

BEFORE MARTIN HENNER

ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN) **AAA Case No.**
) **75 390 00084 06**
) **LYMC**
THE WASHINGTON PUBLIC EMPLOYEES ASSOCIATION)
(UFCW LOCAL 365))
)
and) **OPINION**
) **and**
STATE OF WASHINGTON) **AWARD**
DEPARTMENT OF FISH AND WILDLIFE)
)
(Naylor – Work Schedule))
)
)
)
)
)

REPRESENTING THE ASSOCIATION:

**LESLIE LIDDLE
EXECUTIVE DIRECTOR
UFCW LOCAL 365**

REPRESENTING THE DEPARTMENT:

**CYNTHIA LERCH
LABOR RELATIONS MANAGER
DFW PERSONNEL DEPARTMENT**

HEARING HELD ON:

SEPTEMBER 27, 2006

AT:

OLYMPIA, WASHINGTON

DATE OF AWARD:

OCTOBER 31, 2006

INTRODUCTION

This arbitration arises out of a grievance filed by the Washington Public Employee Association (UFCW Local 365) (Association), on behalf of Deb Naylor (Grievant), against the State of Washington, Department of Fish and Wildlife (Department). The Grievant asserted that the Department violated the parties' Collective Bargaining Agreement (Agreement) when it refused to permit her to continue working an alternative work schedule after the effective date of the newly negotiated Agreement. The Department denied the grievance, claiming that there was insufficient justification for such an alternative work schedule to be authorized.

The grievance, not being resolved to the satisfaction of the parties, proceeded to arbitration before the undersigned, who was selected from a panel furnished by the American Arbitration Association. The matter was heard on September 27, 2006, in Olympia, Washington.

The Association was represented by Leslie Liddle, Executive Director of the Washington Public Employees Association, and the Department by Cynthia Lerch, Labor Relations Manager, Personnel Department. Both parties were afforded a full opportunity to offer written evidence, examine and cross examine witnesses, and submit arguments in support of their positions.

The parties agreed to submit written briefs directly to the Arbitrator, to be postmarked no later than October 20, 2006. In addition to faxed copies, the postmarked

briefs were received on October 23, 2006, by the Arbitrator, at which time the record was closed and the matter submitted for decision.

Both the Association and the Department made excellent presentations in support of their viewpoints, both at the hearing and in their written and closing arguments.

ISSUE

The parties failed to stipulate regarding the issue presented for determination at the hearing. They instead left it to the arbitrator to frame the wording of the issue. I have determined the issue to be:

Did the Department violate Article 6 of the Agreement when it denied the Grievant's request for an alternate work schedule? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE.

ARTICLE 6

HOURS OF WORK

6.1 Definitions

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E. Work Schedules

Workweeks and work shifts of different numbers of hours may be established by the Employer in order to meet business and customer service needs, as long as the work schedules meet federal and state laws.

6.2 Overtime-Eligible Employees (Excluding Law Enforcement Employees)

A. Regular Work Schedules

The regular work schedule for overtime-eligible employees shall not be more than forty (40) hours in a workweek, with starting and ending times as determined by the requirements of the position and the Employer. An employee may request different starting and ending times. The Employer may

adjust the regular work schedule with prior notice to the employee as defined in this Article.

B. Alternate Work Schedules

Workweeks and work shifts of different numbers of hours may be established for overtime-eligible employees by the Employer in order to meet business and customer service needs, if the alternate work schedules meet the requirements of federal and state laws, and do not result in overtime. An employee may request different workweeks and work shifts.

ARTICLE 33

MANAGEMENT RIGHTS

33.1 The Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, shall include but not be limited to, the right to:

- A. Determine the Employer's functions, programs, organizational structure and use of technology.
- B. Determine the Employer's budget and size of the agency's workforce and the financial basis for layoffs;
- C. Direct and supervise employees;
- D. Take all necessary actions to carry out the mission of the state and its agencies during emergencies;
- E. Determine the Employer's mission and strategic plans;
- F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;
- G. Determine or consolidate the location of operations, offices, work sites, including permanently or temporarily moving operations in whole or part to other locations.
- H. Establish or modify the workweek, daily work shift, hours of work and days off;

.....
33.2 The Employer agrees that the exercise of the above rights shall be consistent with the provisions of this Agreement

ARTICLE 44

ENTIRE AGREEMENT

- 44.1** This Agreement constitutes the entire agreement and any past practice or agreement between the parties, whether written or oral, is null and void, unless specifically preserved in this Agreement.
- 44.4** During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. Therefore, each party voluntarily and unqualifiedly waives the right and will not be obligated to bargain collectively, during the term of this Agreement, EXCEPT if the Employer intends to, make a change in a mandatory subject of bargaining that is not addressed in this Agreement, the Employer will notify the ASSOCIATION and, if requested, engage in collective bargaining.

POSITIONS OF THE PARTIES

THE ASSOCIATION

The Association recognizes that the Department has been granted in Article 33 of the Agreement, Management Rights, the authority to establish or modify an employee's hours and days of work. However, the Association contends that this general right is restricted by the terms of Article 6, specifically section 6.4.E and 6.3.B, which permit an employee to request different workweeks and work shifts and which specify that alternative work schedules are to be established to meet business and customer service needs.

In the Grievant's case, evidence was presented showing that the customer requirements and the business needs of the Department were best served by her requested alternate work schedule, wherein two days of the week she would commence work at 5 a.m., thereby being able to review incomplete data on the sport catch record cards and then be able to telephone recreational fishermen about questionable data on

their cards. The Association claims that restricting the Grievant to a schedule in which she started work later in the morning hampered her ability to reach the recreational fishers before they departed for work, creating difficulty in clarifying inaccurate data on the cards and thus hampering the mission of the Department.

THE DEPARTMENT

The Department contends that the Association has the burden of proving that it violated, misapplied, or misinterpreted the Article specified in the grievance. This burden has not been met.

The Department contends that it properly exercised its authority under its management rights when it defined agency-wide workweeks and work shifts. Article 6 gives the Department the discretion to establish alternate work schedules when such schedules would best meet the business and customer service needs of the Department. The authority and discretion for making such a determination of how to best meet its business and customer service needs is vested with management.

STATEMENT OF THE CASE

Washington State Public System Reform Act 2002 centralized all collective bargaining for employees of the State of Washington, effective July 1, 2005. The master agreements, which were negotiated to be effective on that date, replaced prior agreements which had been negotiated with various agencies.

In conjunction with this change, the Department's Director determined that agency efficiency would be improved if most employees worked regular Monday

through Friday hours and thus were available to confer and coordinate their activities.

Accordingly, the Director initially directed that employees generally work from 8 AM through 5 PM Monday through Friday, although deviations from that schedule would be approved for business and customer needs. In July, 2005, the Director clarified his earlier memorandum, indicating that as long as departmental offices were "open for business" from 8 AM to 5 PM each weekday, he was amenable to having supervisors grant flexibility for employees' workday starting and ending times, so long as the employees' workdays included the "core" work hours of 8:30 a.m. to 4:30 p.m. (Is this accurate?)

Prior to the July 1, 2005, changeover, the Grievant had worked an alternative workday schedule of 3 AM to 11 AM, Monday through Friday. In July, 2005, the Grievant and her supervisor proposed that she be granted an exemption from the core working hour requirement and instead be permitted to work from 5 AM to 2:30 PM on two days, 7 AM to 4:30 PM on two days, and 7 AM to 2 PM on the last day. This schedule change request, submitted by the Grievant's supervisor, detailed business and customer service needs requiring the proposed alternate workday hours.

This request was denied by the Divisional Manager, who determined that supervision and coordination of operations would be better achieved if the Grievant worked a regular weekday work schedule and was present during the core work hours. In his testimony at the hearing, he explained that he specifically rejected the Grievant's justification that working an early schedule would permit her to call recreational anglers in the early morning before they had departed for work. As a matter of policy and

public relations, he determined it was not advisable for calls to be made to individuals before 8 AM, as such early morning calls might be unwelcome or inconvenient to the fisher,

His recommendation to deny the Grievant's request for an alternative work schedule was accepted and ratified by the Assistant Director of the Fish Program, who made the ultimate decision. That individual testified at the hearing that the Grievant's request for an alternative work schedule did not meet the criteria he had set for the approval of alternate workday schedules.

DISCUSSION

As indicated, the Association has the burden of proof in this matter.

The parties' negotiated Agreement contains a "zipper clause" in Article 44 and specifically voids all past practices not specifically preserved in the new Agreement.

In Article 33, Management's Rights, the Department specifically retains all rights of management, including establishing or modifying hours and days of work. It is noted that Article 33.2 requires that these management rights of establishing or modifying the work shift and workdays must be consistent with the other provisions of the Agreement.

Article 6 provides that alternate work schedules may be established to meet business and customer service needs. The Association is arguing that the Department improperly exercised its management rights in denying the Grievant her alternate work

schedule, since Article 6 provides for such schedules when required for business and customer service needs.

The Association argument has two fatal flaws:

1. The Agreement does not require an alternate work schedule to meet business and customer service needs. It only states that such factors may justify alternate work schedules. Thus the Department appears to have discretion in making its determinations as to whether business and customer service needs will justify the creation of an alternate work schedule for some employees.

2. While the Grievant offered evidence as to why the business and customer service needs of the Department would be enhanced by permitting her to work an alternate workday schedule, that evidence is only her opinion, and management is not required to agree with it. In fact, the Manager of the Grievance Unit testified that he placed more weight on coordination and supervision of the Grievant's activities, factors which militated against the approval of an alternate workday schedule.

Furthermore, that manager determined that, for public relations and other reasons, it was not appropriate for the Grievant to be calling recreational anglers prior to 8 AM. In doing so, he negated one of the Grievant's strongest points for an alternate workday schedule.

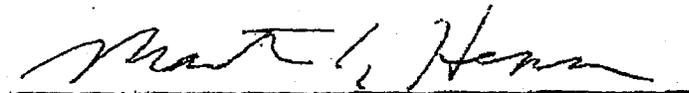
3. The Grievant points to at coworker of the Grievant who had been granted an alternate schedule. But that employee, in working with commercial fishers, had duties which were substantially different than the Grievant's.

Taking the record as a whole, find that nothing has been presented that would require me to overrule management's exercise of its discretion in making its determination about whether sufficient business and customer service requirements necessitated the adoption of an alternate workday schedule for this Grievant.

AWARD

The grievance is DENIED.

Respectfully submitted the 31st day of October, 2006 in Eugene, Oregon.

A handwritten signature in cursive script, appearing to read "Martin Henner", written over a horizontal line.

Martin Henner, Arbitrator