

IN THE MATTER OF THE ARBITRATION)
BETWEEN)
STATE OF OREGON)
OREGON HEALTH SCIENCES UNIVERSITY)
"THE EMPLOYER" OR "THE HOSPITAL")
AND)
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES)
LOCAL 328)
"AFSCME" OR "THE UNION")

ARBITRATOR'S
OPINION
AND
AWARD
Steve Azorr Grievance

HEARING: None

EVIDENCE RECEIVED: May 5, 1992

BRIEFS RECEIVED: May 5, 1992

ARBITRATOR: Timothy D.W. Williams
9 Monroe Parkway, Suite 280
Lake Oswego, Oregon 97035-1425

REPRESENTING THE HOSPITAL:

Byron Phillips, Associate Director of
Personnel/Labor Relations.

REPRESENTING THE UNION:

Diane Lovell, Council Representative

EXHIBITS

Joint

- A. 1989-92 Collective Bargaining Agreement
- B-1. Official Notice of Grievance - 12/12/90
- B-2. Memo to Mark Cline - 11/14/90
- B-3. Letter to Diane Lovell - received 12/27/90
- B-4. Appeal of a Grievance - 1/3/91
- B-5. Letter to Diane Lovell - 1/11/91
- B-6. Appeal of a Grievance - 1/25/91
- B-7. Memorandum to Ralph Tuomi - 2/8/91
- B-8. Letter to Diane Lovell - 3/8/91
- B-9. Appeal of a Grievance - 2/28/91
- B-10. Letter to Diane Lovell - 3/20/91
- B-11. Appeal of a Grievance - 3/29/91
- B-12. Letter to Jan Weeks - 4/19/91
- B-13. Letter to Timothy Williams - 8/23/91
- C. Memo to All DPS Personnel - 4/3/90
- D. Memo to All DPS Personnel - 6/20/90
- E. Memo to Mark Cline - received 6/21/90
- F. Memo to All DPS Officers - 10/12/90
- G. Memo to All DPS Personnel - 12/17/87
- H-1. Computer Coded Definitions
- H-2. Computerized work schedule - Oct - Nov
- H-3. Computerized work schedule - Oct - Nov
- H-4. Computerized work schedule - Oct - Nov
- H-5. Computerized work schedule - Oct - Nov

BACKGROUND

The State of Oregon, Oregon Health Sciences University (hereafter "the Employer" or "the Hospital") and the American Federation of State, County and Municipal Employees (hereafter "the Union" or "AFSCME") agreed to submit a dispute to arbitration. The parties determined that an arbitration hearing would not be necessary but that they could provide to

the Arbitrator in written form all evidence and argument necessary for him to render an opinion and award. Thus, the award, in this case, is based on the written evidence provided by the parties and the briefs that accompanied the submission of evidence.

STATEMENT OF THE FACTS

As part of its submission, the parties stipulated to the following facts:

Steve Azorr has been employed as a Security Officer in the OHSU Public Safety Department since November, 1987.

The Union filed and processed a timely grievance. The initial grievance was filed December 12, 1990 (Exhibits B1 through B13).

The Department of Public Safety scheduled employees on 4/10 shifts rotating every three months from days to swing to graveyard in May, 1990. When the rotating 4/10's were initiated employees bid for days off and the shift on which their rotation would begin. The shift hours were Days: 0600 - 1600, Eves: 1400 - 2400, Nights: 2200 - 0800.

The schedule for the remainder of 1990 was posted and initialed by all employees in April, 1990. (Exhibit C1-3)

On June 20, 1990 a bid for a vacated position was posted and initialed by all employees. The position rotated to swing shift on July, 1990 and had Monday, Tuesday and Wednesday as scheduled days off. (Exhibit D)

Mr. Azorr bid for and received the position (se Exhibit E) after discussing the scheduled days off with Assistant Director Mark Cline. Each party understood that beginning with the rotation in January, 1991 Mr. Azorr would actually have Sunday, Monday and Tuesday off.

On October 12, 1990 the tentative schedule for 1991 was posted and initialed by the employees in the Department (Exhibit F1-5). On approximately October 12, 1990 the grievant told his supervisor that his days off should be different than those posted for January, 1991. Mr. Cline

said that Mr. Azorr's days off would not change until a supervisor was properly oriented to his/her responsibilities for weekend coverage and that would only be for a relatively short period of time.

On November 4, 1990 Mr. Azorr wrote a memo to assistant Director Mark Cline requesting that the projected schedule be changed to reflect the days off he bid for (Exhibit B2). Mr. Cline did not respond to Mr. Azorr's November 14 memo. The grievance was filed on December 12, 1990 (Exhibit B1).

Mr. Azorr worked the posted schedule for four weeks in January, 1991.

Mr. Azorr was returned to working the schedule he bid for in February 1991.

The Department at the time had a stated policy of granting only one person a full day of paid leave on any one day on the day shift (Exhibit G).

The Department at the time scheduled a minimum of three employees including a supervisor on Sunday day shift.

On Sundays beginning October 7, 1990 through March 24, 1991 two officers and no supervisors were scheduled to cover the day shift on seven occasions as a result of granting vacation, military leave or sick time off to a third employee (Exhibit H).

STATEMENT OF THE ISSUE

As part of the fact stipulation the parties provided the following statement of the issue:

1. Did the Employer violate the terms of Article 16, Job Bidding and Article 28, Work Week and Work Scheduling when it delayed the implementation of a schedule change the grievant requested as a result of a job bid?
2. If so, what is the appropriate remedy?

APPLICABLE CONTRACT LANGUAGE

ARTICLE 16 - JOB BIDDING

- 16.1 A vacant position is defined as a new position or the opening of an existing position caused by resignation, retirement, etc. The Agency may decide to assign the work to employes within the work unit or fill the vacant position. When the decision is made to fill the position it must be open to job bid.
- 16.2 An employe may bid for a vacant position which occurs within his/her work unit and in the same job classification if the vacant position involves a different shift, days off, or hours of work, or where the assigned duties of the vacant position are substantially different than those assigned the bidding employe. The bidding employe with the greatest seniority shall be assigned to the vacant position provided he/she is qualified to perform the work. This provision will not be employed in changing only assigned duties or work stations.
- 16.3 When a vacant position is to be filled it shall be posted in the work unit for at least five (5) days. The posting will include the date, hours of work and days off or rotation of the position. The most senior bidding employe shall be assigned to the vacant position within ten (10) days of its posting or opening date, whichever is the latest. If no bids are received, the Agency may re-assign the least senior employe. The Agency may make temporary assignments without a bid, pending completion of the bid process or for training purposes.
- 16.4 A vacant position may be filled without regard to section 1 and 2 if the vacancy is the result of two (2) previous vacancies being filled by job bidding.
- 16.5 In the event it becomes necessary to move part of the work unit to a different shift(s), the position(s) on the different shift(s) will be posted for five (5) days and bid on the basis of seniority. If no one bids for the position(s), it will be filled by reassigning the least senior employe(s).
- 16.6 A trial service employe may not job bid.
- 16.7 If an employe bids on and receives a new position in accordance with the provisions of this Article, that employe may not bid into another position for nine (9) months. This restriction does not preclude an employe from applying for a position at any time.
- 16.8 There shall be no recruiting prohibition while the bidding is in progress.

* * * * *

ARTICLE 28 - WORK WEEK AND WORK SCHEDULING

28.1 Work Week and Extended Work Week. An employe's work week is a fixed and regularly recurring period of one hundred sixty-eight (168) hours seven (7) consecutive twenty-four (24) hour periods. The standard work week is 12:01 am Monday through 12:00 midnight Sunday. Changes in the standard work week are permitted, but the employe shall not suffer loss of overtime.

Pursuant to an agreement of understanding between the Agency and the employe before performance of work, an extended work week of fourteen (14) consecutive days can be accepted in lieu of the work week of seven (7) consecutive days for the purpose of overtime compensation.

28.2 This Article is intended only as a basis for recognizing overtime and shall not be construed as a guarantee of hours of work per day or per week.

28.3 Work Schedules.

a. Standard Work Schedule. A work schedule with the same starting and stopping time on five (5) consecutive eight (8) hour days, within a work week. Agency proposed alternate work schedules not in force at the time of this Agreement may be adopted with thirty (30) days notice and written explanation to the employe(s) and Union, or earlier if approved by the majority of affected employes.

b. Alternate Work Schedule. A work schedule which has other than five (5) consecutive eight (8) hour days. Examples include: 1) part-time, 2) a schedule with different starting and stopping times, 3) rotations, 4) special work schedules (i.e. four [4] ten [10] hour days or four [4] nine [9] hour days and one [1] four [4] hour day, etc.), 5) flex-time, etc.

c. Requests for Special Work Schedules. An employe may request and the supervisor may grant an employe's written request for a special work schedule, a schedule with different starting and stopping times or flex time. Such requests shall be granted or denied based on operating requirements.

28.4 Rest Periods. A rest period of fifteen (15) minutes for employes working less than ten (1) hours per day and twenty (20) minutes for employes working ten (10) hours or more shall be permitted for all employes during each consecutive work period of four (4) hours or more which shall be scheduled by the supervisor in accordance with the operating requirements of each employe's duties and shall be considered on-duty time.

Upon the agreement of an employe and the supervisor, rest periods may be taken in conjunction with the scheduled meal period on a regular basis. If, on an occasional basis, the work does not allow the scheduling of rest periods, the employe and supervisor will schedule the missed rest period at a mutually agreed upon time.

28.5 Non-Duty Meal Period. All employes except as noted in Section 6 of this Article shall be granted a non-duty meal period during each work shift. Each non-duty meal period shall be scheduled in the middle of the work shift, or as near thereto as possible and shall be no less than thirty (30) minutes nor more than sixty (60) minutes.

28.6 On-Duty Meal Periods. Employes required to take meal periods in designated areas and/or maintain radio contact with their department will have their meal period considered on-duty time.

28.7 Clean-Up Time. Whenever a job being performed or the material or equipment has caused an employe to become dirty, the employe shall be allowed a reasonable amount of time without loss of pay prior to any meal period or prior to the completion of their work day to clean themselves. In those Hospital areas where special hospital clothing is required and furnished by the Employer, changing into street clothing will be considered as part of the employe's work day.

28.8 Posting of Alternate Work Schedules. Alternate work schedules shall be posted at least fourteen (14) days in advance and shall be in cycles of no less than 28 days. Established work schedules will not be changed except in an emergency or when there is mutual agreement between the employe and the supervisor.

28.9 An employe normally scheduled for weekend work may trade weekend work with the mutual consent of the other employe and their immediate supervisor provided that no overtime will result and that

employees make such trades within the same pay period.

POSITION OF THE UNION

The Union views this case as a very simple and straightforward matter. As the term is used in the labor agreement, the grievant works an alternate work schedule as defined in Article 28.3(b). Consistent with Article 16.2 the grievant bid a vacant position and was scheduled to have Sundays off starting January of 1991. One of the key reasons he bid the position was to obtain a day off on the weekend. Based on seniority he was awarded the bid.

In the Union's view, the grievant now had an "established work schedule" as per Article 28.8 which was open to change only in the case of an emergency or upon mutual agreement between the employee and the supervisor. The stated reason for changing the grievant's schedule (the Employer's need to train a new supervisor) does not constitute an emergency, argues the Union, so that provision does not apply. The grievant did not mutually agree to have his schedule changed and therefore that language does not cover the matter. Thus the Employer's unilateral change of the schedule violates the language of Articles 16 and 28 as read together.

The Union additionally points to the fact that the Employer regularly chose not to have a supervisor present on Sunday. Thus its arguments with regard to the need for a supervisor are without merit. Even, however, if there were some merit to the Employer's concern over the presence of a

supervisor, that problem should not be resolved on the backs on the bargaining unit members. It is a management problem, contends the Union, and could have been resolved by altering the work schedules of other supervisors.

The bottom line, the Union argues, is that the employees strongly contested against the creation of a rotating alternative work schedule. It was imposed on them by management. It creates substantial hardships in terms of family life, sleeping patterns, etc. Thus the language in the labor agreement which provides some stability with regard to work schedules has substantial importance to the employees. As a result effective maintenance of this language is important to the Union and the bargaining unit.

Based on the above arguments the Union urges the Arbitrator to uphold the grievance and find that the Employer violated the labor agreement when it altered the grievant's work schedule for the month of January 1991. As a remedy the Union requests that the schedule be changed back to the original bid and that the grievant be paid ten hours at the overtime rate for each Sunday he did not have off.

POSITION OF THE EMPLOYER

The Employer disagrees with the Union and takes the position that the grievance is without merit and should be denied. It supports this position with three basic arguments. First, the Employer looks to the language of Article 16 and concludes that there are no assurances in that article that

once an employee bids a shift that he/she shall always work that shift. In Article 28 the Employer retained to itself the right to schedule shifts based on reasonable business needs.

The facts of this case are that the grievant did bid a new shift and worked that shift for six months without any problem. Then, with 80 days of notice, which is far more than required by Article 28, he was notified that his shift would be changed and provided a legitimate operating reason for that change. Thus the change was in full compliance with the work scheduling requirements of Article 28.

The Employer acknowledges that it had in the past staffed the Sunday day shift with only two employees. There is a difference, however, between staffing with two employees and scheduling with two employees. By scheduling three employees, one of the three can be granted a vacation day, a sick leave day or even military leave. If only two employees had been scheduled, then the Employer would be required to find a replacement employee in the event of an illness or a vacation day to one of the two. The bottom line is that the Employer needs to schedule three employees for the Sunday day shift in order to avoid the inconvenience of finding a replacement employment and the cost of paying overtime.

Based on the above three arguments the Employer urges the Arbitrator to deny the grievance and find that the agency "acted well within its rights as specified in the agreement to make the change" (Hospital's brief, page 4).

ANALYSIS

There is no dispute that the grievant bid into a position, based on his seniority, that was slated to have Sundays off starting January of 1991. There is also no dispute that when the 1991 work schedule was posted, his schedule had been modified for the first quarter (January-March) so that his days off were Monday, Tuesday and Wednesday. The stipulated facts additionally note that the grievant was returned to a schedule with Sundays off as of the month of February. Thus the grievance focuses on the fact that the grievant worked Sundays during the month of January 1991.

Both the Employer and the Union discussed the reasons that the grievant's shift was modified in January in their respective briefs and disagreed as to the merits of these reasons. In my view there is little value in exploring why the Employer changed the shift assignment as long as that change was not arbitrary or capricious. The right of the Employer to schedule work is protected by Article 2 and is limited only by specific provisions of the labor agreement. Thus the Employer's discretion is subject to Arbitral review only on the basis of whether it violated a specific provision of the agreement or was arbitrary or capricious.

While the basis of the Employer's decision can clearly be debated as to the wisdom of alternative choices, I find that the evidence clearly demonstrates the decision to change the grievant's work schedule was not arbitrary and capricious.

Based on this finding, I conclude that the differences between the Union and the Employer as to the merits of the action have little bearing on this case.

Therefore the essential question focuses on the language of the agreement and the matter of whether the disputed schedule change violates this language. If it did, then it must be reversed regardless of the merits. If not, and with the finding that the action was not arbitrary and capricious, then the action must be sustained and the grievance denied.

The Union identified Article 16 and Article 28 as the pertinent contract provisions. The Employer agrees with Article 28 but finds no relevance in the language of Article 16. I will continue the analysis by first examining the pertinent parts of the language of Article 16 in light of Employer and Union arguments and then turning to the language of Article 28.

Article 16

The pertinent portion of the language of Article 16 comes in Section 16.2:

An Employee may bid for a vacant position which occurs within his/her work unit and in the same job classification if the vacant position involves a different shift, days off, or hours of work, or where the assigned duties of the vacant position are substantially different than those assigned the bidding employee. The bidding employee with the greatest seniority shall be assigned to the vacant position provided he/she is qualified to perform the work. This provision will not be employed in changing only assigned duties or work stations.

(Joint Exhibit A, pages 18 and 19)

This language clearly applies to the grievant's situation. He bid to move into a position, previously held by employee Coller, specifically to change his days off during the work week. It is the Union's position that since the grievant successfully bid, based on his seniority, to a shift with times favorable to his interests, that the language of Article 28 prohibits a unilateral change in the grievant's work schedule. The Employer argues to the contrary that "there are no assurances found anywhere in Article 16 Job Bidding that an employee shall always work the shift received as a result of a bid" and that the only restrictions placed on the Employer by Article 28 is that the change be posted in a timely manner, which it was. (Employers Brief, page 3).

Does Article 16 provide assurances to employees who bid into a shift to acquire a more favorable work schedule that the schedule change has permanence? While the language in question clearly does not convey a sense of absolute permanence, the fact that it grants to employees the right to bid a shift based on the days off implicitly places restrictions on the freedom of the Employer to alter the scheduled time of the shift following the bid. Otherwise the value of the bidding would be nonexistent. If, for example, an employee bid from the night shift to the day shift based on his/her seniority but the Employer was free to reschedule that shift back to the night shift, then the original bid was meaningless. A basic axiom of contract interpretation is that language cannot be read as meaningless.

One difficulty, however, with the language of Article 16.2 is that it does not distinguish between a standard work schedule and an alternate work schedule as defined in Article 28. Since it does not distinguish I find that the language must be read to be inclusive of both. But, even a casual reading of the language of Article 16.2 shows that it is more easily applied to the standard work schedule than to an alternate work schedule. Thus any interpretation must carefully explore the oddities of the alternate work schedule. I will turn to the language of Article 28 to pursue this exploration.

Article 28

Once an employee on the alternate work schedule bids a shift per Article 16.2 to acquire more favorable days off, does Article 28 protect that schedule for the employee? Or, as the Employer argues, does Article 28 permit a change of the work schedule if the change is timely posted?

The grievant clearly worked an alternate work schedule as defined in Article 28.3(b). The only language in Article 28 which deals with the subject of the Employer's right to establish the alternate work schedule is found in Article 28.8. That language reads as follows:

Posting of Alternate Work Schedules. Alternate work schedules shall be posted at least fourteen (14) days in advance and shall be in cycles of no less than 28 days. Established work schedules will not be changed except in an emergency or when there is mutual agreement between the employee and the supervisor.

A review of the above language reveals that the heart of this dispute are the words "established work schedules" found at the beginning of the second sentence. The Employer's case is that there is no established work schedule until it is posted, and as long as it posts the schedule 14 days before it commences then it is free to modify schedules as business needs dictate. Under this interpretation, when an employee bids a position, per Article 16, because of the days off accompanying that position's work schedule, the employee is guaranteed the work schedule only through the final day of the schedule posting in effect at the time of the bid.

In the Union's view, the *effective work schedule* is that in place at the time of the bid. That being the case, the days off associated with that schedule can only be changed "in an emergency or when there is mutual agreement between the employee and the supervisor" and not by unilaterally posting a new schedule.

Having reviewed both of the above arguments, I find the Employer's argument the more persuasive. The problem with the Union's interpretation of the phrase "established work schedule" is that it makes almost meaningless the first sentence which speaks to posting the work schedule. Why post a new work schedule if the existing schedule can only be changed by mutual agreement or in the event of an emergency? The new posting would have to be simply a continuation of the old posting. Or, in the alternative, the Employer and the employees could reach mutual agreement as to schedule changes;

but then why have a 14-day waiting period? More importantly, to conclude that all schedule changes must be by mutual agreement contradicts the language of Article 2 - Management Rights, which specifically assigns to the Employer the right to determine work schedules.

For the above reasons I conclude that an established work schedule is one that has been posted. Therefore, once it is posted the work schedule cannot be changed except in an emergency or by mutual agreement. This interpretation of the language of Article 28.8:

1. Protects the right of the Employer to schedule work as per Article 2,
2. Establishes that when an employee bids a position per Article 16.2, that he/she has assurances that the work schedule associated with that position will not change through the posting period in effect at the time of the bid as per Article 28.8,
3. Assures that once an alternative work schedule has been posted, it becomes the established work schedule not subject to change except for an emergency or by mutual agreement.

While it might appear that this arbitration decision ought to end at this point, a careful review of the facts suggests otherwise. The parties stipulated that the grievant bid for an open position based on assurances that the next posting for that position would include Sundays off. Article 16.2 permits a bid for a position based on the days off associated with it. As per the above analysis, Article 28.8 provides that an employee who bids a position based on its days off has a right to those days off through the effective date of the work schedule posting. The work schedule is

posted for a full calendar year in 1991. The grievant bid the position, however, because the Employer specifically assured him that the position would have Sundays off during the 1991 work year. As I read the language of Articles 16 and 28, the Employer is under no obligation to provide such assurances to employees. I further concluded, however, that if the Employer chooses to make such assurances and the employee bids a position based on those assurances, that the assurances constitute a posting as per Article 28.8.

As previously noted, once the work schedule is posted, it becomes the *established work schedule* and Article 28.8 prohibits change in that schedule except for an emergency or unless by mutual agreement. I find that the grievant's work schedule in January 1991 was not changed for an emergency as per the normal meaning of that word. Further, it was not changed by mutual agreement as is evidenced by his immediate challenge to the change. Thus I must conclude that the Employer's unilateral implementation of the change constitutes a violation of Article 28.8. An award will be entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION)
BETWEEN)
STATE OF OREGON)
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"THE EMPLOYER" OR "THE HOSPITAL")
AND)
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES)
LOCAL 328)
"AFSCME" OR "THE UNION")

ARBITRATOR'S)
AWARD)

Steve Azorr Grievance)

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the opinion that accompanies this award, it is awarded that

1. The Employer did violate the terms of Article 16, Job Bidding and Article 28, Work Week and Work Scheduling when it delayed the implementation of a schedule change the grievant requested as a result of a job bid?
2. The Employer is directed to pay the grievant the additional compensation equal to the wages he received for working on each Sunday during January of 1991 and what he would have received had he been paid at time and one-half.
3. As per Article 12.5 I find the Employer the losing party and submit my bill accordingly.

Respectfully submitted on this the 8th day of July 1992 by


Timothy D.W. Williams
Arbitrator