OCB Award No: 30

OCB Grievance No:

Union: 1199

Department: Rehabilitation and Correction

Arbitrator: Murphy, Tim

Award Date: 87/3/5

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OPINION AND AWARD

In The Matter of the Arbitration

-between-

THE STATE OF OHIO

-and-

OHIO HEALTH CARE EMPLOYEES' UNION
DISTRICT 1199, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES

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ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION:

Tom Woodruff
President
Ohio Health Care Employees' Union
1313 East Broad Street
Columbus, Ohio 43215

Amy Stear
Union Organizer

ALSO PRESENT:

Lea Pierce
Pickaway Correctional Institution

Marcie Henceroth
Ohio Reformatory for Women

Rick Fitzpatrick
London Correctional Institution

Gertrude Jacob
Marion Correctional Institution

FOR THE EMPLOYER:

John R. Alexander
Assistant Attorney General
Office of Collective Bargaining
375 South High Street
Columbus, Ohio 43215-4320

ALSO PRESENT:

Gary Mohr
Superintendent
Ross Correctional Institution
Chairman, Unit Management Task Force

T. J. Turjanica
Social Programs Coordinator
Department of Rehabilitation and Correction

FACTUAL BACKGROUND:

Of the several agencies covered by the collective bargaining contract in question (Joint Exhibit 1), the agency involved in this arbitration was the Department of Rehabilitation and Correction -- an agency with jurisdiction over 14 or 15 institutions throughout the State of Ohio.

The problems involved in this arbitration centered upon the agency's installation of the system of Unit Management at the institutions throughout the state. From the Record, it appears that initial thinking about the installation of Unit Management in Ohio began virtually at the time of the appointment of the current Director in February of 1983. The history, development, goals and procedures for implementation of Unit Management were made part of the Record in the form of the report by the Central Unit Management Task Force (Employer Exhibit 1). Without attempting to restate the philosophy and goals of Unit Management -- amply spread on the Record by the task force report, and the testimony of its chairman, G. Mohr -- suffice it to say that the system sought to divide large numbers of inmates into smaller groups, increase frequency of contacts between staff and inmates, and decentralize and delegate autonomy on decisions with respect to inmates. It appears that Unit Management as a correction philosophy and practice began in 1963, and has had widespread adoption in the past 25 years.

According to the Record, each unit (group of inmates) was to be managed by a team consisting of a Unit Manager, usually two Case Managers, two Correctional Supervisors and one Unit Secretary. The task force report on Unit Management contained a

requirement of Unit Managers to establish working hours for their staff. The Report required that the Unit be staffed at least 12 hours Monday through Friday and 8 hours on Saturday and Sunday. The Report further required that: "All unit staff will be scheduled for evening and/or weekend coverage to become familiar with the total unit operation."

The actual language in the task force report with respect to the duty of Unit Managers to establish working hours for their unit staff was as follows:

> Unit Managers are responsible for establishing working hours for their unit staff. Every unit will have evening and weekend staff coverage for their unit, in addition to the presence of the unit correctional officers. All unit staff will be scheduled for evening and/or weekend coverage to become familiar with the total unit operation. The presence of unit staff at those times also contributes to better control of the unit inmates. Schedule staff for needs of the unit (not for the needs of the staff).
>
> It shall be the responsibility of the Unit Manager to establish a schedule to ensure coverage within the unit by members of the unit staff of at least twelve (12) hours, Monday through Friday, and eight (8) hours on Saturday and Sunday, including assigned Correctional Officers on all three shifts.

In addition to the duty on the part of Unit Managers to schedule evening and weekend staff coverage by members of the Unit such as Case Managers, the task force report included an illustrative schedule showing a weekly shift for unit staff, such as Case Managers.

In January of 1986, the Director of the agency decided that existing institutions could, according to G. Mohr, be "retrofitted" with Unit Management. A schedule was adopted for

conversion to Unit Management, and, again according to G. Mohr, the schedule was met. The schedule was as follows:

| | |
|---|---|
| April 1986 | Orient Correctional Institutions |
| July 1, 1986 | Ohio Reformatory for Women<br>Hocking Correctional Facility<br>Pickaway Correctional Institution |
| October 1, 1986 | Southeastern Correctional Institution<br>London Correctional Institution<br>1 Unit at all remaining institutions |

The difficulty with "retrofitting" existing institutions with the Unit Management system was that the agency (Department of Rehabilitation and Correction) became party to a collective bargaining agreement with the Union that became effective on June 12, 1986. At the arbitration hearing, the Union stated that it did not oppose the movement toward Unit Management; rather, it challenged the implementation of Unit Management under provisions in the collective bargaining agreement. This arbitration centers upon the Union challenges under the agreement to the implementation of Unit Management.

GRIEVANCE AND ISSUES:

There were five grievances made part of the Record that arose from Pickaway Correctional Institution, Ohio Reformatory for Women and Marion Correctional Institution. The parties agreed that there were several other similar grievances, some beyond the fourth step in the grievance process and others still within the grievance process. The parties treated these grievances as class or representative grievances that properly brought before the Arbitrator the issues stated below.

ISSUES:

The Arbitrator inquired of the parties whether there were issues in writing to be presented as suggested by Article 7.07(G) of the contract between the parties. Although the parties did not submit issues in writing, they did not differ on the issues to be placed before the Arbitrator. The Employer preferred to state the problem in dispute in a general statement of an issue as follows:

> Is the system of unit management as implemented by the Ohio Department of Rehabilitation and Correction violative of the collective bargaining agreement between the parties?

Without dispute from the Employer, the Union preferred to state the issue as relating to three specific sections of the contract between the parties that the Union alleged were violated by the Employer in implementing the Unit Management system. In the Union's terms, the issues are as follows:

> Did the Employer implement unit management in a way that violated the contract by:
>
> 1) Rotating the shift of employees contrary to Article 22.15;
> 2) Changing the practice of weekends off scheduling contrary to Article 22.14; and
> 3) Making job assignments contrary to Article 26.04?

It should be noted that the Employer agreed that the specific article sections cited by the Union in its statement of the issue were indeed placed before the Arbitrator. These sections read as follows:

> 22.14 WEEKENDS
>
> The present practice of weekend off scheduling shall be continued. Any changes shall be discussed in the Agency Professional Committees.

22.15 SHIFTS

In the Department of Rehabilitation and Correction, the agency may schedule nursing personnel on a rotational shift basis for a temporary period during the opening of new facilities. The agency shall not schedule any employee to rotate more than two (2) different shifts in any four (4) week scheduling period. Exceptions may be mutually agreed to by the parties.

In the other agencies, shifts shall not be rotated unless mutually agreed to by the parties.

...

26.04 SHIFT AND ASSIGNMENT OPENINGS

Shift and assignment openings shall be filled by the qualified employee within the classificztion at the work site having the greatest state seniority who desire the opening.

...

PROCEDURAL BACKGROUND:

A hearing on this matter was held in Columbus on January 26, 1987. The parties stipulated that the issues expressed above fell within the arbitration clause in their contract, and that all conditions for arbitration were either met or waived. Consequently, the issues were before the Arbitrator for decision with such finality as is set forth in the contract between the parties.

No transcript was made of the hearing; witnesses were sworn and post-hearing memoranda were received and exchanged by the Arbitrator by February 13, 1987 -- the date of the conclusion of the hearing. The parties agreed that the Arbitrator would have 45 days after the conclusion of the hearing within which to render an Award.

- POSITIONS OF THE PARTIES:

The Employer argued that Unit Management was adopted before negotiations, and the Union was well aware of the fact that Unit Management was going to be phased into the Department of Rehabilitation and Correction before the agreement became effective on June 12, 1986. The theory of Unit Management with its evening and weekend work required for Case Managers was explained to the Union before the effective date of the contract.

The Employer denied that Article 22.15 was violated by the Employer in implementing Unit Management. First, a split shift within a week (i.e., working different hours on different days during the week) is a fixed shift and is not a rotating shift. It is a fixed shift because it is a pattern of work that obtains each week. Therefore, a work schedule within a week which has different daily starting and ending times is not a "rotating shift" within the meaning of Article 22.15. "Rotational shifts" contemplated by the parties in Article 22.15 involves a variation of the total weekly schedule -- days and/or hours worked -- from week to week. In this instance, with the exception of the Ohio Reformatory for Women, the weekly schedule does not rotate in the sense that each employee's weekly schedule is predetermined and remains constant from week to week.

With respect to the Ohio Reformatory for Women, there is less than two variations in the weekly schedule in any four-week scheduling period. Consequently, the Employer complied with Article 22.15 in that agency. Lastly, management under Article 5 of the collective bargaining agreement has retained the right to determine and manage its programs and services. This

right has been manifested by the establishment of shifts that include differing beginning and ending points for days within the week's schedule. This is not precluded by the prohibition against rotation of shifts in Article 22.15.

With respect to weekend scheduling, the Employer denies a violation of Article 22.14. First, this article does not prohibit changes in "weekend off scheduling". Rather, this article simply states that "[a]ny changes shall be discussed in the Agency Professional Committees," with no indication of when such discussion must take place. The Record shows that schedules for weekend work were discussed in committee, thereby satisfying this requirement. (Employer Post-Hearing Brief at 3-4)

Secondly, the Grievants moved to new classifications as a result of the phasing in of unit management. These classifications carry the duty of weekend schedules. Therefore, the duty to continue weekend off scheduling stated in Article 22.14 does not apply to employees who move to classifications after the effective date of the collective bargaining agreement.

Lastly, the leadership of the Union was briefed by the Employer on the impending implementation of Unit Management, which included weekend scheduling of work. Therefore, the "present practice of weekend off scheduling" at the effective date of the collective bargaining agreement was in fact a phase-in of this new system that included mandated weekend work.

The third point made by the Employer centered upon Article 26.04 of the contract. The Employer urged that it complied with the requirements of this article in filling shift and assignment openings that occurred in the implementation of

Unit Management. At the hearing, the Employer argued that the Grievants were given an opportunity to move from Social Worker 1 or 2 classifications to Social Programs Specialist (Case Manager). Although the Employer acknowledged that there was no formal bidding, the employees all volunteered for the Social Programs Specialist classification.

With respect to the composition of each unit team, several criteria were considered for the appointment of persons as Case Manager. The Employer made the decision based upon qualifications and seniority under this article, and, therefore, the agreement was complied with.

The Union denied that pre-contract negotiations carried an agreement between the parties that Unit Management would be installed by the Department of Rehabilitation and Correction at its various institutions. It argued against the view that the provisions of the agreement should be interpreted in light of any assumption that Unit Management was understood and agreed by the parties to be part of the context in which the contract was to be interpreted. Rather, the Union insisted that the parties knew that Unit Management was to be controlled by the terms of the collective bargaining agreement.

The Union argued that Unit Management implementation constituted a violation of Article 22.15 in that it involved rotating shifts. Shifts cannot be rotated under this Article -- not within a week or between weeks. "If the contract allowed shifts to be rotated within a week but not between weeks, it would say so." (Union Post-Hearing Brief at 5)

The Union urged that management interpretation of

Article 22.15 -- permitting rotation of work day schedules within each week -- "would allow the most onorous form of shift rotation. It is more difficult to adjust mentally and physically the shorter the period of rotation. It is just impossible to believe that the parties intended to prohibit shift rotation between weeks but allow it within the same week." (Union Post-Hearing Brief at 6)

The Union argued that the Employer violated Article 26.04 in that vacancies in assignments within Unit Management were not filled in accordance with this article. First, the Union noted that a change from one case load to another within the same prison is a change in assignment, and therefore, Article 26.04 applies. Next, in its application, this article required that an opportunity be given to all employees to express an interest in taking an open assignment, which was not done in this case. In addition, the Union argued that denial of a position under this section to the most senior employee cannot be based upon the view that some other employee, who was less senior, is the best qualified or is more qualified.

With respet to weekend off scheduling under Article 22.14, the Union opined that this was the only close question of the three questions before the Arbitrator. The Union acknowledged the Employer's position that the requirement of weekend work went with the new classification of Social Programs Specialist (Case Manager). As the Union conceded, "if I am working one job with every weekend off and bid on another that has weekend work, it would be improper to attempt to invoke Article 22.14 so that I could work the new job with weekend off

scheduling of the old job." (Union Post-Hearing Brief at 7)

The Union's argument on this issue was to challenge the basic process by which the employees were moved to the new classification. The Union's concern was whether the Employer could obfuscate its contractual commitment under Article 22.14 to maintain weekend off scheduling by simply reclassifying employees to a job with weekend work.

OPINION:

Pre-Contract Negotiations

The Union does not contest the Employer's right to adopt and to implement a system of Unit Management, so long as the implementation is consistent with the terms of the collective bargaining agreement. In this case, the Union claims that the class grievances challenge the implementation of Unit Management in the Ohio Department of Rehabilitation and Correction under three clauses of the agreement: 1) Article 22.14 dealing with the continuation of the present practice of weekend off scheduling; 2) Article 22.15 dealing with "rotational shifts"; and, 3) Article 26.04 mandating a process for the filling of shifts and assignment openings.

Let us first deal with a basic contention made by the Employer; i.e. the Employer was deciding upon the operational scheme for Unit Management during the course of negotiations. This was both known, acquiesced in and impliedly accepted by the Union during the course of pre-contract negotiations. Therefore, at a minimum, Unit Management was understood to be in a phase-in condition at the dawning date of the contract between the parties. It was a reality that should be used to interpret any

term of the contract, including the three terms relied upon by the Union.

A maximum position for the Employer is the view that, although not operational prior to June 12, 1986, Union acquiescence and acceptance in pre-contract negotiation made Unit Management a prevailing condition of employment that should be carried forward as part of the terms of the contract unless specifically denied in those terms.

The Record in this case shows, however, that the Union neither accepted nor acquiesced silently in pre-contract negotiation to the Employer's decision to adopt Unit Management. First, the Employer created a Task Force, and appointed G. Mohr as its chairman in July of 1985. The Task Force was not active from July through November of 1985, but its committees met monthly from November through April or March of 1986.

In the meantime, the parties apparently reached a tentative agreement in April of 1986. Despite the ongoing discussion within the Task Force of the philosophy and operational design of Unit Management, the Union was not officially asked at any time to be part of the Task Force. R. Callahan, Secretary-Treasurer of the Union, testified that the Union had no role in the Task Force, and that its report had not been submitted in negotiation with the Union. Furthermore, it appears that when negotiations turned on the particular clauses in issue in this case, i.e. Article 22.15 (dealing with rotating shifts), no one raised Unit Management and the impact of Unit Management on this clause or any other clause in the contract.

Lastly, there was evidence that G. Mohr, as Chairman of

the Employer's Task Force planning Unit Management, attended a meeting on March 21, 1986 to which the Union had been invited officially. Mr. Mohr testified that he set forth at this meeting the consequences to the employees of the implementation of Unit Management in terms of assignment changes, weekend work, and changes in shift hours.

As Mr. Mohr testified, however, he was not present at this meeting as a representative of the Employer in labor relations with the Union; rather, his presence had been requested by the Employer's labor relations director.

The undisputed testimony of the Union representative who was present at this meeting as the official representative of the Union, Mr. Callahan, shows that the Union insisted at this meeting that the impact of Unit Management on the employees comport with the terms of any future collective bargaining contract. This analysis concludes with the proposition that the Union neither acquiesced nor accepted Unit Management in pre-contract negotiations as a fact-of-life within the Department of Rehabilitation and Correction. The Union did not accept Unit Management as part of the employment context within which the terms of the collective bargaining agreement of June 12, 1986 are to be interpreted. Quite to the contrary, the evidence shows that the Union put the Employer on notice at the pre-contract stage that the implementation of Unit Management must respect and comply with the terms of the collective bargaining contract.

Filling Assignment Openings and Weekend Scheduling

Let us now turn to the question of whether the implementation of Unit Management violated Article 22.14 (the

practice of weekend scheduling), and Article 26.04 (the manner of filling assignment openings). We will merge the analysis of both of these questions for the following reason. Although both parties made independent arguments with respect to each of these articles in the contract, one central link reflects the Employer's view that the Grievants volunteered to change from an assignment without weekend work to an assignment opening under Unit Management with weekend work. Therefore, whatever limitation emanates under Article 22.14 on weekend scheduling, the limitation must fall in the face of the voluntary act of the Grievants in taking a valid new assignment opening with weekend work.

This view of the Employer, of course, assumes that the new assignment openings were voluntarily taken on the part of the Grievants, and also assumes that the assignment openings were otherwise filled by the Employer in accordance with the requirements of Article 26.04. If the Grievants did not in fact volunteer for the assignment openings, or if the assignment openings were otherwise defectively filled under Article 22.06, then both the assignment openings were filled improperly under the contract, and the weekend work linked to these assignment openings was equally tainted.

The Record shows: 1) 3 out of 4 of the representatives of the class grievances before the Arbitrator did not volunteer to fill the new assignment openings under Unit Management; and 2) all assignment openings under Unit Management discussed in this Record were filled by the Employer in a manner that failed in any respect to comply with the requirements of Article 26.04 of the

contract between the parties.

As G. Mohr testified, the implementation of Unit Management increased assignment openings for social workers by a substantial margin (he suggested that there was a doubling in these assignment openings). There was also a change in duties for social workers; their location was shifted from a central location to one of the units that housed inmates. Their case load was reduced, but they also acted from time to time as manager of the living unit to which they were assigned as social workers. In addition, these changes were usually accompanied by a change in classification for the bargaining unit (Joint Exhibit 1 at pp. 91-94). The change for social workers was usually from the classification of Social Services Worker 3 or 4 to Social Programs Specialist (Case Manager).

Under the contract between the parties, assignment openings were to be filled by the following process under Article 26.04.

> Shift and assignment openings shall be filled by the qualified employee within the classification at the work site having the greatest state seniority who desires the opening.

This article mandates a process by which assignment openings "shall be filled." This process has the following mandated characteristics. First, the last phrase "who desires the opening" manifests an intention by the parties that all persons at the work site have an opportunity to express their interest in the assignment opening. Although the contract between the parties does not state a posting and bidding procedure for assignment openings, this quoted phrase in Article

26.04 carries the reasonable implication of a duty on the part of the Employer to notify persons at the work site of an assignment opening in order to permit these persons to express their desire to fill the opening. Second, with respect to who is entitled to fill the openings, the above-quoted clause represents a modified seniority clause, in that the most senior employee requesting the opening is entitled to fill the opening if he or she possesses sufficient ability to perform the job. Under this type of seniority provision, the question becomes whether the most senior employee can in fact do the job, or in other words, is qualified to do the job. Comparisons among all of the applicants is unnecessary, and the opening is given to the most senior employee if he or she can perform the work.

The evidence on the manner by which the Employer filled assignment openings under Unit Management was supplied by R. Turjanica, who coordinated Unit Management from the central office of the Employer. This evidence shows that the Employer did not comply in any way with the mandated elements of Article 26.04. First, the Employer assumed that all Social Workers 2 and 3 were available for reassignment under Unit Management to openings created by Unit Management. There was no procedure by which employees could express their desire to fill openings. Second, the superintendent at each institution determined his or her own criteria and method by which employees made known their preferences for openings. In addition, these superintendents decided whether there was to be such a method at all. There were no written criteria for choosing employees to fill these openings; rather, the superintendent at each institution made his

or her own decision on filling these openings at his or her discretion. This evidence shows that there was not even the barest, most minimal effort to comply with the contracted elements of consideration of seniority and ability in filling assignment openings under Article 26.04.

We now turn to the question of whether the representatives of these Class Grievances volunteered for these assignment openings, and the significance of any such voluntary acts. If these class representatives did volunteer for these assignment openings, such voluntary acts would in no way nullify the duties of the Employer under Article 26.04. This article sets forth a process by which particular employees are selected for assignment openings. This article sets forth a contractual duty on the part of the Employer on the process of choosing among employees -- a duty that cannot be waived by the individual voluntary act of a particular employee.

On the other hand, Article 22.14 deals with weekend scheduling. Voluntary acts of individual employees may have legal significance with respect to this article.

All of the four class representatives appear to have enjoyed weekends off at the time that this contract was commenced on June 12, 1986. Article 22.14 has the following consequence to weekend off scheduling:

> First, the plain language of the first sentence of this article mandates that the employees who enjoyed weekend off scheduling would continue to enjoy this practice during the term of the contract. This sentence clarifies the question of whether such a

pre-contract practice was to be carried forward beyond the date of the contract.

Second, this first sentence also forecloses the prospect of unilateral change or termination of the past practice under circumstances that are generally recognized in arbitral decisions (See, Elkhouri & Elkhouri, How Arbitration Works at pp. 446-449, 4th ed. 1985).

Third, the second sentence of this article mandates discussion of any changes in the Agency Professional Committees, but it must be clearly understood that the mandate to discuss changes is qualified by the overarching duty stated in the first sentence that "the present practice of weekend off scheduling shall be continued."

A voluntary act on the part of an employee to assume weekend scheduling may have significance under Article 22.14. Practices that pre-date a contract may be of the sort that reflect a method by adopted by management from time to time as part of its general right to determine its method of operation. On the other hand, other practices involve what may be called a benefit of personal peculiar value to the employee, observed and applied over a long period. The distinction between the two types of practices is oftentimes difficult, but the distinction is frequently seen as significant on the question of whether the Employer may change the practice during the term of a contract. In this case, the parties enshrined in the contract the past practice of weekend off scheduling for the employees, thereby

recognizing the right to such scheduling as a personal and peculiar value to the employee. As such, it would appear that individual employees could waive this right, and voluntarily undertake weekend scheduling.

The Record in this case shows that 3 of the 4 representatives of the Class Grievances did not volunteer for the assignment opening under Unit Management which included weekend scheduling. The three who did not so volunteer were the representatives of Pickaway Correctional Institution, the Ohio Reformatory for Women and the Marion Correctional Institution. The situation that occurred to the Class Representative from the Ohio Reformatory for Women is illustrative.

She was a Social Worker 2 as of June 12, 1986, the inception date of the contract. She and all of the other Social Workers were informed by the Personnel Director at this institution that they were to be re-classified to Social Programs Specialist, and that there would be no bids or no applications. According to her undisputed testimony, "we were just told this." The Personnel Director said that if we remained as Social Workers, we would be doing Social Programs Specialist work with its duties and hours at less money. There was nothing voluntary in the action of this Class Representative.

Another illustration is what befell Gertrude Jacob, a Social Worker 3 with 20 years of State service. Although her classification was not changed, on July 23, she was simply informed that her duties would change. She had a case load and coordinated security as well as orientation. Her case load was changed and orientation work dropped. There was nothing

voluntary about Ms. Jacob's change in assignment.

On the other hand, there was evidence that some members of the bargaining unit did volunteer for the assignment openings under Unit Management that did carry weekend scheduling. For example, the Class Representative from London Correctional Institution applied for the classification of Social Programs Specialist. Although at the time of the application, he protested and declared his unwillingness to accept weekend scheduling, the evidence shows that he clearly was aware of the fact that this new assignment opening carried the responsibility of working on weekends. His continuing to persist in his own application constitutes evidence that he volunteered for the weekend scheduling.

It should be noted, however, that the voluntary act by this class representative in applying for the assignment opening did not cure the contractual deficiencies by the Employer in filling the assignment openings. As noted above, there was no evidence in this Record that the Employer complied at all with its duties under Article 26.04 in filling assignment openings.

The voluntary act by the Class Representative from the London Correctional Institution may have constituted a waiver of his right to be free from weekend off scheduling, but his assignment to the new opening which included weekend scheduling was defective under Article 26.04.

The Matter of Rotating Shifts

Article 22.15 was the subject of much conflict between the parties as to its meaning. It states:

22.15 Shifts

> In the Department of Rehabilitation and Correction, the agency may schedule nursing personnel on a rotational shift basis for a temporary period during the opening of new facilities. The agency shall not schedule any employee to rotate more than two (2) different shifts in any four (4) week scheduling period. Exceptions may be mutually agreed to by the parties.
>
> In the other agencies, shifts shall not be rotated unless mutually agreed to by the parties.

Apart from the question of when shifts may be rotated, and on how many occasions during what period, the parties raised a basic, fundamental question about this article. That is, if an employee works a different span of hours among the work days within a week, does this mean that the employee is working a rotational shift under Article 22.15. As the Union contended, shifts cannot be rotated <u>within a week.</u> As the Employer views this article, a split shift (differing working hours on the days within one week) is a fixed shift in that it is a pattern of work. Article 22.15 may have limitations on the extent to which the Employer may change this pattern of work from week to week, but the prohibition, if any, in this article on rotation does not apply to split working days within the week.

To illustrate the difference between the parties, the Class Representative from Pickaway was working from 8:00 a.m. to 4:30 p.m. from Monday through Friday on the inception date of the contract; whereas, she is now working from 7:30 a.m. to 4:00 p.m. on three days a week and 12:30 p.m. to 9:30 p.m. on two days a week. Assuming Article 22.15 prohibits rotational shifts with exceptions not applicable to this Class Representative, is her

schedule within each week a rotational shift under the contract between these parties?

This contract does not contain any express limitation on the scheduling of time periods for work on the work days of each week. Although the contract in Article 22.01 states that the standard work week shall be 40 hours, the contract does not include any clause that states when the work day begins and ends. It is not reasonable to assert that the contract should contain an express permission to the Employer to schedule work at differing commencement and ending times on days within each week. Rather, in the absence of a prohibition against scheduling differing work hours on days within the week, or in the absence of a provision explicitly stating the commencement time and ending time for the work day, management has the right to change the work schedule within the days of the work week so long as the standard work week remains 40 hours.

The next question arising under Article 22.15 is the extent to which this article requires the Employer to maintain on a week to week basis the set pattern of work time that the Employer has established for the 40 hour work week. To put it another way, how often and when may the Employer change from week to week the pattern of the work schedule that the Employer has established for the 40 hour work week for each employee.

The first paragraph within Article 22.15 deals exclusively with the Department of Rehabilitation and Correction, the employing agency involved in this arbitration. The second paragraph deals with other agencies.

The first paragraph in this article is ambiguous. The

paragraph opens with a sentence declaring a narrow privilege on the part of the Agency to rotate shifts for nursing personnel under certain circumstances. The second sentence either further delineates this narrow exception applicable to nursing, or implies a general privilege on the part of the Employer to rotate the weekly shift of any employee so long as it does not do so by using more than two shifts in any four week scheduling period.

The ambiguity in this second sentence of the first paragraph of Article 22.15 should be resolved in favor of a delineation of the narrow privilege on the part of the Employer to rotate the weekly shifts for nurses. This is both logical and consistent with the evidence, although sparse, on the negotiating history leading to the adoption of this article. It would be illogical to interpret the second sentence as stating a broad privilege by the Employer to rotate shifts of any employee so long as the rotation was limited to no more than two shifts in any four week period. Such a broad privilege would subsume, and make unncessary the narrowly stated privilege to rotate shifts for nursing personnel. Rather, logic suggests that this article sets forth a privilege on the part of the Employer to rotate shifts for nurses under certain circumstances. This privilege is further delineated by limiting the privilege to a rotation of no more than two different shifts in any four week period.

This analysis would lead to the conclusion that the first paragraph of Article 22.15 constitutes a broad prohibition against rotation of shifts on a week to week basis with an exception with respect to nursing personnel.

This is consistent with the meager evidence on the

negotiating history leading to the adoption of this article. The Union proposed a broad clause prohibiting the rotation of shifts at all agencies, and met as an objection the need by the Employer to rotate shifts for nurses in the Department of Rehabilitation and Correction when new institutions were being opened. This is the totality of the evidence presented at this hearing on negotiations that led to the adoption of Article 22.15.

The above analysis of Article 22.15 leads to the following conclusions:

First, the Employer has the right under this contract to determine the schedule for work days within each week so long as the work week is 40 hours.

Second, having established the schedule for the employee's work week, the Employer may not rotate (change) this schedule from week to week. In other words, the Employer may not set forth on a pre-determined basis a weekly work schedule for an employee that differs at various times in the future. This would constitute a rotation of a shift which is not permitted under Article 22.15.

Third, there is an exception to this general prohibition against rotating shifts, but this exception applies to nurses who are not represented in these Class Grievances.

One of the key elements in this analysis is the conclusion that the Employer is free to schedule the period for the working days within each weekly schedule. The analysis on this point is consistent with the other arbitral Awards cited by the Union in its post-hearing brief. For example, in National Distillers Products Company, 80-2 ARB Par. 8335, the arbitrator

denied the authority to an employer to change the commencement time for the work day from 10:00 a.m. to 6:30 a.m. in order to increase productivity. The contract in this arbitration, however, contained a clause that stated: "The regular starting and quitting time for all departments shall remain unchanged." In other words, this contract contained an express limitation on the right of management to schedule the working times within the work week. In San Diego Gas & Electric Co., 43 LA 415, the arbitrator denied contractual authority to an employer to change the work schedule for employees within the work week. In this contract, the commencement and ending times for the work day were specifically set forth with a privilege to the employer to make certain changes which were not complied with by the employer.

By contrast to these two arbitral Awards cited by the Union, the contract between the parties in this arbitration is silent on the required or even normal starting and ending times of the work day. The contract does establish a work week of 40 hours, but does not limit the Employer's right to schedule the 40 hours within the work week.

Remedy

The Union did not request, and the Award that follows does not include any make-whole or element of compensation. The Union did, however, request that the Arbitrator engage in reassigning employees and rescheduling employees. This Record, however, is not sufficiently complete to go beyond a declaration of the contractual rights and duties of the parties under the three clauses in dispute in this arbitration, and an order to comply with these declared rights and duties. Since the

grievances presented in this arbitration were characterized and treated by both parties as Class Grievances, the parties must consider the impact of this Award on individual employees within the classes represented by each of the Grievants.

AWARD:

1) The Class Grievances are granted.

2) With respect to Article 26.04:

a) Article 26.04 requires the Employer to notify employees at the work site of openings in assignments. The Employer failed in these Class Grievances to so notify employees at work sites of assignment openings that occurred as a result of the implementation of Unit Management.

b) Of employees who express a desire for assignment openings, the openings shall be filled by employees with the greatest State seniority so long as they have sufficient ability to perform the work involved in the assignment opening.

3) With respect to Article 22.14:

a) Employees who enjoyed weekend off scheduling as of June 12, 1986 have the right to the continuation of this practice for the term of this contract. This right may be waived by the voluntary act of the individual employee.

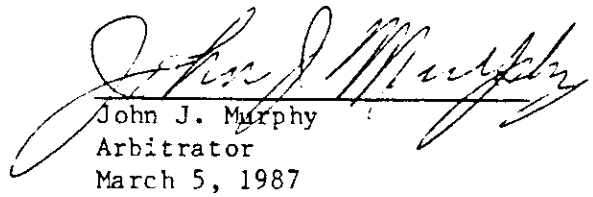
4) With respect to Article 22.15:

a) The Employer, under the terms of this Article and Article 22.01 has the right to establish the work schedule within the 40-hour work week.

b) The Employer may not set a pre-determined system of rotating weekly work schedules with the exception of nursing personnel. The exception with respect to nursing

personnel is delineated in the second sentence of the first paragraph of Article 22.15.

5) The Employer and the Union shall take care to comply with the above declarations of the rights and duties of the parties with respect to Articles 22.14, 22.15 and 26.04 as soon as reasonably possible after the receipt of this Award.



John J. Murphy
Arbitrator
March 5, 1987