

Arbitration Decision and Award

Arbitrator: Jack Buettner
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In the Matter of:

SEIU District 1199 WV/KY/OH

and

**The State of Ohio Department of Rehabilitation and
Correction Institution**

Case Number: DRC-2023-01721-11

Grievant: Shiela Elder

Date of Hearing: April 25, 2024

Post Hearing Briefs Received: June 24, 2024

Date Decision Issued: July 22, 2024

Advocate for the Employer:

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Advocate for the Union:

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Appearances for Management:

Victor Danbridge	OCB
Aaron Corwin	ODRC
Phil Radar	ODRC
Kevin Runyon	Medical Operations Director
Allison Vaughn	Labor Relations Administrator
Shawn Shelton	Healthcare Administrator, Richland

Appearances for Union:

Josh Norris	1199
Shiela Elder	Grievant
Sam Troyer	1199 Observer
Caitlin Gordley	1199 Observer
Jodie Slone	Witness, RN
Michael De	Witness, NCA

Joint Exhibits:

#1 – Grievance Trail of Grievance (pp.1-3)

#2 – Collective Bargaining Agreement between SEIU District 1199 WV/KY/OH and The State of Ohio 2021-2024 (Current)

#3 – Collective Bargaining Agreement between SEIU District 1199 WV/KY/OH and The State of Ohio 2006-2009

#4 – Annotated Version of CBA between SEIU District 1199 WV/KY/OH and the State of Ohio 2009-2012

[https://dam.assets.ohio.gov/image/upload/das.ohio.gov/employee-relations/Legacy-Contracts/SEIU-1199/1199%20\(2009-2012\)%20Annotated%2002-2004-10.pdf](https://dam.assets.ohio.gov/image/upload/das.ohio.gov/employee-relations/Legacy-Contracts/SEIU-1199/1199%20(2009-2012)%20Annotated%2002-2004-10.pdf)

#5 – Collective Bargaining Agreement between SEIU District 1199 WV/KY/OH and The State of Ohio 2012-2015

#6 - Collective Bargaining Agreement between SEIU District 1199 WV/KY/OH and The State of Ohio 2015-2018

#7 – Collective Bargaining Agreement between SEIU District 1199 WV/KY/OH and The

State of Ohio 2018-2021

#8 – Classification Specifications and Position Descriptions (Pgs. 4-19)

#9 – ODRC SEIU District 1199 Nurse Overtime Policy 35-PAY-06 November 1, 2022 (Effective Date) (Pgs. 20-24)

#10 - ODRC SEIU District 1199 Nurse Overtime Policy 35-PAY-06 December 7, 2006, 2022 (Effective Date) (Pgs. 25-30)

#11 – DRC Policy Impact Analysis (Pgs. 31-33)

#12 – Email Correspondence Kevin Runyon (Pgs. 34-42)

#13 – Shiela Elder EHOC (Pgs. 43-49)

#14 – Overtime Worked Sheet of Shiela Elder (Pg. 50)

#15 – CNP Overtime Worked Sheet of CNP Jodie Slone (Pgs. 51-56) (Wheeler included on pg. 56)

#16 - CNP Overtime Worked Sheet of CNP Jesse Glass (pg. 56 A, 56 B-57)

#17 - CNP Overtime Worked Sheet of CNP Kendra Newland (Pgs. 58-61)

#18 – RN Schedules and Overtime Sign Up Sheets (Pgs. 62-214)

Background:

Arbitrator Jack Buettner was mutually selected by the Parties to arbitrate this matter according to the Collective Bargaining Agreement, Article XII, Grievance Procedure, Section 7.07: Arbitration Procedures. The two parties are SEIU District 1199 (hereafter known as the “Union”) and the Department of Rehabilitation and Correction (hereafter known as the “Employer” or the “ODRC”). The Grievant, Sheila Elder, was awarded the position of Correctional Nurse Practitioner (CNP) in May of 2023. Effective June 4, 2023, she was headquartered at the Richland Correctional Institution. She signed up to work overtime in a Nurse 1 classification, was denied by Management, and filed a grievance on June 26, 2023.

An arbitration hearing was held at 9:30 am on April 25, 2024, at SEIU District 1199 headquarters in Columbus, Ohio. Both Parties were given a full opportunity to present both oral testimony and documentary evidence to support their respective positions.

Further, both Parties waived service of the Arbitrator's report via overnight delivery and agreed upon service via email.

Joint Stipulations:

1. The grievance is properly before the Arbitrator and there are no procedural issues.
2. Grievant Shiela Elder's effect date as a Nurse Practitioner for the purposes of computation of any backpay awarded with the grievance is 6/4/2023.
3. Grievant Shiela Elder possesses a valid license as both a Registered Nurse (RN) and a Certified Nurse Practitioner (CNP).
4. Management has provided all requested information to the Union prior to the hearing.
5. CNPs Glass, Slone, and Newland have worked overtime as RNs at Marion Correctional Institution and Mansfield Correctional Institution after the agency's COVID-19 response was over.

ISSUE:

Did the Employer violate the Collective Bargaining Agreement (CBA) by denying the request of the Grievant, Correctional Nurse Practitioner Shiela Elder, to work overtime in the role of a Nurse 1? If so, what shall the remedy be?

Union's Summary and Position:

The Union contends that the Grievant and other CNPs were unfairly denied opportunities to work overtime as RNs. The CBA establishes a clear process for who is permitted to work overtime and a clear order in which individuals are entitled to that work. The contract (Joint Exhibit #2) states under the section Department of Rehabilitation and Correction, pages 240-241:

4. The order for calling overtime will be as follows:

- a. Volunteer from those who normally work the shift where the opportunity occurs (an employee on their good day).
- b. Volunteer from department where the opportunity occurs.
- c. Volunteer from within the institution.
- d. Volunteer from any other institution.
- e. Qualified management personnel and qualified personnel from other bargaining units may work to avoid mandating a bargaining unit nurse.
- f. Mandatory overtime assigned from the department where the opportunity occurs.
- g. Mandatory overtime assigned from the institution (any department).

The Union argues that this order was negotiated so that mandatory overtime would be the last resort. It was also negotiated to ensure qualified SEIU 1199 bargaining unit members were given consideration over non-bargaining unit staff, such as Nurse Supervisors, Quality Insurance Coordinators, or any other exempt staff who maintains a RN License and members of other bargaining units (OCSEA, OEA, etc.). The Union contends that the Parties, in negotiations, never intended to exclude NPs from volunteering for this overtime especially since other bargaining units are permitted to do the work of SEIU 1199 classifications. This is, however, only after following the order listed in the CBA and after exhausting the volunteers from the bargaining unit.

The employees who volunteer to work overtime must be qualified for the position. Overtime is not offered solely to a particular classification but to qualified employees. In this case, the volunteers must be RNs. Nurse Practitioners hold a license not only as an NP but as an RN so they are more than qualified to work the overtime. The Union argues that Management is excluding CNPs from ever working overtime even though exempt staff and members from other bargaining units are eligible.

The Union further argues that NPs have worked overtime in the RN classification numerous times over the past several years. NP Slone, NP Glass, and NP Newland have all worked RN overtime with NP Slone working RN overtime just eighteen (18)

days prior to the hearing date. Mr. Kevin Runyon, the ODRC Medical Director, testified that he was aware NPs had been working overtime in RN positions as far back as 2020. He claimed he advised institutions to stop this practice sometime in 2022. Mr. Runyon is responsible for oversight of all institutions, yet he lacked knowledge of the overtime practice and failed to provide a valid reason why his directive was not followed.

The Union contends ODRC has put into effect an undocumented, arbitrary, inconsistent rule prohibiting NPs from working overtime. Further, Management admits that NPs have worked overtime as RNs in the past. For the past four (4) years the contract language has been interpreted and applied to allow this. The Grievant, however, has been deprived of a contractual benefit that has been extended to other NPs and requests that the Arbitrator sustain the grievance.

Employer's Summary and Position:

The Employer contends that there is no contractual obligation to permit employees of one classification such as NP to work voluntary overtime in a different classification such as RN. ODRC further argues that Section 24.03 (A) of the CBA (Joint Exhibit #2) gives Management the right to determine overtime opportunities and how they are assigned. Section 24.03 (A) states:

In institutional settings when the Agency determines that overtime is necessary, overtime shall be offered on a rotation basis, to the qualified employees who usually work the shift where the opportunity occurs. If no qualified employee on the shift desires to work the overtime, it will be offered on a rotating basis first to the qualified employee with the most state seniority.

The controlling language cited by the Union as to how overtime is awarded comes under the heading of "Overtime Procedures for Nurses." ODRC contends that it applies solely to nurses and not NPs. It does not state that medical staff or other 1199 bargaining unit members are included. The CBA does state: "Qualified management personnel and qualified personnel from other bargaining units may work to avoid mandating a bargaining unit nurse." Management argues that this language is

permissive but does not contractually oblige ODRC to offer overtime to employees in different 1199 classifications. Article 5 of the CBA gives the Employer the authority to make rules and regulations and to determine work assignments and standards. Thus, ODRC contends they have the right to make a rule that CNPs cannot work overtime performing Nurse 1 duties, cannot complete duties of another classification, and that they must work to the level of their licensure and not to another classification with a lower licensure.

Another reason Management cites to deny the overtime is due to licensing and liability issues. A CNP has different duties than a Nurse 1 and is required by licensure to provide a higher level of care. Kevin Runyon, Medical Operations Director, testified that the Grievant, by virtue of her NP status, would be expected to “perform to her licensure”. A CNP is required to fully diagnose every patient he/she encounters. He/she may unintentionally misdiagnose a patient resulting in harm to the patient and liability issues for the Grievant and Management. CNPs and Nurse 1s have different classification specifications and are not in the same class series. Classification Specifications (Joint Exhibit #8) show that the responsibilities of a CNP and a Nurse 1 are significantly different. There are no overlapping duties between the two.

While the Union raises the issue of past practice in using CNPs to work overtime for Nurse 1s, ODRC contends that this happened only during COVID 19 outbreaks at institutions. Mr. Runyon testified that institutions were given discretion to use various classifications in various positions to maintain safety, security, and services across the entire agency. As institutions and agencies entered recovery phases, that practice was stopped. A directive to cease the practice of CNPs completing duties of the Nurse 1 classification came from OCHC. Any examples of CNPs working overtime for Nurse 1s after late 2022 will not be from the Grievant’s assigned institution. Also, the Employer contends that any other examples of overtime that the Union introduces will have occurred without the permission of the agency.

Allison Vaughn, current ODCR’s Bureau of Labor Relations Labor Administrator,

testified that she was present when language was negotiated for the order for calling volunteer employees to work overtime. She testified that CNPs were never discussed as being able to work Nurse 1 overtime opportunities. Permission for Licensed Practical Nurses (LPNs) to work Nurse 1 overtime in order to avoid mandating a Nurse 1, however, was discussed and adopted into the contract after a Policy Impact Analysis (Employer Exhibit #9) was completed. The issue of CNPs working Nurse 1 overtime has not come up since this instant grievance.

Mr. Shawn Shelton, Health Care Administrator at Richland, has worked there in many capacities since 2007. He stated that there has never been a practice to permit CNPs to work overtime to avoid mandating a Nurse 1.

ODRC also cites the financial burden which would be incurred by allowing CNPs to work overtime as RNs. Nurse 1s start with a base salary of \$31.86 per hour and reach \$50.93 per hour. CNPs are in pay scale 15 which begins with a base salary of \$38.54 per hour and reaches \$61.77 per hour. Since overtime is paid at time and one-half (1 ½), the Grievant could earn upwards of \$93 an hour while a Nurse 1 would earn \$75 per hour. ODRC contends that this pay difference creates a significant financial burden and one that contractually they are not required to carry.

For these reasons, the Employer requests that the Arbitrator denies the grievance.

Arbitrator's Summary and Position:

Management established that they are well within their rights to determine when overtime is necessary to prevent a Nurse 1 from being mandated to work overtime. Article 24.03(A) of the CBA (Joint Exhibit #2) allows for that. It states, in part, "In institutional settings when the Agency determines that overtime is necessary, overtime shall be offered on a rotating basis, to the qualified employees who usually work the shift where the opportunity occurs." It continues to delineate a very specific order in which the overtime is to be offered. In the CBA, under Department of

Rehabilitation and Correction (pp. 240-241), if further outlines the order for calling volunteers to do overtime. In all instances the volunteer must be qualified whether it is management personnel or personnel from other bargaining units. Nurse practitioners would be considered qualified by virtue of their licensure. As stated by the American Association of Nurse Practitioners (Retrieved 7/11/24. <http://www.aanp.org>):

Becoming an NP is a rigorous educational process underpinned with evidence-based coursework and clinical rotations. To become an NP, **one must be a registered nurse (RN)**, hold a Bachelor of Science in Nursing (BSN), complete an NP-focused graduate master's or doctoral nursing program and successfully pass a national NP board certification exam. (Emphasis added.)

The Union argues that using NPs for Nurse 1 overtime is a past practice that has been going on for over four years and occurred as recently as eighteen (18) days prior to the hearing when NP Slone worked overtime. As stated in Elkouri & Elkouri, *How Arbitration Works*, "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a period of time as a fixed, and established practice accepted by both Parties." (Alan Miles Ruben ed., 6th ed. 2003, pp. 607-608) The Union cites that NP Slone, NP Glass, and NP Newland have worked RN overtime. The Employer concedes that NPs were used in 2020 through 2022 during the pandemic but that was out of necessity to maintain its facilities during a *force majeure* that affected every institution across the nation. After 2022, documentation shows only the aforementioned three NPs worked overtime as Nurse1s. The ODRC has twenty-five (25) institutions across the state and employs approximately seventy-five (75) CNPs. The three named NPs worked at two different institutions from the location where the grievance arose and did so without agency permission. Thus, there does not seem to be an established past practice.

The Employer cites liability as a reason for denying NPs overtime as Nurse 1s. The NP would need to "work to her licensure" which could mean providing more care than a Nurse 1 would be able to provide. Any nurse, whether NP or RN, carries liability with the

job they do. To think an NP would be any more liable seems unreasonable especially considering Allison Vaughn's testimony that the concept of using LPNs to work Nurse 1 overtime was adopted into the contract. LPNs hold a lesser degree than RNs. As stated on the Cleveland Clinic website (Retrieved 7/10/24, <http://www.myclevelandclinic.org>):

Licensed practical nurses don't have the full scope of practice that registered nurses do. LPNs are directly involved in patient care. They perform basic medical tasks and make sure patients are comfortable.

RNs typically oversee LPNs and may have more of a managerial role. They may administer medications and perform medical tasks. But they're more involved in working closely with a patient's doctors. They create care plans and provide treatment.

The education and training of RNs and LPNs differ as well. Registered nurses must receive an associate's degree in nursing and a bachelor's degree in nursing (BSN).

It would be reasonable to assume that the liability would be the same or greater in cases where an LPN is replacing an RN, yet that language was adopted into the CBA.

ODRC cites the financial burden of paying CNPs overtime as a reason for denying the grievance, and it is not unreasonable to consider the cost factor. There is no argument that it costs more as the basic wages are different for CNPs and RNs. Arbitrator Samuel Chalfie, in defining the limits of arbitral authority, stated, "Nor can the Arbitrator allow economic consequences of an award to influence him in his ultimate decision." [Volz, M. M. & Goggin, E. P. (eds.) (1997). *Elkouri & Elkouri: How Arbitration Works*, BNA Books. p. 476] LPNs were permitted to do Nurse 1 overtime only after a Policy Impact Analysis (Joint Exhibit # 11) was done showing that there may be a small positive fiscal impact in doing so. An Impact Analysis of CNPs would most likely show the opposite but is not sufficient reason to deny the grievance.

In this instant case, the Arbitrator must first look to the language of the contract itself. An Arbitrator's authority is limited to interpreting and applying the collective bargaining agreement. The U.S. Supreme Court's *Enterprise Wheel* doctrine states:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. [Volz, M. M. & Goggin, E. P. (eds.) (1997). *Elkouri & Elkouri: How Arbitration Works*, BNA Books. p. 476]

The goal of the contract language delineating the order in which qualified volunteers are called to cover Nurse 1 overtime is to prevent mandated Nurse 1 overtime. The contract does not exclude CNPs but states that volunteers must be qualified which CNPs, by virtue of their RN licenses, are. Adding them to the pool of qualified volunteers would be a step closer to avoiding mandated overtime. All other stipulations would apply as to the order in which volunteers are assigned.

The CBA neither explicitly includes nor excludes NPs from the rotating volunteer overtime roster for Nurse 1s. The language as such suggests that any **qualified** employee can sign up for overtime. Both Management and the Union cite contract language, specifically Section 24.03, that consistently states that all volunteers must be **qualified**. Thus, this Arbitrator has determined that the Union has met their burden of proof, and the grievance is sustained. The remedy will be that going forward, the Grievant will be able to volunteer for Nurse 1 overtime, and the overtime will be assigned in accordance with pages 241 through 242 of the CBA. No compensation will be granted since the CBA, in "Missed Overtime Opportunities" on page 242, states that employees who missed an overtime opportunity will be permitted to work the number of hours missed at the date and shift of their choosing but receive no other monetary or compensatory time award. The Union, however, never identified which dates or specific missed overtimes were being grieved. After a review of sign-up sheets (Joint Exhibit #18) the Employer did identify seven (7) possible missed opportunities. The opportunities were missed because the language was interpreted differently in different

institutions and by different people. Overtime is not a guaranteed benefit. Since the Grievant was not harmed and the interpretation of the language was questionable, no makeup opportunities will be afforded to the Grievant. It is suggested that moving forward, this issue be specifically addressed in bargaining to further clarify the intent of both Parties.

CERTIFICATE OF SERVICE

The foregoing report was delivered via email on this the
22nd day of July, 2024

Philip Radar

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and

Josh Norris

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Jack Buettner

Jack Buettner
Arbitrator