

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**IBEW LOCAL 426,
Grievant,**

HF No. 19 G, 2006/07

v.

DECISION

**CITY OF PIERRE,
Respondents.**

This matter comes before the Department of Labor based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Steve Miller appeared on behalf of Grievant IBEW Local 426. Robert C. Riter, Jr. represented Respondent City of Pierre. The Department of Labor conducted a hearing on September 19, 2007, in Pierre, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby denied.

Issue:

Did Respondent violate, misinterpret, or inequitably apply the Agreement when it paid employees straight time pay for work performed on Sunday, April 15, 2007?

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Local 426 of the International Brotherhood of Electrical Workers, AFL-CIO (Union) is the designated representative for all full-time, non-supervisory employees of the City of Pierre Electrical Department (City).
2. The Agreement, formally known as the Agreement Between City of Pierre and Local 426 of the International Brotherhood of Electrical Workers, AFL-CIO, effective January 1, 2006 through December 31, 2008, is at issue and governs the parties in this matter.
3. Section 15.02 of the Agreement establishes the work week as extending from 12:00 a.m. Saturday to 11:59 p.m. the following Friday.
4. City did not change the definition of work week during the week including April 15, 2007.
5. Section 2.02 of the Agreement gives City the right to alter the work schedule.
6. Section 15.03 of the Agreement gives City the right to schedule the hours of work to be performed by employees during the work week.
7. City has from time to time previously altered the schedule of its employees, including those in the Electrical Department, within the work week.
8. City provided advance notice to Union that the days worked during the week including April 15, 2007, were going to be changed.

9. City scheduled Union to work Sunday, April 15, 2007, through Thursday, April 19, 2007, in order to accommodate a major project that would affect service to business customers for a number of hours. City chose Sunday as the day to complete the project in an effort to minimize the disruption of business.
10. Union was scheduled to work eight (8) hours per day Sunday through Thursday, instead of the usual Monday through Friday.
11. City did not pay overtime for the hours Union worked on Sunday.
12. Union and City attempted informal settlement of the grievance.
13. Steve Miller is the Assistant Business Manager for Union.
14. On April 23, 2007, Miller filed a formal grievance¹ with City, alleging City violated the Agreement by changing the work schedule to include a Sunday so that City could avoid paying overtime to Union employees.
15. City denied Union's grievance.
16. Union appealed City's denial of the grievance to the Department of Labor.
17. Other facts will be developed as necessary.

Issue

Did Respondent violate, misinterpret, or inequitably apply the Agreement when it paid employees straight time pay for work performed on Sunday, April 15, 2007?

SDCL 3-18-1.1 defines a grievance:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

The Department's role in resolving a grievance is defined by SDCL 3-18-15.2.

SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

The burden of proof is on the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

¹ Union is not seeking appeal of the two other grievances addressed by Grievant's Exhibits 2, 3, 4, and 5. Those grievances are not addressed by this Decision.

Union argues that City violated the Agreement when it required Union to work on a Sunday and failed to pay overtime for hours worked on a Sunday. City argues that the alteration of the work schedule is permitted by the Agreement and that the Agreement do not require the hours worked by Union to be paid as overtime hours.

City retained certain management rights in the Agreement. Article II, City Rights, provides in part:

- 2.01 Except to the extent expressly modified by a specific provision of this agreement, the City of Pierre reserves and retains solely and exclusively all of its statutory and Common Law rights to manage the operation of the Electrical Department of the City of Pierre, South Dakota, as such rights existed prior to the execution of this agreement with the Union.
- 2.02 Such rights shall include but are not limited to
 - A) To develop, alter, or abolish policies, practices, procedures, and rules to govern the operation of the Electrical Department and bring about discipline.
 - B) To determine work assignments and establish, alter or eliminate work schedules, locations or functions in accordance with municipal or departmental needs and to contract or subcontract any or all of the functions.
 - ...
 - F) To take such measures as the City or Electrical Administration may determine to be necessary for the orderly and efficient operation of the Electrical Department for the City.
- 2.03 To the extent that the above rights are specifically limited by the provisions of this agreement, alleged violations are subject to the grievance and arbitration procedures.

City retained the right to alter "work schedules" in accordance with municipal or department needs. Article XV governs Hours of Work, and provides:

- 15.01 Regular scheduled hours of work for all employees covered by this agreement shall be 40 hours per week, per person. Work is to be scheduled so as to give 8 consecutive hours per day per person, except for lunch and rest periods as otherwise provided for in this agreement.
- 15.02 The work week shall be from 12:00 o'clock a.m. Saturday to 11:59 p.m. the Friday following, except as otherwise designated by the commission. This work week shall be used for computation of pay for all work falling within the work week.
- 15.03 The schedule of hours to be worked each day will be set by the department head and shall be considered the normal work day.

15.04 Except in cases of illness or other causes satisfactory to the City, (a) no employee should refuse to work his regular days off, (b) no employee shall have the right to leave his duties until he has been relieved or released by his immediate supervisor, (c) no employee should refuse to come to work earlier than his regular starting time.

15.05 When job conditions dictate, and with mutual agreement of both parties, the employer will be allowed to establish a four day, ten hour per day work week. This work week will be specified in writing as being Monday through Thursday, or Tuesday through Friday, and the employer may divide the employees among the shifts as it deems appropriate. All hours worked in excess of ten hours per day, or forty hours per week, shall be paid at the applicable overtime rate. If a recognized holiday falls during the work week, the City may require employees to work four eight hour days that week. Hours worked in excess of thirty-two hours during the week with the holiday, shall be paid at the overtime rate of pay.

Article XV guarantees that the designated "work week" is from Saturday to Friday. City did not alter this definition of "work week" when it notified Union that during the work week beginning April 14, 2007, Union would be working Sunday through Thursday instead of Monday through Friday. City did not violate the agreement's definition of "work week".

Article XV guarantees for employees that the "work day" will be 8 consecutive hours, exclusive of lunch breaks and rest periods. City's actions did not alter this guarantee of an 8 hour work day.

Union argues that section 15.05 implies that any alteration of the work week must be made "with mutual agreement of both parties". Section 15.05 applies only to the establishment of a four day, ten hour per day work week. Article XV does not require mutual agreement of the parties to alter the work week other than to establish a four day, ten hours per day work week. Article XV does not guarantee for Union that the work week is Monday through Friday. The "work week" is defined as Saturday through Friday.

Article XVII governs Over-Time and Premium Pay and provides in part:

17.01 One and one-half times the employee's regular hourly rate of pay shall be paid for work under any of the following conditions:

- (a) all work performed in excess of eight (8) hours in any one day, except:
 - 1. where time is lost during the work week by reason of unexcused absence.
- (b) all work performed in excess of forty (40) hours in any work week, except those work weeks in which a holiday falls on a

Monday through Friday, then over-time shall be computed after thirty-two hours (32).

The Agreement provides that overtime shall apply if there are more than forty (40) hours per week worked or more than eight (8) consecutive hours per day. City did not require Union to work more than forty (40) hours during the week beginning April 14, 2007. City did not require Union to work more than eight consecutive hours per day. The overtime provision of the Agreement was not triggered.

Union argues that Article XVII applies. Article XVI governs Call Back, Reporting and Standby Pay, and provides in part:

16.02 Any employee who is called in to work outside of his regular shift or schedule shall receive overtime for all such hours and be guaranteed at least two hours work or two hours pay at the rate of time and one-half his regular rate of pay. The two hour minimum shall not apply to the following:

- (a) The call out is two hours or less prior to the beginning of the regular shift.
- (b) Employees who are called in to begin work prior to the start of their shift and work continuously into their shift, or
- (c) Employees who work their entire shift and are held over after the completion of the shift or work additional time, provided the city permits in any of the three cases, the employee to work his regular scheduled shift for that day.

Union was not called in outside of the schedule established for that day. Union was notified that the work week would include Sunday, not Friday. Union was not "called out" to work on Sunday. Article XVII does not operate to deny City's rights guaranteed by Article II to set the work schedules of its employees "in accordance with municipal or departmental needs." City chose the work schedule to accommodate several of its customers. The Agreement does not provide when and how the work schedule is set or deemed "regular", other than to provide that City retains the right to "establish, alter, or eliminate work schedules." Union was notified of the change in the work schedule in advance. Article XVII does require that City pay overtime for the eight hours worked by Union on April 15, 2007.

Union also argued that employees had on a prior occasion received overtime pay for work performed on a Sunday has no applicability. The circumstances under which overtime may have been paid for work on a Sunday were not presented. The facts of this matter demonstrate that City does not owe overtime for the work performed on Sunday, April 15, 2007.

Grievant Union has failed to show that the Agreement was violated, misinterpreted, or inequitably applied when Respondent City paid employees straight time pay for work performed on Sunday, April 15, 2007.

Union also argues that City violated the Fair Labor Standards Act, 29 CFR §778.105, which provides, in part:

An employee's work week is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single work week may be established for a plant or other establishment as a whole or different work weeks may be established for different employees or groups of employees. Once the beginning time of an employee's work week is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the work week may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act.

Article XV established the work week for Union. City did not alter this work week. City altered the hours to be worked within the designated work week. The Fair Labor Standards Act requires that the starting day of the work week remain a constant. City did not alter the starting day. Furthermore, 29 CFR §778.102 provides that the Act does not generally require an employee to be paid overtime for hours in excess of eight per day or for work on Sundays. City did not violate the Fair Labor Standards Act.

Grievant Union has failed to show that the Fair Labor Standards Act was violated, misinterpreted, or inequitably applied when Respondent City paid employees straight time pay for work performed on Sunday, April 15, 2007.

Respondent shall submit proposed Findings of Fact, Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of receipt of Respondent's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 29th day of January, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge