Kahn #3

ARBITRATION OPINION AND AWARD

EMPLOYER

-and-

UNION

Subject: Shift Scheduling - Union Agreement

December 21, 1998

Statement of the Grievance:

"The Union is in receipt of a shift bid for Customer Service, specifically in the billing section, with a posted shift for the Office Assistant IV. The posted shift is in fact a flex schedule allowing the employee a different amount of time for lunch period and a different time to end the work day. The parties have negotiated no such flex time arrangement and, therefore, finds the Employer in strict violation of Article XIV."

"Suggested Adjustment: Immediately rescind the flex time schedule offered to the OA IV in Billing. Immediately post a straight time shift for the affected employee and any and all things to make the Union and its members whole."

Contract Provisions Involved:

Articles IV, XIV, XXXIV and XXXVI of the January 1, 1995 - December 31, 1997 Agreement.

Grievance Data:	**Date:**
Grievance filed:	November 14, 1997
Case Heard:	November 10, 1998
Post-Hearing Briefs Exchanged:	December 16, 1998

Statement of the Award:

Because scheduling in the Water Systems Customer Service Billings Section was governed by a Memorandum of Understanding between the parties, it was a violation of the terms of the Memorandum to change the schedule without obtaining the Union's consent. To that extent, the grievance is sustained. No finding is made with respect to the precise schedule agreed upon by the Supervisor and the employee.

Neither party has clearly prevailed in this case. Therefore, the parties are directed to share the fee and expenses of the arbitrator, in accordance with Article IE.

BACKGROUND

This grievance from the Union protests Management's action with respect to the setting of the schedule for the Office Assistant IV (OA IV, hereafter), at the Water System Department Customer Service Billing Division, in November 1997.

The evidence is that a new supervisor came to the Customer Service office in August 1997. At that time the clerical employees were working four ten-hour days. When the Administrator, Person 1, reviewed the schedules, she believed it would be best for her to have the lead clerical worker, the OA IV, at work on five days. The hours would be 7:00 a.m. - 4:00 p.m., Monday through Friday. Person 1 communicated that request to the OA IV, who then asked if she could have a different schedule on Thursday. Person 1 agreed with the OA IV to extend the Thursday workday, permitting her a longer lunch break.

When the office posted the OA IV position, it was bid with a shift assignment "to vary

based upon need of service." The Union protested, claiming it could not police the Agreement if it did not know with certainty the clock times each member was working. Management then reposted the job showing "Mon, Tues, Wed, Fri: 7:00-4:00, Thurs.: 7:00-4:30". That is the posting which prompted this grievance.

The Employer insists the schedule afforded the OA IV does not violate the Collective Bargaining Agreement. It cites these provisions:

> ARTICLE IV. MANAGEMENT RIGHTS
>
> Section I. Except as otherwise specifically provided in this Agreement, the Management of the Employer and [sic) the direction of the work force, including but not limited to ... the right to determine schedules of work ... are vested exclusively in Management. ...
>
> ARTICLE XIV. SHIFT AND SCHEDULE PREFERENCE
>
> Section I. 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 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. (Underlining added)

The Union insists, for its part, that the City, absent agreement with the Union, has never posted a schedule with varying starting and ending times in a work week. The Union further cites Article XXXIV, which provides:

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.

Person 2, Union 1st Vice-President, testified about instances that the Union believes illustrate the practice of the Employer obtaining Union agreement in order to establish a schedule with different starting and/or ending times. He referred to a Supplemental Agreement covering the Comptroller's office that called for employees involved with issuing paychecks to start earlier on Tuesday every other week. By agreement with the Union, utility workers at Place A and Place B have rotating shifts and work weeks. In other instances, agreements with the Union allowed the scheduling of workers at the Place A Filtration Plant, the Wastewater Treatment Plant and the Water Systems Customer Service Billings office to work four ten-hour days.[1]

DISCUSSION AND FINDINGS

The facts and issue presented for decision in this case ask whether it was a violation of the Agreement for Management, without Union agreement, to establish a work schedule for the OA IV in Water Systems Customer Service Billings, a schedule that contained a different ending time on one day of the work week.

The principle is well-settled that management possesses scheduling authority as an integral element of its operational decisions. Management must exercise this right with reasonableness and its decisions, if protested, must be shown to be related to demonstrable

[1]The four ten-hour day schedule is not shown to have varying starting and ending times but is rather a departure from the traditional five-day work week, agreed to with the Union.

business needs. The Union retains a right to challenge a scheduling decision it believes either violates the Agreement or is contrary to the rule of reasonableness.

In the case at hand, the Employer and the Union had an agreement, a MEMORANDUM OF UNDERSTANDING concerning WORK SHIFTS IN THE WATER SYSTEM CUSTOMER SERVICE OFFICE/BILLING SECTION (Joint Exhibit 4-c). That agreement established the four day/forty hour work week for the Section's clerical employees and decided how other related contract provisions -- when overtime will be paid, defining the "workday" and "workweek", when holidays will be observed -- would be affected. When the supervisor and the OA IV negotiated a change in the OA IV's hours, they in effect amended the terms of the Memorandum of Understanding. That is the change triggering this dispute.

The Supervisor, for business reasons, wanted the OA IV to work five eight-hour days a week, instead of the before-scheduled four ten-hour days. The OA IV said she would work the five-day week but she wanted a longer lunch period on Thursdays in order to work out at the gym. That was acceptable to the Supervisor and the deal was struck. The reality of the situation is that the OA IV obtained at least a modicum of a flex-time schedule. That is, she got to have a longer lunch break than is customarily provided and worked thirty minutes later in the day. Management insists that absent an express prohibition in the Agreement -- and none is asserted -- it has contractual authority pursuant to Article XIV, §5 to "change ... shifts or work schedules". According to the Union, a past practice engrafted onto Article XIV, §5, obligates the Employer to secure the Union's agreement before establishing a schedule with varying start/end times.

My judgment is that because the parties had an agreement specifically covering the schedule for the OA IV's work area, the Memorandum of Understanding, it was necessary to

secure the Union's consent before amending that agreement. The Memorandum is a part of the Agreement, incorporated by Article XXXVI. An individual employee is not authorized to make a change in the Agreement, which is essentially what the OA IV consented to. In reaching this conclusion, I am mindful that the parties did not make an argument, either way, about the effect of the Memorandum on the disputed issue. While ordinarily an arbitrator must be cautious about raising a theory neither party has addressed, the Memorandum is critical to the entire dispute and must be considered.

One additional comment based upon the particular factual circumstances of this case lends further support for the finding that the agreement reached between Person 1 and the OA IV, ignoring the Union, violated the contract. Where a collective bargaining agent represents employees, setting individual working conditions between a supervisor and an individual employee erodes the role of the union. The Recognition clause (Article I) is intended to guard against bypassing the Union and possibly undermining the bargain struck in negotiation of the Collective Bargaining Agreement. I do not mean that Union consent to any and all schedule change(s) is required by Article I, but where consent is required, the Union must be the other party to such agreement.

The essence of the conclusion here is that the Employer's approval of Supervisor Person 1' and the OA IV's "negotiated" schedule change constituted a procedural violation, depriving the Union of its proper voice in amending the Memorandum of Understanding in place. I make no finding that the schedule itself was or was not improper.

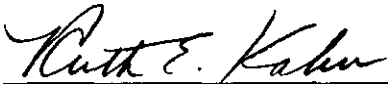
The Union expressed its concern that approval of the change to the OA IV schedule will enable the Employer to promulgate irregular and burdensome schedules -- it cites as examples, split shifts, hours varying daily and/or weekly, sporadically -- that encroach inequitably upon

the affected employees' lives. I think the OA IV's schedule in this case does not come close to the kinds of schedules worrying the Union. I emphasize, however, the ruling in this case neither approves nor disapproves the substance of the schedule worked out between Person 1 and the OA IV, for such finding is unnecessary to the finding that the Union should have had a part in amending the Memorandum of Understanding. It was stated at the hearing that the OA IV is currently working a schedule made up of the same clock times each day. Hence, there appears to be no need for any other remedy apart from the finding of the violation, and none will be afforded.

AWARD

Because scheduling in the Water Systems Customer Service Billings Section was governed by a Memorandum of Understanding between the parties, it was a violation of the terms of the Memorandum to change the schedule without obtaining the Union's consent. To that extent, the grievance is sustained. No finding is made with respect to the precise schedule agreed upon by the Supervisor and the employee.

Neither party clearly has prevailed in this case. Therefore, the parties are directed to share the fee and expenses of the arbitrator, in accordance with Article IX.



RUTH E. KAHN, Arbitrator