

In the Matter of the Arbitration :  
between:

OHIO DEPARTMENT OF MENTAL :  
HEALTH (Central Ohio :  
Psychiatric Hospital), :  
Employer :

Gr. No. G87-0042

and :

OHIO HEALTH CARE EMPLOYEES :  
UNION, District 1199, :  
Union :

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ARBITRATOR'S DECISION and AWARD  
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This matter was heard by me, the arbitrator duly designated by the parties, on April 2, 1987. The Union was represented by Tom Woodruff, President; the Employer by David Morris, Labor Relations Specialist in the Office of Collective Bargaining. The parties were afforded full opportunity to adduce evidence, to cross-examine, and to argue orally. They waived the filing of post-hearing briefs.

The issue has to do with the right of the Employer to assign "on duty" work at the Central Ohio Psychiatric Hospital to a non-bargaining unit physician. For several years antedating the execution of the collective bargaining agreement in June, 1986, the on duty work at this hospital had been performed by the regular physicians. Schedules were prepared monthly, apportioning the available on duty work among those physicians who were willing to perform it.

time was an outside physician utilized for this purpose. Without prior notice to or discussion with the Union or the civil service physicians at the hospital the Employer contracted with a resident at the Ohio State University hospital to perform week-end on duty work starting in January, 1987. The on duty schedule of the civil service physicians was necessarily built around the week-end hours which were to be covered by the non-bargaining unit physician.

When the civil service physicians learned of this, they promptly filed a grievance on December 5, 1986 protesting the hiring of "an individual on personal contract to perform a part of the on duty coverage in violation of Article 41.03 of the collective bargaining agreement;" and requesting that all such work be restored to them. In denying the grievance on December 31, 1986 the Superintendent of the hospital stated:

"COPH has offered on-duty coverage to all civil service physicians as specified in Section 41.03 of the Contract.

The Contract does not restrict the Hospital to offering on duty coverage only to members of the bargaining unit.

Article 5, Management Rights, gives management the right to determine need and use of contractual services.

The use of civil service employed physicians for on-call duty does affect patient care delivered during normal working hours due to the use of compensatory time. Thus, management, has the right to maintain a minimal level of service by keeping compensatory time at reasonable levels.

Thus, this personal service contract is, in my opinion, not a violation of the Agreement.

At Step 4 the grievance was denied for the stated reason that "On duty compensation as requested by Article 41, Section 41.03 has not been altered by the situation described".

Section 41.03, which was prepared and submitted by the Employer during the closing days of the contract negotiations, states:

"41.03 On Duty

Where the agency continues on duty coverage, the agency will prepare and offer on duty contracts to bargaining unit physicians. The contracts will specify duties to be performed, e.g., making rounds, handling emergencies, etc.

Contracts will be offered at the rate of twenty-three dollars (\$23) per hour in fiscal year 1987 and twenty-four dollars (\$24) per hour in fiscal years 1988 and 1989. In those institutions where the current compensation exceeds this rate, contracts will be offered at the current rate. In these situations, if compensatory time is offered as part of the on duty compensation, the compensatory time must be used within one (1) year of its being earned."

The other contract provision which is relevant to the issues in this case is Article 5, the Management Rights article, which states:

"Except to the extent modified by this Agreement, the employer reserves, exclusively, all the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include, specifically, but are not limited to ----- the determination of the need and use of contractual services ----."

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Section 41.03 resulted in no change in the manner in which OD work was handled at COPH. The OD schedules continued to be prepared and carried out as in the past. In offering Section 41.03 the Employer did not state that it was intended to effect any change at COPH. Its purpose, as stated at the hearing, was to promote OD coverage by bargaining unit physicians and to promote uniformity in that regard among the various hos-

pitals to the extent that it was practicable to do so considering their varying sizes, locations and personnel. The Employer conceded that the intent was to give priority to bargaining unit physicians in the assignment of OD work.

The arrangement at COPH is to compensate the physicians for OD work with 75% in cash and 25% in compensatory time off unless the physician has accumulated 120 compensatory hours, in which case he must be paid for his OD work in cash.

The Union contends that Section 41.03 requires the Employer to offer all of the OD work to bargaining unit physicians, as in the past, and forbids the contracting out of that work as long as the bargaining unit employees are able and willing to perform it. The Employer argues that Section 41.03 does not grant such exclusivity to bargaining unit physicians and that the Employer satisfies its requirements if it offers them some OD work. It contends that Sec. 41.03 does not bar the contracting out of such work, a right reserved by management under Article 5, as long as some of the work has been offered to the bargaining unit physicians. When asked how much of the work must be offered to bargaining unit physicians to satisfy the requirements of Sec. 41.03 the Legal Counsel to the Department of Mental Health, who participated in the contract negotiations and in the drafting of Sec. 41.03, stated, "A reasonable amount". However, that concept was not expressed when the contract was negotiated and it clearly represents an elaboration of the wording of Sec. 41.03.

The Employer's interpretation presents obvious difficulties: How much OD work is "reasonable" and by what guidelines is "reasonableness" determined? A provision which called for the offering of a "reasonable" amount of OD work would be an invitation for controversy. Moreover, any significant reduction in the number of OD hours worked by the bargaining unit physicians means a substantial reduction of their pay. Thus, the loss to them as a result of the use of an outside physician to provide weekend coverage, which gave rise to the instant grievance, is estimated to reduce the earnings of the bargaining unit physicians by about \$2,000 per year, an amount which almost offsets their 1986-87 salary increase. It is unreasonable to assume that the Union would have agreed to a provision which could produce such drastic consequences. I find the Employer's proposed interpretation impracticable and contrary to the admitted purpose of that Article which was to promote rather than to reduce the utilization of the bargaining unit physicians to provide On Duty coverage.

Under these circumstances, if there is an ambiguity in Section 41.03 it should be resolved against the Employer since the Employer drafted it. Since the longstanding practice at COPH had been to offer all OD work to the civil service physicians, and since the Employer did not express or imply an intent to change that practice when it proposed Section 41.03, and since that section may fairly be interpreted as merely codifying the past practice at COPH, I conclude that that section requires the Employer to offer all OD work to bargaining unit physicians so

long as they are willing and able to perform it in addition to their regular duties.

The Employer raises two other defenses which require comment: It claims, as stated in the Superintendent's response to the grievance, that "the use of civil service employed physicians for on-call duty does affect patient care during normal working hours due to the use of compensatory time". No evidence was offered to substantiate this claim and the Director of Clinical Service testified that the compensatory time probably, if there was one, had never been presented to the doctors to her knowledge. It is also to be noted that compensatory time off may be controlled since it must be approved by management. In short, there is nothing in this record to support the claim that patient care had been affected by the use of compensatory time off.

Instead, at the hearing the Employer placed its principal emphasis on the claim that its contract with the resident from Ohio State was an attempt to promote the recruitment of physicians to its staff, the hope being that the resident doing OD work might become interested in becoming a staff physician. The Union objected to the Employer's reliance on this recruitment defense because it had <sup>not</sup> been mentioned during the processing of the grievance. There is no provision in the contract which explicitly prohibits the raising of an issue which has not been raised earlier. However, Article 7, Section 7.07-G requires the parties to reduce to writing the issue or issues to be placed before the arbitrator and directs the arbitrator to address only the issue or issues presented. This provision is obviously in-

tended to avoid either party being surprised at the hearing by being confronted with an issue not previously discussed. However, in this case no written issue or issues were submitted by the parties and the issues were framed by the grievance and the reply to the grievance by the Superintendent and the Deputy Director of the Department of Administrative Services. Since the parties did not observe the strict requirements of Section 707-G I permitted the Employer to make its case on the recruitment issue.

It is not for me to determine whether this is an effective way to recruit physicians or to pass judgment on the Union's claim that a recruitment program which results in the reduction of physicians' earnings is counterproductive. However, I am not satisfied that the weekend OD work was contracted out to this resident in furtherance of a recruitment program since that was not the reason, or one of the reasons, given by the Superintendent in denying the grievance.

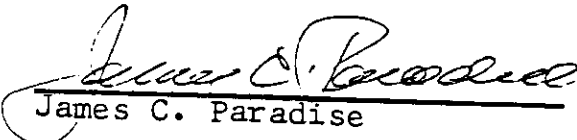
Even if the Employer contracted out this work to improve patient care by reducing compensatory time off or to further a recruitment effort, it had no right, unilaterally and without prior notice to or discussion with the Union, to depart from the requirements of Section 41.03 and the established practice at COPH and thereby to substantially reduce the earnings of its physicians. It must be noted that under Article 5 the reserved right of management to contract work out is subject to the opening phrase, "Except as modified by this agreement".

I have found that Section 41.03 limits management's right to contract out OD work by physicians at COPH.

With respect to the remedy, the civil service physicians who suffered a loss of earnings as a result of the contracting out of some of the weekend coverage should be made whole by payment of cash and/or compensatory time in the same manner as though none of the work had been contracted out and all of it had been apportioned among them in the customary manner. Since the precise manner in which that was done before January, 1987 was not testified to at the hearing I leave it to the parties to reconstruct the monthly OD schedules since the beginning of 1986 in order to ascertain what the earnings of the bargaining unit physicians would have been if the outside contractor had not been utilized. I shall retain jurisdiction to resolve any dispute between the parties with respect to the computation of the loss sustained by the bargaining unit physicians.

AWARD

The grievance is sustained. The utilization of an outside contract physician to perform OD work at COPH shall be discontinued by not later than April 30, 1987. The bargaining unit physicians shall be made whole, in the manner described above, for their losses of earnings caused by the utilization of an outside contract physician to perform OD work.

  
James C. Paradise

Dated April 23, 1987