Chiesa #6

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER (Employer)

-and-

UNION (Union)

Grievant: Employee 1

OPINION AND AWARD

Arbitrator: Mario Chiesa

THE CASE

The grievance in this matter is dated April 3, 1998. In part it reads as follows:

> "**Date of Occurrence**: March 25, 1998 and continuing and ongoing"
>
> "**Statement of Facts**: Management has given grievant a direct order to adjust her schedule to her best estimate, to come in late to cover Zoning and Historic Preservation meetings that can go over her 5:00 PM quitting time. This is to avoid paying overtime."
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> "Michigan Department of Labor, Bureau of Safety & Regulation Overtime Compensation rules state you cannot change schedules to avoid paying overtime."
>
> "Articles Violated: XIV; XV; XXXIV; XXXVII"
>
> "**Suggested Adjustment**: Follow Dept. of Labor Rules and Union contract. Pay grievant for eight hour day and overtime worked for changed schedule and any and all things to make grievant whole."

The grievant, Employee 1, has been employed by the Employer for approximately seven years. At the time the dispute arose and since January 4, 1998, the grievant has been working as a Zoning Inspector II.

Even prior to her promotion to Zoning Inspector II the grievant would attend the Historic Preservation Commission meetings. Subsequent to her promotion to Zoning Inspector II the grievant was required to attend both the Historic Preservation Commission meetings and the Zoning Board of Appeals meetings.

The grievant's work schedule was 7:00 a.m. to 4:00 p.m., five days per week. Prior to the events which led to this grievance, the grievant would work her regular shift, then attend the meetings in question and receive overtime to the extent she worked beyond her normal shift.

Beginning in March of 1998, I note the grievance mentions March 25, the grievant was directed by supervision to alter her schedule based on her best estimate by coming in later and working later to cover the meetings in question so the Employer could avoid paying overtime. The record establishes that the Historic Preservation Commission meetings are held on the first and third Wednesdays of each month, and generally commence about 5:00 p.m. On those days the grievant's normal schedule was altered so she would begin her shift at 10:00 a.m. and conclude at 7:00 p.m. The Zoning Appeal Board meetings were held the first and third Thursday of each month and on those dates the grievant would generally work from 9:00 a.m. until 6:00 p.m.

Testimony establishes that the Department's overtime budget has been constrained and, as a result, decisions had to be made in order to keep overtime expenditures within the amounts allotted.

There was evidence and documents relating to supplemental agreements reached by the parties in other circumstances. There were several letters of understanding relating to the proposed implementation of the 10-hour-a-workday shift at the various Water and Waste Treatment facilities. There was also a document memorializing the supplemental agreement regarding various shift changes for employees working in the Controller's Department.

The grievance was processed through the grievance procedure and presented to me for resolution. Additional aspects of the record will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that I have carefully analyzed the entire record even though it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

> ARTICLE IV. MANAGEMENT RIGHTS
>
> "Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union."

ARTICLE XIV. SHIFT AND SCHEDULE PREFERENCE

"Section 1. Definitions

a. Shifts shall be defined as the daily work period between the starting and quitting time of such period, exclusive of lunch period.

b. Work schedules shall be defined as the schedule of work days and shifts during a work week, including off-duty days.

"Section 2. Seniority shall be recognized as the basis of shift assignment and work schedule assignment. For the purpose of this Section, the exercise of seniority shall be limited to occasions of job opening and shall apply within classification title only. In such instances, the position shall be posted for a period of seven (7) calendar days and filled as soon as administratively possible. When an employee is newly assigned to a job, Management may, for a period of three (3) months, select the shift and work schedule assignment for the employee. In proper cases, exceptions can be made.

"Section 3.

a. Shift and work schedules shall be posted and bid on by employees in the same Department and Division within the same classification on the basis of seniority, once each calendar year. Such posting and bidding shall be accomplished during the month of October, except that no bidding shall be required in a Department/ Division where all employees in a classification work the same eight (8) hour shift and work schedule.

b. If shift and work schedules are to be changed for more than five (5) consecutive work days and the need for such change is known to Management for more than seventy-two (72) hours in advance, openings on such shifts and work schedules shall be posted for at least twenty-four (24) hours and shall be filled on the basis of seniority within classification title.

"Section 5. Nothing in this Article shall be construed to limit the right of Management to establish, change, enlarge or decrease shifts or work schedules, or the number of personnel assigned thereto, provided that the rights of seniority set forth in this Article are followed in making the necessary personnel assignments."

ARTICLE XV. OVERTIME

"Section 1. Purpose

"The following provisions shall govern compensation for overtime to employees of the Employer.

"Section 2. Employees covered:

a. Employees holding the positions listed in Appendix A are eligible for overtime compensation.

b. Employees, except those holding appointment in the Employer Clerk's Office, engaged in overtime work relating to any regular or special election, shall be paid at their regular hourly rates for time so worked.

"Section 3. Definitions

a. Normal Work Week and Work Day. A normal work week for regular full-time employees shall consist of forty (40) hours, not including meal periods. A normal work day for such employees shall be eight (8) hours, unless regularly scheduled otherwise, not including meal periods.

b. Overtime shall consist of authorized work in excess of the normal number of hours in any scheduled work day or any work week, not including meal periods. Overtime of less than twenty (20) minutes in any work day shall not be included in determining the total number of hours worked. Thereafter, overtime shall be computed to the nearest half hour.

c. All overtime shall be authorized by a responsible supervisor.

"Section 4. Method of Compensating for Overtime Work

a. Overtime shall be paid at one and one-half (1 1/2) times the employee's hourly rate.

"Section 6

b. In the assignment of overtime hours Management will, consistent with the needs of the service, give preference to those persons holding permanent appointment. A record of such overtime hours shall be kept and the record shall be posted during the first ten (10) days of each month."

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."

The Union argues that the Employer violated the contract by directing the grievant to adjust her schedule by starting work later on days that she is required to attend Historic Preservation Commission and Zoning Board of Appeals meetings. The Union argues that nowhere in Article XIV is the Employer given the authority to adjust an employee's schedule so that the employee's work shifts vary in starting and ending times in a particular week. Referencing Section 5 of Article XIV, the Union argues that the provision is ambiguous and the practice between the parties is to define the language in question to require uniform start and ending times of shifts. It maintains that the Employer's position in this case is inconsistent with the parties' interpretation of the contract as manifested by established past practice. It argues that the parties have always met and reached an agreement before a schedule has been established varying shifts during a workweek. It argues that it is undisputed that the Employer has never established shifts with irregular and non-uniform starting and ending times in a workweek absent an agreement with the Union. It argues that the Employer's interpretation of the language would grant the Employer such broad authority that it simply defies reason. The Union goes on to argue that the Employer's interpretation of Article XIV should be rejected as it would result in harsh and illogical results. It argues that scheduling employees to work shifts with varied starting and ending times during a workweek would create a tremendous burden and much cost on its members' lives. It argues that the Employer has violated the Maintenance of Standards provision by directing the grievant to gerrymander her schedule so that she is working shifts on a regular basis with varied starting and

ending times. It argues that there was no evidence presented by the Employer to dispute the fact that non-uniform shifts during a workweek have only been established when the Employer and the Union have reached an agreement. Further, it maintains that the Employer violated the contract by directing the grievant to adjust her schedule for the purpose of avoiding overtime payments. The Union argues that the grievant lost approximately 53 hours of overtime opportunities when compared to the overtime she received in the past prior to the time she was forced to change her schedule to attend the Historic Preservation Commission and Zoning Board of Appeals meetings on a straight-time basis.

The Employer argues that the burden is upon the Union to show that its actions have violated the Collective Bargaining Agreement. It argues that the Management Rights clause, Article IV, retains to the Employer the right to determine the schedules of work, except as "otherwise specifically provided in the Agreement." It goes on to argue to that Article XXIV provides that employees be allowed to bid on shift and work schedules and defines shifts as "the daily work period between the starting and quitting time of such period, exclusive of lunch period." The Employer argues that previously the grievant was allowed to bid for a shift and work schedule of 7:00 a.m. through 4:00 p.m. Monday through Friday. In 1998 she was required to adjust her shift. It maintains that Article XXIV, Section 5 clarifies that nothing in the article is to be construed to limit the right of the Employer to change shifts or work schedules. It maintains there is nothing which references the need to achieve mutual agreement or lack of inconvenience for the involved employee. It maintains that it only needs to post changed shifts and work hours and follow seniority rights when the change is for more than five consecutive workdays

and the need was known by management for more than 72 hours in advance. It argues that the grievant is being asked to change her shift hours at most on consecutive Wednesdays and Thursdays. It maintains that posting is a moot issue since the grievant is the only Zoning Inspector II in her division. It argues that requesting the grievant to change her shift, as was done in this case, does not violate the agreement and is consistent with Article XXIV. It goes on to argue that the Union has failed to identify any contract provision which prohibits changes in work hours to preclude or control overtime payments. It points out that the language in the contract reflects that overtime is to be authorized by management. The Employer argues that notwithstanding the fact that the change may be inconvenient for the grievant, the parties have expressly negotiated language in the Collective Bargaining Agreement which recognizes that the Employer has the right to do what it did in this case. The Employer goes on to state that it is asking me to interpret and apply the express terms of the agreement as written. The Employer further argues that supplemental agreements need be executed by the parties only when the contemplated action deviates from the contract. It argues that Union Exhibit 6 waives the requirement to post and fill changed shift hours on the basis of seniority when the change exceeds five consecutive days. It argues that in this case the grievant's change in shift hours does not exceed five consecutive days. The Employer argues that the remainder of the supplemental agreements deal with trial basis, 10-hour-a-day and a four-day-per week schedule. It maintains these were never implemented, but nonetheless, the supplemental agreement was necessary because the contemplated action deviated from the contract language. The Employer argues that the fact it may have created overtime for

the grievant for her attendance at the meetings in question does not establish a practice, nor prevent it from changing the grievant's shift hours.

In cases of this nature it is my responsibility to interpret and apply the Collective Bargaining Agreement insuring that the mutual intent of the parties is realized.

The Employer has suggested that the Union bears the burden of proof in this case. Given the nature of the dispute, many arbitrators would agree that the Union bears the burden of not only coming forward, but the burden of persuasion. While I have no quarrel with this general observation, I would hope that rather than focusing on the burden of proof, parties in disputes of this nature each provide as much evidence as necessary to establish an adequate and complete record, thus, increasing the probability that the arbitrator's resolution will be appropriate.

Before beginning the analysis, it is important that the parties understand that the Opinion and Award in this case is strictly confined to the facts and circumstances contained in this record. If any of the facts and circumstances were to change, then perhaps my decision would have changed. The point is that the resolution of this dispute, as I have outlined in this Opinion and Award, applies only and exclusively to this dispute and the parties should not conclude that the findings herein are applicable in any other dispute. The reasons for the narrow focus of this decision should become obvious.

One thing that must be kept in mind, and which is very important, is that the work which the Employer expected the grievant to perform on straight-time, and thus changed her schedule to include, was work that she had performed in the past. In other words, in the past the grievant would work her normal shift and then attend the meetings and be paid overtime. However, the evidence establishes that she did perform this work in the

past. The point is that this is not a situation where the grievant was given additional work to perform.

It would be appropriate to start the discussion with a look at the contract language.

Article IV - Management Rights, clearly indicates, inter alia, that the Employer has the right to determine schedules of work, except as otherwise specifically provided for in the agreement.

Article XXIV - Shift in Schedule Preference, specifically Section 1.a. and b., defines both shifts and work schedules. It should be noted that a shift is the daily work period between the starting and quitting time of such period. This doesn't include the lunch period. A work schedule is defined as a schedule of workdays and shifts during a workweek. The schedule also includes off-duty days. Section 2 recognizes that seniority is used as a basis of shift and work schedule assignment.

Section 3.a. of Article XIV deals with bidding and there is language establishing that bidding is not required in a department/division where all employees in a classification work the same eight-hour shift and work schedule. Clearly this language contemplates that employees in a department/division may work different eight-hour shifts and work schedules.

Directly referenced by the parties is the language in paragraph b of Section 3 of Article XIV. That language establishes that if shift and work schedules are changed for more than five days, and management knew of the change more than 72 hours in advance, the opening shall be posted. This language clearly anticipates that there may be changes in a work schedule or shift which are less than five consecutive workdays.

Furthermore, heavily relied upon by the Employer is the language in Section 5 of Article XVI. It relates that nothing in the article should be construed to limit the Employer's right "to establish, change, enlarge or decrease shifts or work schedules.

Article XV contains the overtime provisions and generally outlines the various aspects of overtime administration. It does not contain any provision guaranteeing overtime. It does define a normal workweek as 40 hours, not including meal periods. The normal workday is defined as eight hours, unless an individual is "regularly scheduled otherwise" and does not include meal periods.

The Maintenance of Standards language, Article XXXIV, Section 1, has been referenced by the Union. In essence, the language provides that conditions of employment not otherwise contained in the contract which relate to wages, hours, overtime differentials and generally working conditions, shall be maintained at the standards in effect at the time the contract was signed.

If we rely on the contract language as it is written, it would be very easy and reasonable to conclude that the language clearly recognizes the Employer's right to change a shift, i.e., the daily work period between the starting and quitting time of such period, exclusive of lunch period. However, the Union maintains that there is a practice which establishes that this language, which it suggests is ambiguous, should be construed to mean that the Employer cannot change a particular day shift except in an emergency unless it changes all of them uniformly. I am not convinced that the record supports such a proposition.

First of all, the language seems straightforward and clear. Nonetheless, even if we assume that it is ambiguous enough to examine a past practice, there is a real question of whether a practice can or did exist in this dispute.

I consider past practices, which are often called binding past practices, to be nothing more or less than an agreement or understanding reached by the parties which is expressed by their actions rather than by the written word. A past practice reflects the mutual intent of the parties to react to a situation in a consistent and uniform manner. Practices have also been characterized as unwritten agreements establishing benefits or other aspects of the relationship.

In general terms, arbitrators have utilized past practice in various fashions. For instance, past practice is often utilized to interpret ambiguous language. The logic is that if the language is ambiguous, the manner in which the parties have consistently reacted to it or utilized it, establishes their mutual understanding and thus the past practice defines the ambiguous language. Additionally, past practice is often considered to provide what I call a substantive term of employment. In other words, the practice fills gaps in language or establishes a condition of employment between the parties which can be enforced as any other element of an agreement. Furthermore, past practice has been used, admittedly in a very limited basis, as evidence that the parties by their actions have agreed to change clear contract language. In most cases this would be treading on thin ice, but there are a few situations where the evidence is so overwhelming that the practice establishes a change in clear contract language.

The third use of a practice I have mentioned above is significant because generally arbitrators will take the position that clear contract language, as I suggest we have in this case, will always prevail over a conflicting past practice.

The study of past practice is an interesting excursion and there have been a multitude of decisions issued by arbitrators indicating when practices can be established, how they are altered, how they are eliminated, what can become a practice, etc. However, I don't see the need for engaging in that excursion in this Opinion and Award.

It is important to understand that past practices do not take away or diminish an employer's right to react to a situation when that right is specifically recognized in the contract. For instance, if the Employer has the right to decide what tools will be used, the fact that for 25 years it used a single-bit drill doesn't mean that a past practice has developed preventing the employer from changing to a multi-bit fixture. To state it in another fashion, when management has the right to determine how a particular function shall be performed or, as we have in this case, the right to decide the specifics regarding shifts and work schedules, the fact that it hasn't changed a shift or a work schedule in many years doesn't mean that a practice has developed which prevents it from doing so. In other words, past practices should not be utilized to prevent the Employer from changing management's way of doing things if management otherwise has the authority to change the way it performs a certain managerial function.

In this case I am convinced that there is no binding past practice which prevents the Employer from changing the grievant's work shift as it has done. The contract language clearly gives the Employer the right to change work schedules and shifts. Even

though it chose not to do so for 20 years doesn't mean that it is now prevented from doing so on the basis that a practice has developed because of its failure to change shifts or work schedules.

The Union has also argued that the changes in the grievant's shift and work schedule implemented by the Employer in this case could not be implemented absent a side agreement or a supplemental understanding between the parties. It has presented evidence establishing that other proposed changes in scheduling have been the subject of agreements. The Employer's evidence suggests that such supplemental agreements have only been instituted to modify or avoid the impact of language in the Collective Bargaining Agreement.

I am persuaded that if the Collective Bargaining Agreement allows the Employer to do what it did in this case, a supplemental agreement is not necessary. Furthermore, after examining the supplemental agreements in this record and carefully analyzing the testimony, I am persuaded that the Employer is correct; that is, that supplemental agreements are not necessary unless the actions taken would otherwise violate the Collective Bargaining Agreement. So the absence of a supplemental agreement in this dispute does not impact the ultimate resolution.

Nor do I agree that the Maintenance of Standards clause, Article XXXIV, impacts on the resolution of this dispute. The language provides that conditions of employment not otherwise "provided for herein" shall be maintained at the standards in effect at the time the contract was executed. The reason it does not apply is because the condition of employment referenced in this dispute, i.e., changing work schedules and shifts, is

specifically controlled in the Collective Bargaining Agreement. Thus, the Maintenance of Standards clause does not apply.

Certainly the Union has voiced sincere and appropriate concern that the Employer should not be given the *carte blanc* right to change shifts in such a manner as to impose burden upon employees as would exist if shifts were changed to provide different starting times during various days during the week. I agree with the Union that it would be a very unfortunate circumstance, but this decision doesn't give the Employer the right to do such changing. As I indicated, this decision is focused on the particular facts in this case.

The grievant had always been performing the work in question. The only change in her shift was to allow the Employer to have the work performed on a straight-time basis.

One of the issues raised by the Union is that the Employer does not have the right to schedule shifts to avoid overtime. It has referenced other arbitrators' decisions in this area. Nonetheless, I cannot adopt the Union's position. There is nothing in this Collective Bargaining Agreement which provides that the Employer cannot change shifts in order to get work done which would have otherwise been done on overtime. Again, this does not give the Employer the blanket right to shuffle and manipulate shifts in an unreasonable manner. To state it in another fashion, in this case I find that the Employer did not violate the contract by changing the grievant's shift on the days involved to allow her to attend the meetings without incurring overtime expense.

In summary, after carefully analyzing the entire record, I am forced to come to the conclusion that the grievance must be denied.

AWARD

The grievance is denied.

MARIO CHIESA

Dated: September 24, 1999