

BACKGROUND

The State of Washington, hereinafter referred to as the Employer and the Washington Federation of State Employees, hereinafter referred to as the Union, entered into a Collective Bargaining Agreement covering several State Agencies, including the Washington State Patrol. The Agreement in effect when the grievance arose began on July 1, 2011.

The State Patrol is divided into eight Administrative Districts. The City of Tacoma is located in District 1. In 2006 the Employer began placing cameras into squad cars. The cameras can record pursuits, arrests and officer involved shootings. The camera is placed on to a portable hard drive known as a Mobile Office Platform (MOP). The hard drive is inserted into the patrol car. The camera automatically is turned on whenever the emergency lights are activated. It can also be turned on in the car or remotely by the Trooper.

The camera has a limit as to how many videos it can hold. Troopers are told to bring the camera to headquarters every two weeks. Each Trooper has two portable hard drives so there will always be one available. If there is a major incident a trooper may be required to bring the hard drive back immediately so the video can be reviewed. The hard drive first goes to the evidence locker. It then goes to the Video Coordinator. Grievant has held that position since 2010. She uploads the video on to a server. It is at this point the video is "secure" and can be viewed by those who need to see it. The request to view it could be an internal request or it could come from a prosecutor or in response to a request from the public. The Server will make a DVD that can be given to the requester.

District 1 was initially the only District that had cameras. This was expanded over time to the other Districts. Grievant was the only person at the beginning qualified to perform the function. She thus had responsibility for the videos in all the Districts. Eventually, she trained a person in each District on how to do the task. Only District 2, located in Bellevue, has a person who devotes all of her time to the video functions. The other Districts do not have enough volume to keep the Coordinator busy all the time. The videos in those Districts are managed by an Office Assistant 3. Grievant testified that in 2011 she handled 5500 video requests. The number decreased in 2012 to 4200. The decrease occurred because Grievant had trained employees by then in other Districts. Thus, she was only responsible for her own District in 2012.

Grievant in 2012 was also classified as an Office Assistant 3. She sought to have her position upgraded. On March 23, 2013, she was upgraded to a Forms Analyst. She and the Video Coordinator in Bellevue are the only Forms Analysts. Her duties did not change when she was upgraded. It merely reflected the duties she had been performing. An audit of her duties showed them to be:

The position receives approximately 20 to 60 requests daily for copies of video tapes from the public and the public disclosure coordinator.

Each request requires locating the information on the video, reviewing, redacting and copying for prosecuting attorneys, defense attorneys, the public, and WSP personnel per Rules and Regulations, RCWs, and WACs.

The position assists the district Public Disclosure Coordinator (PDC) whenever a request is received for information from the officer's video camera. She will find the information, redact if necessary, copy, and deliver the disc to the PDC for handling/processing.

Grievant worked a 4x10's schedule. She worked Tuesday to Friday and was off Saturday, Sunday and Monday. Her predecessor also worked 4x10's. A 4x10

schedule is considered an alternate work schedule under the Agreement. Article 6.3.B allows the Employer to rescind an alternate schedule under certain conditions. It provides in pertinent part:

Previously approved alternate work schedules may be rescinded by the Employer if business and customer service needs are no longer being met, or if performance or attendance concerns occur. The Employer will consider the employee's personal and family needs.

The Employer determined the business needs of the District would better be met if Grievant worked five days a week. Lieutenant Old came into District 1 on June 1, 2012.¹ While praising the job Grievant did, he expressed concern that Grievant's absence on Monday caused problems. Sergeant Tomaras had been in District 1 in 2011. He too noted it would be more convenient to have Grievant there Monday-Friday, although he also said it would be more convenient to have someone there 24x7. Captain Noland had been the Captain in District 1 since early 2012. He testified the demands of the job required Grievant be there Monday to Friday. He then directed Lieutenant Old to inform Grievant her schedule would now be a 5x8 schedule Monday to Friday. This occurred on June 7, 2012. That new schedule was the same schedule the office personnel worked. The District praised Grievant's work and the change was not at all caused by performance or attendance issues, but only based on business needs. The District believed there were times that a video coordinator was needed on a Monday and Grievant was off that day.

Grievant testified there is located in the District a cradle or cradles where a hard drive can be inserted and a video uploaded. Command Personnel,

¹ Several of the Employer's witnesses have been promoted since they were in District 1. The Arbitrator will reference the Rank they held at the time and not their present rank.

including Sergeants are authorized to do that if there is an immediate need to see a video due to some major incident, such as a shooting. Grievant also testified she trained two of the Office Assistants in her office to upload a video in her absence and the Forms Analyst in Bellevue can remotely access her computer. However, she can only access a video after it has been uploaded. A video can only be uploaded from the site where the hard drive is located.

Grievant testified as to why she needed a weekday off. She used her day off on Friday to visit her elderly Grandparents. She took them to the Doctor on those days or helped them in other ways. She noted since her schedule was changed this has become much harder to do. She believed the change of schedule was not justified and the Union grieved the change alleging no business need had been shown.

POSITION OF THE UNION

Both Grievant and her predecessor worked a 4x10 schedule for several years. Grievant was always able to meet the needs of the State Patrol while on that schedule. All of her evaluations acknowledged she was timely in providing the videos requested. The evaluations never said Grievant was unable to meet the business needs of the State Patrol and to the contrary stated she always “maintained up to date response for requested video recordings.”

The Employer offered no evidence that its business needs were not being met. One Arbitrator has already addressed this same issue in a different Division and he found the State had violated Section 6.3.B. This Arbitrator should also find a violation. The Union requested the Employer show it which

requests were not timely met by Grievant. It offered 24 examples out of the thousands handled and Grievant explained why even those 24 were not untimely. The Employer also offered anecdotal evidence where it was claimed Grievant was late in providing videos, but they did not show that to be true. They only showed it would be more convenient to have someone there Monday to Friday or even to be there 24x7.

Grievant is entitled to take and did take vacations or other leave. When she is gone, the Employer finds a way to fill in for her. There are video coordinators in seven other Districts and the OA3's in District 1. Further, absences like these have no relation to her working a 4x10 schedule. As was shown, there are alternate ways to view a video when Grievant is not present. It can use the cradle in the Station to immediately view it. The Grievant trained several OA3's to upload videos so they also could provide service if needed immediately. Grievant need not be present for the needs of the Employer to be met.

The only changed circumstance was a change in Command. The Captain and Lieutenant were new to the positions and they wanted to make the change. Section 6.3.B is in the Agreement to prevent a change simply because the Supervisor's want to make it.

POSITION OF THE EMPLOYER

The Employer offered considerable evidence to demonstrate there was a business need for the change of schedule. Several witnesses testified as to that need. There is at times an urgent need to view a video on a Monday after a weekend incident. Grievant's absence on that day has delayed the review of the incident. This has occurred more than once. The lack of adequate backup for

her makes her presence during the normal workweek imperative. Grievant maintained there were people who could upload a video in her absence, but that was not at all clear from her testimony. Grievant's Supervisor also expressed concern and noted Grievant had expressed concern about others uploading a video as it would require them using Grievant's password. Grievant's contention that the video coordinator in Bellevue could fill in for her was impractical as she would have to come to the District 1 office and that would be quite time consuming. The Employer's Command also was concerned about others doing any of the duties of Grievant. On one occasion the office staff tried to upload a video and inadvertently deleted all the videos on that hard drive. Grievant's testimony that the video was defective is contrary to what the office staff told the Captain.

The testimony from the Employer's witnesses explained how it would be much more convenient for the Troopers and their Supervisors to have Grievant present during the Monday-Friday 8-5 hours. Even though the witnesses acknowledged that Grievant was timely in fulfilling requests there was still a business need to have her there Monday to Friday. If there was an accident or a situation involving the use of force, getting the video immediately makes it easier on the Trooper involved given the stress of the situation. Grievant working 4x10's made her unavailable 20% of the business hours of District 1.

District Policy makes one person responsible for the videos. That is Grievant. The duties of the video coordinator are critical duties. Having others fill in for her would not be consistent with the Policy. A video is not secure until it is

uploaded. The possibility of deleting or altering a video exists until it is uploaded. Thus, having it done quickly is important.

The case hinges on one phrase in Section 6.3.B. Performance is not in issue. The only issue is whether the business needs of the Employer justified the change. The evidence was that it does.

DISCUSSION

The Employer is correct that there is only one portion of Section 6.3.B that is in issue. Grievant's work schedule had no impact on her attendance or her work performance. The Employer relies solely on the provision in Section 6.3.B that allows the recession of an alternate work schedule when the business needs of the Employer "are no longer being met." The Employer has given several reasons why it believes this has occurred. In order to prevail it must offer evidence to support their rationale.

Such a requirement on the Employer was spelled out in a prior matter involving the interpretation of this same Section. Arbitrator Krebs had to interpret this language in 2009 in a case involving the Division of Child Support. In his case, it was not the elimination of an alternate schedule that was involved, but the creation of one. He noted:

It is, of course, the Employer that determines its needs and is in a position to determine if they have been met. An Arbitrator should recognize that the Employer has considerable discretion in such basic management functions. However, the discretion is not absolute here, given the language of Section 6.3.B. If it could deny the request by merely citing 'business and customer service needs' without having to prove that such needs justify the denial of the specific request, the mandate in Section 6.3.B would be effectively meaningless...²

² AAA 75 390 00195 08 at p.15-16

The Arbitrator shall now review the evidence in this case to determine whether the Employer has proven “that such needs justify” the discontinuance of Grievant’s alternate schedule.

One of the reasons offered by the Employer as told to Grievant was that it anticipated in the future its needs might no longer be met. The contract language says the needs are no longer being met, not that they might not be met in the future. Thus, it cannot support its position based on speculation as to what needs might arise sometime down the road.

The Employer also indicated in its response to the grievance that Grievant’s reclassification to Forms Analyst played a role in the decision. The Arbitrator finds the change in classification has no bearing on the issue before him. Grievant’s duties did not change when she was reclassified. The change merely reflected the higher level of duties she was and always had been performing. It in no way impacted on the needs of the Employer one way or the other.

A video coordinator has certain timelines that must be met. When there is a public records request, the video coordinator must provide the video within five business days. The video coordinator has even longer to respond to a request from a prosecutor. Being off on one of the five or more days did not affect Grievant’s ability to meet and often exceed those timelines. Internal Affairs has seven business days to complete its investigation. Grievant being out one day did not threaten the ability of the Employer to meet that timeline. While it might lower the stress of a trooper to have an issue resolved quickly, that in itself is not a business need that requires a change of schedule. These same

timelines have always been there and have been met by Grievant. This argument, therefore, does not provide a basis for changing her schedule.

In this same regard the Exhibits offered that were meant to show there were 24 instances out of thousands where Grievant's work schedule actually resulted in untimely responses is rejected as a reason for the change. Grievant went over those examples and explained the circumstances surrounding them. One thing they did not show, as noted by the Union was that any of these situations had anything to do with Grievant working a 4x10 schedule. Absent a nexus, the examples cannot be used to support the decision. It should also be added parenthetically that even if they were related, such a low percentage would hardly show a need.³

The Employer also mentioned a situation where Grievant was absent and an OA3 tried to download a hard drive and everything was deleted. The OA3 believed she did something wrong. Grievant testified the hard drive was defective and this was why no videos were uploaded. The Employer questions how Grievant would know that, but she is best qualified to interpret the situation and the Arbitrator credits her explanation.

The Employer next argues only Grievant can do the job and no one else. Grievant testified that the OA3's she trained could do the download. Lieutenant Old testified there were concerns expressed by Grievant about others doing the uploading because they would need access to her password to do so. Grievant

³ The Employer objected to the introduction of Grievant's evaluations because performance was not in issue. However, the Union offered them not for the purpose of demonstrating how well Grievant performed, but for a very limited purpose. All of the evaluations said Grievant had performed her duties on a timely basis. They were admitted for that sole reason. This would be consistent with her testimony regarding the 24 examples and her overall timeliness.

testified there are four cradles in her office and an OA3 could sign in under that person's own name and upload using one. Only for formatting would Grievant's password be needed and formatting is not typically done as it erases everything on the hard drive. The Arbitrator for this reason does not find this argument persuasive.

It is significant as pointed out by the Union that the desire to change the schedule coincided with the change in command structure. Lieutenant Old reached the conclusion the needs were no longer being met after being in the position for two weeks. Captain Nolan had only been in his position a few months. It was this new Command that felt it would be better to have the video coordinator available during normal business hours and on Monday in particular. They both talked about how it would be more convenient to have her there those days. There is no doubt it would just as it would be more convenient to have a video coordinator present 24x7. However, being more convenient does not mean that the business needs are not met by Grievant working 4x10s. There is a difference between convenience and a business need. The language of the Section says business needs are no longer being met. That is the test. The Union is not incorrect when it argues it is not the need that has changed, only the commanders. The Agreement does not permit the rescission of an alternate schedule whenever new supervisors arrive. The fact that the commanders were new to their positions and reached their conclusion so soon after assuming those positions, makes it hard for them to show in such a short time that what had worked for so long no longer does. They need to compare then and now and they had no frame of reference for the then.

As noted at the outset, the Employer needed to show that some circumstance had changed and with it a change in the needs of the Employer, which then required elimination of the alternate schedule. In fact, the requirements of Grievant have lessened since she trained video coordinators in the other Districts. The number of videos decreased after that. As noted by Arbitrator Krebs more is needed than simply an assertion that there is a business need not being met. The Arbitrator finds the Employer has failed to make the case for the change. Therefore, the Arbitrator finds the discontinuance of the 4x10 schedule violated Section 6.3.B.⁴

The Arbitrator is not unmindful of the concerns expressed by the Commanders that there is a need on Monday for Grievant's presence. It may determine that having her there that day is more important than having her there on Friday even though there is shift overlap that day. The Arbitrator will leave that determination to the Employer. Such a change would still leave Grievant the opportunity to help her Grandparents with their Doctor visits or whatever else she must do with them during normal business days. It is thus free to make that change. It is not free to rescind her 4x10 schedule.

⁴ One of the other issues raised by the Employer in support of its decision was a concern that Grievant occasionally changed her days off making it difficult to plan. That is something that is within their control. If it has problem with the switch it can deny it as circumstances dictate.

AWARD

1. The grievance is granted.
2. The Employer violated Section 6.3.B when it eliminated Grievant's alternate work schedule.
3. Grievant shall be returned to a 4x10 schedule, but the Employer shall have discretion to determine whether Grievant be off Friday, Saturday and Sunday or Saturday, Sunday and Monday.
4. The Arbitrator will retain jurisdiction for no less than 60 days to address any issues regarding the implementation of this Award.

Dated: October 28, 2013



Fredric R. Dichter,
Arbitrator