

**A MATTER IN ARBITRATION**

In a Matter Between:	)		
RITE AID - STORES NO. 5675,	)	Grievance:	Concepcion Cecilia
	)		Ortiz - Schedule
(Employer)	)		Selection
and	)	Hearing:	August 28, 2009
UNITED FOOD AND COMMERCIAL	)	Award:	November 12, 2009
WORKERS LOCAL 1167,	)	McKay Case No.	09-188
(Union)	)		

**DECISION AND AWARD**

**GERALD R. MCKAY, ARBITRATOR**

Appearances By:

Employer: Jonathan Allan Klein, Esq.  
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**STATEMENT OF PROCEDURE**

This matter arises out of the application and interpretation of a Collective Bargaining Agreement, which exists between the above-identified Union and Employer.<sup>1</sup> Unable to resolve the dispute between themselves, the parties selected this Arbitrator in accordance with the terms of the contract to hear and resolve the matter. A hearing was held in Bloomington, California on August 28, 2009. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The Arbitrator received a copy of the briefs from the parties on or before October 28, 2009. Having had an opportunity to review the record, the Arbitrator is prepared to issue his decision.

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<sup>1</sup> Joint Exhibit #1

### ISSUE

Did the Employer violate the contract with respect to the Grievant's request for a schedule preference? If so, what is the appropriate remedy?<sup>2</sup>

### RELEVANT CONTRACT LANGUAGE

6.6.14 Schedule Preferences. Any employee wishing special scheduling consideration including preferential schedule hours must make such preferences known in writing to the store management prior to noon Tuesday. Such notices will remain in effect until revoked in writing by the employee. Store management will attempt to accommodate, by seniority, as many such requests as operationally practical provided the employee has the skills and ability to perform the job.

### BACKGROUND

The Grievant works for the Employer as a Clerk and has done so for the past 11 years. At the time the grievance arose, the Grievant was working at Store No. 6515. Prior to the present store, the Grievant worked at Store No. 5675 for approximately 8 years. The Grievant asserted that when a new manager came to the store named Christina Loucel, her schedule of work changed. Rather than working 7:00 to 4:00, 9:00 to 6:00, or 10:00 to 7:00, she was put on closing, which required her to work 11:00 to 8:00 or 12:00 to 9:00. According to the Grievant, she did not make any request to have her schedule changed. The Grievant put in a request for a schedule preference so she could get morning shifts again, she testified. However, according to the Grievant, the Employer did not give her the shifts that she wanted in violation of Section 6.6.14 of the contract.

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<sup>2</sup> Transcript page 7

The Employer argued that the Union cannot meet its burden because in fact the Employer “attempted to accommodate” the Grievant for more than 4 years since the matter was brought to the Employer’s attention. The Employer asserted that there are other sections of the contract, such as 6.6.3 that requires the Employer to “endeavor to rotate all full-time employees on night and Sunday work, except where such rotation adversely affects the Employer’s operation.” The Employer also has an obligation to rotate days off under Section 6.6.4. For all these reasons, the Employer asked that the grievance be denied.

The Union’s presentation of evidence consisted of the Grievant’s testimony with respect to her desire to work the dayshift Monday through Friday. During her examination, the Grievant acknowledged that no one, at least from 2005 forward, has ever worked the schedule Monday from Friday, 8:00 to 4:30, which the Grievant is seeking. The Grievant acknowledged that on numerous occasions, she works a 9:00 to 5:30 schedule, or even an 8:00 to 5:00 schedule.<sup>3</sup> On one particular week, the Grievant acknowledged that she was scheduled to work only Monday through Friday. During the week of July 25<sup>th</sup>, the Grievant worked Monday through Friday, she was then off for a week, and then worked a 9:00 to 6:00 shift, having to work on Saturday that particular week. During the four-week period in July, the Grievant never worked past 5:30 p.m. The Employer produced the Grievant’s work schedules for the period from June 2005 through January 2007. During this timeframe, 85% of the time, the Grievant worked a daytime schedule sometime between 8:00 and 5:30.<sup>4</sup>

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<sup>3</sup> Transcript page 33-36

<sup>4</sup> Transcript page 36

The Grievant acknowledged that the store is busier at some times than it is at other times. For example, after normal work hours, the store becomes very busy. On weekends, the store is very busy. The Grievant acknowledged that many of her co-workers have requested time off and that the store manager has to balance all of the various desires of the clerks working in the store against the needs of the store to service its customers. The Grievant presented a document that requested a preferential schedule Monday through Friday from 8:00 to 4:30.<sup>5</sup> She sent this to her manager, Maria Loucel. The Grievant stated that she wrote this letter because Ms. Loucel "gave me closing days and middle shifts and she didn't give me no more of my morning schedule."<sup>6</sup> The Grievant testified that Ms. Loucel is not responsible for doing the schedule. Someone named Martin was responsible for doing the schedule. According to the Grievant, she gave Ms. Loucel the same request every Tuesday morning.<sup>7</sup> The Grievant was asked if she was ever given a preferential schedule after filing a grievance. The Grievant claimed, "She didn't give me a preferential schedule. She gave me closings and mornings and middle shift."<sup>8</sup>

### POSITION OF THE PARTIES

#### UNION

The Union argued that in the two years prior to 2005, the Grievant had been working a morning schedule from 8:00 to 4:30. In 2005, when the new manager took over the store, the Grievant had her schedule changed and was put on closing shifts, which denied her Fridays and Saturdays off. The Grievant put in her request for a Monday through Friday schedule every Tuesday. She was given no explanation by the store manager why she was being denied the

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<sup>5</sup> Union Exhibit #1

<sup>6</sup> Transcript page 20

<sup>7</sup> Transcript page 21

request. The Union's case, according to the Union, is very simple. An employee makes a schedule preference request, and should be accommodated and provided with the schedule requested. The Union stated the contract provides that store management will attempt to accommodate by seniority if it is operationally practical. Here, the Union has not been shown that any attempt has been made to accommodate the Grievant, as the contract requires. The Employer provided all kinds of reasons in its opening statement, but provided no evidence to support those reasons. If there was some attempt, it was never explained to the Grievant, nor was it explained to the Union when it filed a grievance. There may have been a good reason for why the Grievant's scheduled could not have been accommodated, but at the very least, the Employer had the burden to establish that it could not for whatever reasons it stated. For all these reasons, the Union asked that the grievance be granted and, at the very least, the Arbitrator require the Employer to provide an explanation to employees with respect to whether their preference request can be accommodated or not.

#### **EMPLOYER**

The Employer pointed out that the Union had the burden of proof in the present case. It also noted that Section 6.6.14 does not mandate that the Employer grant every employee's request for a special schedule consideration. The Union presented absolutely no evidence to show that it was operationally practical for the Employer to schedule the Grievant on Monday through Friday from 8:00 to 4:30. The Union presented no evidence to show that the Grievant was sufficiently senior to be considered for special scheduling consideration. The Union did not present any evidence to show that the Grievant demonstrated the skills and ability of the job.

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<sup>8</sup> Transcript page 25

Instead, the evidence presented shows that the Employer did exactly what it was suppose to do under the contract, which was to attempt to accommodate the Grievant's request for special scheduling consideration.

It is not operationally practical for the Employer to grant permanent schedules to its cashiers, let alone permanent schedules limited exclusively to daytime weekday shifts. There are several reasons the Employer cannot do so. Schedules are prepared on a weekly basis due to constant fluctuations and staffing caused by such things as customer traffic, and availability of employees. The Employer must tailor its business to the needs of its customers, many of whom shop after the normal business day and on weekends. Providing one full-time retail employee with only daytime weekday shifts would be incredibly difficult due to other collective bargaining provisions such as Section 6.6.1, which guarantees full-time employees 40 hours per week, or Section 6.6.2 requiring the Employer to schedule a ratio of 40% part-time to 60% full-time. One Section -- 6.6.3-- cannot be reconciled with the Union's demand. This provision states, "The Employer shall endeavor to rotate all full-time employees on night and Sunday work, except where such rotations adversely affects the Employer's operation." Section 6.6.3 precludes the Employer for giving special scheduling and considering to any employee that requests a permanent schedule limited to daytime weekday days.

The Employer stated that it attempted to accommodate the Grievant's schedule. Based on the Grievant's testimony, from 2005 forward, 85% of her shifts were daytime shifts. The remedy sought by the Union cannot be granted at arbitration. The Union asked the Arbitrator to do something that the Arbitrator is without power to do. The Union wants the Arbitrator to order the Employer to provide the Union with an explanation in all future cases of alleged failure to

accommodate scheduling requests. This would require the Arbitrator to compel the Employer to do something in the future with respect to other potential grievances. For all these reasons, the Employer asked that the grievance be denied.

### DISCUSSION

In a contract dispute, it is always wise to start with the contract language that has allegedly been violated. In the present case, the language that is alleged to have been violated is Section 6.6.14 referencing schedule preference. This language requires a number of things. First, an employee who wishes a special schedule consideration must make such preference known in writing to the store manager prior to noon on Tuesday. Second, these notices will remain in effect until they are revoked in writing by the employee. Third, store management will attempt to accommodate by seniority as many as such requests as operationally practical provided that the employee has the skills and ability to perform the job. It is the Union's burden in this particular dispute to establish that all of those elements have been met, and the Employer has failed to follow that language with respect to the Grievant. The problem, of course, is that the nature of the Grievant's request must, on its face, be consistent with the operational feasibility of the store and with other provisions of the Collective Bargaining Agreement.

The Grievant's requested special consideration asked that she work only Monday through Friday from 8:00 to 4:30. The Grievant acknowledged during her testimony that she has never worked this schedule and that no one she knows in the store has ever worked this schedule. On direct examination, the Grievant suggested that in the two years prior to 2005, she did work the Monday through Friday schedule. Except for the Grievant's recollection, there is no evidence to

support this claim. The Employer's records demonstrate conclusively that the Grievant never worked this schedule, at least from 2005 through the end of 2006. Furthermore, there is no evidence that any other employee in the store ever worked this particular schedule. There are good explanations for why that schedule is, on its face, not an appropriate schedule to be assigned as a matter of preference.

Other provisions of the contract would interfere with the rights of other employees if the Grievant worked that type of schedule. For example, Section 6.6.3 requires the Employer to rotate employees so that one employee is not always required to work nights or Sundays. Section 6.6.4 requires the Employer to rotate days off. There are requirements with respect to ratios between full-time and part-time employees. There are workday guarantees. There are demands in the store with respect to customer traffic that fall outside the 8:00 to 4:30, Monday through Friday schedule the Grievant requested. The Grievant acknowledged that many customers come in after normal work hours, which would normally be around 5:00 p.m. She also acknowledged that many customers come in on weekends, which is not Monday through Friday. If the demand in the store is greater after 5:00 p.m. and on weekends, it would be virtually impossible on the face of the request for the Employer to meet the Grievant's schedule preference.

Contrary to the Grievant's assertion that she was always required to work nights to do closing, the evidence establishes that at least 85% of the time she worked the dayshift. In the Arbitrator's opinion, the present grievance reflects a misconception of the Grievant's work schedule. In her mind, the Grievant believed that she had to work too many nights and too many weekends. The reality of her schedules demonstrate to the contrary that she did not work a

majority of night and weekend days. Eighty-five percent of her time was spent on the dayshift working during the week. If an employer can accommodate an employee's schedule 85% of the time, in the Arbitrator's opinion, that demonstrates a significant attempt by the employer to accommodate the preference schedule of the employee. The Union presented no evidence that having one employee work at Monday through Friday, 8:00 to 4:30 schedule would be operationally practical or would not impinge on the rights of other clerks working in those stores. The Union failed to establish that the Grievant had sufficient seniority in the first place to make such a claim relative to other clerks working in the store. The Union failed to establish what other schedules are worked by the clerks in the store where the Grievant was working. There simply is no evidence in the record to establish that the Employer in any way violated Section 6.6.14.

In summary, it is the Arbitrator's opinion that on the face of the request, the Grievant made an unreasonable demand that she be allowed to work only Monday through Friday from 8:00 to 4:30. That is a schedule that is not worked and has not been worked by any other employee in the stores where the Grievant worked. It is, on its face, a schedule that is not consistent with other obligations imposed on the Employer in other portions of the Collective Bargaining Agreement. On its face, it would impinge on the rights of other workers who may be more senior to the Grievant and who also want to work dayshifts. On its face, it is inconsistent with the operational needs of the store where customer traffic is higher after 5:00 p.m. and on weekends than it is during the normal daytime hours. The Grievant acknowledged all of these elements, but still persisted on claiming that she had a right to work Monday through Friday from 8:00 to 4:30. The contract does not give the Grievant such a right, nor does it require the

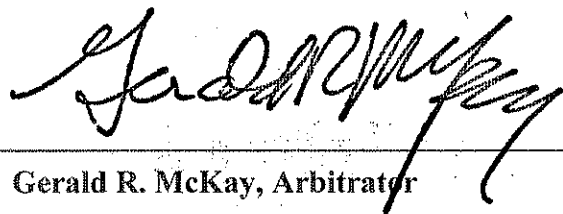
Employer to give the Grievant a written explanation for why it would not schedule the Grievant Monday through Friday from 8:00 to 4:30. The contract requires the Employer to make an attempt to accommodate the Grievant, which, based on the evidence in the record, the Employer did. Eighty-five percent of the time, the Employer accommodated the Grievant's desire to work the dayshift. For all these reasons, the grievance is denied.

**AWARD**

The Employer did not violate the contract with respect to the Grievant's request for a schedule preference. The grievance is denied.

**IT IS SO ORDERED.**

Dated: November 12, 2009



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Gerald R. McKay, Arbitrator