had been on the program for five years, her rights are probably greater than that of an employee initially requesting to be authorized AWS. The Employer is not obligated to grant an Alternate Work Schedule to applying employees merely because the Grievant is on such a program.

The fact that an employee was allowed an AWS subsequent to the Grievant being taken off the program is not pertinent. The Association correctly points out that facts not elicited or agreed to at the hearing cannot be incorporated in a party's brief, although I am convinced that the Department incorporated facts in its brief in good faith and without intending to subvert the grievance procedure. This grievance can be decided on the basis of the interpretation of the Letter of Understanding and without any consideration to the granting of AWS to an employee after the Grievant was terminated from the program.

I conclude that the Employer has failed to establish an operational need or an employee performance need for removing the Grievant from the AWS program. In conclusion, I hold that the grievance is arbitrable. It is held further that the Employer violated the Letter of Understanding by removing the Grievant from her AWS position. Although the Management Rights section of the contract grants the Employer significant rights, it restricts those rights to the express provisions of the labor agreement including the Letters of Understanding. The Grievant shall be allowed to resume her Alternate Work Schedule. The Association's requests that a Cease and Desist Order be issued and that the Grievant be granted a monetary remedy are denied.

Dated: March 14, 2000 _____

ELLIOT I. BEITNER