

ARBITRATION

STATE OF OHIO

and

OHIO HEALTH CARE EMPLOYEES UNION,
DISTRICT 1199, WV/KY/OH, NATIONAL
UNION OF HOSPITAL AND HEALTH CARE
EMPLOYEES, AFL-CIO

DECISION AND AWARD

The issue in this proceeding is whether Grievant was properly compensated for hours worked on two separate occasions under the call-back provision of the parties' collective bargaining agreement. Briefly, the facts are as follows.

Grievant is a Pharmacist 1. Her regular work schedule is Monday through Friday, 8 a.m. to 4:30 p.m. On June 29, 1986, a Sunday, she was called into work and worked approximately one hour. She was paid for four hours at straight time. On July 26, a Saturday, she was called into work, worked 2.83 hours, and was paid for 2.83 hours at overtime. She contends that she should have received six hours of compensatory time for each occasion.

The applicable contract provisions are as follows, in pertinent part:

40.10 Call Back Pay

When an employee is called into work on other than his/her regularly scheduled day and shift, the employee will be paid a minimum of four (4) hours at his/her regular rate of pay, either at straight time or overtime in accordance with Article 22 Hours of Work and Overtime, if applicable.

22.02 Rate of Overtime Pay

Employees shall receive compensatory time or overtime pay for authorized work performed in excess of forty (40) hours per week. . . .

22.04 Overtime and Compensatory Time

Overtime work shall be compensated as follows:

A. Hours in an active pay status in excess of forty (40) hours in any calendar week shall be compensated at the rate of one and one-half ($1\frac{1}{2}$) times the regular rate of pay for each hour of such time. . . .

B. An employee may elect to take compensatory time off in lieu of cash overtime payment for hours in an active pay status more than forty (40) hours in any calendar week. Such compensatory time shall be granted on a time and one-half ($1\frac{1}{2}$) basis.

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F. For the purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave and personal leave.

Grievant contends that because she worked 40 hours during both of the weeks in question, in addition to her call back time, Article 40.10 of the contract entitles her to a minimum of four hours pay at the overtime rate, or the equivalent in compensatory time, for each occasion. The State conceded at the hearing that she should have been paid four hours at the overtime rate (or the equivalent in compensatory time) for the Saturday call back, but not for the Sunday call back. The State reasons that under Article 22, employees can only be paid overtime (or compensatory time) if they have already spent 40 hours of that calendar week in an active pay status. In other words, to the State the timing of the call back is crucial; if it occurs before the employee has been in active pay status for 40 hours during that calendar week, the overtime provisions of the contract are not applicable, and the employee is only entitled to a minimum of four hours at straight time. Here, therefore, Grievant was concededly entitled to be compensated at the overtime rate for the Saturday call back, since she had been in an active pay status for 40 hours the preceding Monday through Friday. However, the State contends that she is only entitled to four hours pay at straight time for the Sunday call back, since it

occurred at the beginning of the calendar week, before she had accumulated 40 hours in an active pay status.

This interpretation of the applicability of the overtime provisions to a call back situation is correct. The contract only provides for overtime for hours in an active pay status of more than 40 hours in a calendar week. There is no provision for daily overtime. Thus, the overtime provisions of the contract are not applicable in a call back situation unless the employee called back has already been in an active pay status for 40 hours during that calendar week. Since Grievant's Sunday call back occurred at the beginning of the week, before she had accrued 40 hours in an active pay status, she would not be entitled to compensation at the overtime rate for the call back time, but only for the minimum four hours pay at straight time.

However, the question then is whether the hours Grievant worked on Sunday should be added to the other hours that she was in active pay status during the remainder of the week in determining whether she is entitled to overtime for the week. The answer is yes. Article 22.04 of the contract states that overtime shall be paid for hours in an "active pay status" in excess of 40 hours per calendar week, and defines "active pay status" as "the conditions under which an employee

an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave and personal leave." Hours worked during a call back obviously constitute "conditions under which an employee is eligible to receive pay." Thus, absent provisions to the contrary, those hours should be counted in computing hours worked for purposes of computing overtime.

A review of past decisions supports this interpretation of the contract. For instance, in Hawaiian Pineapple Co., Ltd., 30 LA 324 (1958), the contract provided that work "in excess of 40 straight time hours in any one week shall constitute overtime." Arbitrator Cobb held that employees who worked on a holiday and on a sixth day during the same week were entitled to overtime for the sixth day as well as holiday pay, stating (30 LA at 325):

For every inconvenience" set forth in the Collective Bargaining Agreement that an employee experiences, he is to receive a premium payment. Two of these "inconveniences" are work performed on a holiday and work performed by any factory employee in excess of 40 "straight-time" hours.

Similarly, in Safeway Stores, Inc., 45 LA 244 (1965), Arbitrator Wren held that an employee who worked an extra of "off-schedule" day in addition to her normal 40 hour week was entitled to premium pay for the "off-schedule" day, and overtime for the extra eight hours

she worked that week as a result of working the "off-schedule" day, noting that "in the absence of a specific prohibition against payment for both these inconveniences, she is entitled to recover for both." (45 LA 246). And in Industrial Building Materials, Inc., 58 LA 204 (1972), Arbitrator Heibling held that employees who were called to work prior to their regular starting time and who then worked more than eight hours during that day were entitled to the premium pay provided by the contract for reporting to work early, and also to overtime for the resulting extra time worked. Arbitrator Heibling's reasoning is applicable here (58 LA at 206):

. . . It seems clear that [the parties' collective bargaining agreement] requires premium pay for those hours worked before the regular starting time in order to compensate for the additional inconvenience of a change in starting time and the necessity to report to work before the usual and regular time. Such a penalty placed on the Employer cannot be regarded as payment for overtime in the absence of any express provision in the contract which excludes such hours paid at penalty rates from the calculation of the number of hours worked each day or each week for the purpose of computing overtime. . . .

. . . [I]t is clear that the inconvenience of being called to work before the regular and usual starting time is substantially different than being required to work long hours.

Here, there is no express provision in the contract

excluding the hours worked on a call back from the calculation of the number of hours worked each week for the purpose of computing overtime. Under these circumstances, it must be concluded that Grievant's actual hours worked during the call backs must be included in computing her time in "active pay status" for the purpose of computing her weekly overtime.

The grievance is granted as set forth above. The State is directed to compensate Grievant four hours at the overtime rate (or the equivalent in compensatory time) for the Saturday call back, if it has not already done so, and to compensate her four hours at straight time for the Sunday call back plus overtime (or the equivalent in compensatory time) for any hours over 40 worked the week of the Sunday call back including the actual hours worked during the call back.

Jan. 16, 1987
Dated

Abigail Modjeska
Abigail Modjeska, Arbitrator

COUNTY OF FRANKLIN
STATE OF OHIO