

Grievance DNR 2020-00955-02

Unit 2 Association

v.

State of Ohio

I. Issue and Relevant Collective Bargaining Language

The parties agreed that this grievance addresses the following issue: Did the State of Ohio violate Article 61(C) of the Collective Bargaining Agreement by not paying the \$8.00 per hour stipend to Unit 2 members?

The language of Article 61(C) reads as follows:

C. Other Than Weather Emergency

Employees not designated essential may be required to work during an emergency. When an emergency, other than weather emergency, is declared by the Governor or designee and Administrative Leave with pay is granted for employees not required to work during the declared emergency, such leave is to be incident specific and only used only in circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected. Payment for hours worked for other than weather emergencies shall be pursuant to Section B above.

Factual Background

The parties do not dispute the facts in this case; instead, they disagree about the import of those facts, in light of the collective bargaining agreement (CBA) language excerpted above.

The parties have planned for emergencies, including the possibility of a pandemic. The CBA has contained the language excerpted above since the 2006-2009 contract.¹ Since adoption, the parties have not altered this language.

On March 9, 2020, Governor Mike DeWine signed Executive Order 2020-01D (Joint Exhibit 22) as part of the State of Ohio's response to the COVID-19 pandemic. Executive Order 2020-01D suspended state regulatory barriers that inhibited the government's response to the pandemic. The issuance of Executive Order 2020-01D empowered the State of Ohio to request federal assistance to address the impact of the COVID-19 pandemic. The Order did not, however, implement the Department of Administrative Services (DAS) Directive HR-D-11. The Order

¹ Article 61, Sections B and C were added to the CBA in 2007 through a tentative agreement that expanded Article 61. Eventually, the two sections were included in the 2006-2009 CBA.

stated: “This proclamation does not require the implementation of Department of Administrative Services (DAS) Directive HR-D-11.”

The State of Ohio drafted and implemented DAS Directive HR-D-11 without union input. The directive’s goal was to “establish uniform procedures for all agencies implementing public safety emergency procedures.” According to the Directive, only the Governor or the Governor’s designee can declare a public safety emergency. When a public safety emergency is declared, a state employee’s obligation to travel to and from work may be limited for a specific period of time. Such emergencies may include but are not limited to, severe weather conditions like snowstorms, floods, or hurricanes. They may also include power outages, riots, and other unforeseen circumstances.

According to the State of Ohio, because the Governor’s proclamation did not require implementation of Directive HR-D-11, a public safety emergency was not declared and, therefore, “State employees’ obligations to travel to and from work is not to be limited as a result of this proclamation” and all employees could continue working.

Ohio Unit 2 employees continued to work during the pandemic. Some were required to work in person throughout the pandemic, while other employees worked from home. The question is whether Unit 2 employees are entitled to the additional \$8 per hour for their work, whether in person or at home, that is referenced in Article 61(C).

The Union’s Position

The Union contends that both objective and subjective interpretations of Article 61(C) require a finding that the Employer pay the \$8.00 per hour stipend to all Unit 2 employees for all hours worked during the time an emergency was declared. According to the Union, the plain language of this section indicates that both essential and non-essential employees may be required to work during an “other than weather” emergency. The Union contends that the second sentence of the provision does not, however, create a condition that must be satisfied before the stipend is paid. The second sentence simply addresses the use of administrative leave when such leave is granted during a non-weather emergency. The final sentence, which references Article 61(B), states that employees should be paid a stipend for hours worked during the emergency. The Union concludes that an objective interpretation of this language indicates that the stipend should be paid if an emergency is declared and employees worked during the declared emergency. Since that is what occurred, the Union believes that the employees should receive the stipend.

The Union contends that a subjective interpretation of this language requires the arbitrator to reach the same result. The Union states that its members were required to work during an emergency that is precisely the kind of emergency for which the stipend was intended. The Union emphasizes that emergency is not defined in the CBA and that the Employer’s definition of emergency was not known to them and was not a bargained-for term. In the Union’s view, the Employer cannot have the ability to define what is and is not an emergency because they could define certain emergencies as non-emergencies simply to avoid paying the stipend. The Union contends that where, as here, the Governor declared an emergency, whether invoking Directive HR-D-11 or not, the Employer should have paid the stipend. The Union also rejects the

Employer's theory that the Employer must grant administrative leave to some employees before Ohio Unit 2 employees are eligible for the stipend. The Union does not believe that this language creates a condition upon which payment of the stipend depends. Moreover, the Union argues that it would require a subjective interpretation of the language to reach the conclusion that administrative leave would have to be offered to employees before Ohio Unit 2 employees would be eligible for the stipend. The Union argues that the bargaining history supports its view because, at the time the contract language was incorporated into the CBA, few, if any, employees were able to work from home. Thus, the assumption is that any employees who did not physically come to work would not be working from home. Thus, employees sent home would be granted administrative leave and would not be expected to work.

The Union also contends that, even if granting administrative leave without pay is a condition that must occur before the stipend is owing, that occurred here because some employees stayed home with "no genuine work duties." Many performed menial tasks and their work did not always fill the day.

Employer's Position

The Employer contends that the Union has the burden of proving that the Employer violated Section 61(C), and claims that the Union failed to meet its burden. According to the Employer, to trigger the stipend payment referenced in 61(C), two events must occur: (1) an emergency must be declared, and (2) administrative leave with pay must be granted. As to the first, the Employer contends that because the Governor did not declare a public safety emergency in his Executive Order, the requirement that an emergency be declared was not satisfied. The Employer contends that the management rights provision of the CBA empowers it to define emergencies and that the Governor's Executive Order makes clear that the State of Ohio did not intend the Order to create an emergency condition that triggers Article 61(C). The Employer states that the Executive Order was to suspend regulatory barriers to allow a more expeditious response to the pandemic and to enable the State of Ohio to request Federal Assistance.

As to the second, the Employer contends that the granting of administrative leave with pay was a pre-condition to the granting of the stipend. Because no employees were given administrative leave with pay but, rather, required to work from home, this condition was not satisfied. The Employer argues that all employees were working at all times, even if the kind of work they were performing was, at times, different from what they would have done during non-pandemic times.

Because neither of the two conditions were satisfied, the Employer states that it acted properly when it did not pay Unit 2 employees the stipend.

Opinion

The plain language of Section 61(C) states that

Employees not designated essential may be required to work during an emergency. When an emergency, other than weather emergency, is declared by the Governor or designee and Administrative Leave

with pay is granted for employees not required to work during the declared emergency, such leave is to be incident specific and only used only in circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected. Payment for hours worked for other than weather emergencies shall be pursuant to Section B above.

This provision provides that the State of Ohio can require non-essential employees to work during an emergency. The section also requires that only the Governor or the Governor's designee may declare an emergency. The provision further requires that Administrative Leave with pay be granted *for employees not required to work during the declared emergency* and then continues on to state that such leave be limited in certain ways. Finally, the Section states that payment for hours worked in non-weather emergencies will be determined according to Section B, which describes the stipend to be paid. Because at least one of these requirements was not satisfied, the State of Ohio did not have to pay the \$8 stipend to the Unit 2 employees.

Emergencies are rare and are often accompanied by dangerous conditions – like bad weather or threats of illness from a pandemic. When the parties negotiated the CBA language, they agreed that state employees, whether essential or not, may be required to work during an emergency. And they likely considered that it would be unfair to require some (essential and non-essential) employees to work during hazardous times, while others stayed home and were paid for doing nothing. In other words, it made sense to reward the employees who had to work during the emergency with compensation higher than their regular pay, as a means to compensate them for working when others were receiving pay while not working. Here, though, all employees worked during the pandemic and they received their regular rate of pay for doing so. The stipend payment only comes into play when leave is granted to some workers, because, in that case, some employees would be working and some would not be working. Only in that situation would the State of Ohio have to pay the stipend.

The Union argues that the stipend should be paid because Unit 2 employees faced hazardous conditions when other state workers were permitted to work from home, and thus did not face those conditions. But the language of the section does not support that interpretation. Instead, the language creates the obligation to pay the stipend only when other employees receive pay when not working. Here, the Union concedes that employees were working from home (although it contends as an alternative argument that they were not actually working), thus the necessary precondition for the stipend is not satisfied.

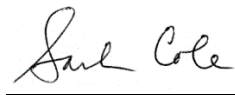
The arbitrator also rejects the Union's contention that the employees who worked from home were not actually working. While they may not have been doing the same work that they would have done had they been in person, the Employer made certain that they were working in some capacity. Thus, no employee was on administrative leave with pay.

The Union also argued that because telework was "impossible" in 2007, the 61(C) language would have been superfluous because no employee could work at home and all

employees, except those called in to work during an emergency, would receive administrative leave with pay and would not be working. While 2007 was a long time ago, the Union's argument that employees could not work from home before teleworking was technologically available, is inaccurate. Employees have worked from home for decades -- the lack of a computer or teleworking capability does not prevent working from home during an emergency if one's employer required it. Thus, even when adopted, the language required the payment of a stipend only if the State granted administrative leave with pay to some employees.

Unquestionably, Unit 2 employees continued working in dangerous conditions during the pandemic. They are not, however, entitled to the \$8 stipend because I find that one of the two preconditions for payment of the stipend was not satisfied. And, because I find that one precondition is not satisfied, I need not address whether the State of Ohio did or did not declare an emergency (the other precondition). The grievance is denied.

Date: August 4, 2022

A handwritten signature in cursive script, reading "Sarah R. Cole", written in dark ink. The signature is positioned above a horizontal line.

Arbitrator Sarah R. Cole