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IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Department of Mental Health,

Employer

and

Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO

Union

Grievance No. G-86-103

(Grievant: Slone and Ladden)

Hearing Date:
January 15, 1988

For the Ohio Department of Mental Health: John Rauch

For OCSEA: Dan Smith, Esq.

Present: For the Union: Mr. Dan Smith, Mr. Robert Rowland (Staff Rep, OCSEA), Mr. David Slone (Grievant and Steward), Mr. James Ladden (Grievant and President). For the Employer: Mr. John Rauch and Mr. Gorge R. Nash.

Preliminary Matters

The parties agreed that the Arbitrator could record the proceedings for the sole purpose of refreshing her memory and on condition that the tapes are to be destroyed on the day the opinion is rendered. The parties also agreed that the Arbitrator might publish the opinion.

The parties stipulated that 1) the matter is properly before the Arbitrator and 2) that the grievance is a class action with

the Grievants representing all "psych attendants" (PA's), "psych attendant coordinators" (PAC's), and "Correction Officers" (CO's). No witnesses were sequestered, and all witnesses were sworn by the Arbitrator.

The following exhibits were jointly presented and received:

Joint Exhibit #1. The Contract

#2. Grievance Trail

#3. "Members Only" Contract

#4. Contract between ODMH and AFSCME Council 8 and Its Affiliated Department of Mental Health Local Unions Effective 12-1-81 (continued by extension until 6-30-86)

#5. Henline Mediation (1981) decided under Exhibit #3

#6. Letter from John Rauch to Labor Relations Officers (2-9-81) written in response to Henline decision

#7. Pemberton Grievance (Step 3) (11-4-87)

#8. Schedules for various holidays

#9. Present schedule for PA's, PAC's and CO's

#10. Job Position Description for Psych Attendants

Relevant Contract Provisions

Section 9 of Joint Exhibit #3

No employee's posted regular work shift and days of the week shall be changed to avoid the payment of overtime to that employee.

Section 8 of Joint Exhibit #4

No employee's posted regular work shift and days of the week shall be changed to avoid the payment of overtime to that employee.

§ 13.07 (in part) of Current Contract

An employee who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime. Emergency Overtime.

§ 26.02 (in part) of Current Contract

No employee's posted regular schedule or days off shall be changed to avoid holiday premium pay.

Issue: Did the employer violate the contract by their scheduling practice when those employee's schedules fell on Holidays?

Facts

The grievance was brought with regard to work scheduling for the July 4th 1986 Holiday. The Grievants brought the grievance as a class action for themselves and all other psych attendants, psych attendant coordinators, and correction officers at the Oakwood Forensic Center. All of these employees are involved in

either direct care or security, and they provide 7 day, 24 hour service. They are all scheduled on a 7 day basis in three shifts. Oakwood Forensic Center is a mental health facility for persons from the corrections system.

Grievant David Stone, a psych attendant and Union Steward testified that all the employees involved had a "regular" schedule, that is, each person's schedule was such that he or she could predict months in advance which days he or she would have off (R days). Under the set day schedule which had been in effect until 1985, each employee had the same two days each week as R days. Under the schedule apparently in effect at the time of the grievance, an employee's two R days came together and moved each week by one day, e.g., one might start with Monday/Tuesday as R days, the next week R days were Tuesday/Wednesday, the next Wednesday/Thursday, etc. Under this system, one's work schedule was highly predictable. Mr. Slone testified that the only change made in an employee's schedule was that the employer would change the employee's R days if the regularly scheduled R day fell on a paid Holiday. For example, if one's regular R days were Monday/Tuesday and July 4th (a Holiday) fell on a Monday, that employee's R days that week would be Tuesday (the regular day) and some day other than Monday. The regular R day would be scheduled as a Holiday. The net effect for that employee would be to deprive him of overtime pay: If his regular R day fell on the Holiday and he was not scheduled for another R day in that pay period, then he would be paid for more than 40 hours that week

because he would be entitled to 8 hours for theHoliday plus 40 hours of work and would receive time and a half for the extra 8 hours. If the Holiday replaced his regular R day, he would receive only 40 hours straight time pay. Thus, each time the employer used this method of scheduling, the employee lost 8 hours of time and a half pay or 12 hours straight time pay. The second problem created was that the re-scheduling of the replaced R day was erratic and unpredictable. The Grievant testified that while work schedules were posted every two weeks, these schedules followed patterns of scheduling which were consistent over the year not merely within the two week posting. He said that once an employee knew his or her pattern that schedules were predictable over the year and that the two week postings followed that broader pattern.

Mr. Nash testified for the Employer that he was the person responsible for the particular work schedule in question. Mr. Nash testified that he tried to keep schedules as predictable as possible. He testified that he intentionally scheduled so that no R days fell on holidays because the employer's "philosophy was that no one had a holiday off." Under cross examination, he testified that an employee would be left in his regular rotation unless his R day fell on a holiday. He said that one reason for this "philosophy" was to save money but that saving money was not the main reason. The main reason was "maintaining appropriate staff levels on Holidays." He admitted that 7 day employees were divided into three patterns of work schedules "A, B, & C." Mr.

Nash testified that he never changed "posted" schedules and that the key to this issue is the word "posted".

No further testimony was taken.

Employer's Position

The employer argues that the scheduling practices described do not violate the contract and are an exercise of management's rights under Art. 5. Section 26.02 and § 13.07 require that "No employees' posted regular schedule or days off shall be changed to avoid holiday premium pay" (§ 26.02) and "An employee's posted regular schedule shall not be changed to avoid the payment of overtime." The Employer maintains that these sections are not violated because

1. no schedule once "posted" was changed;
2. no schedule is "regular" beyond the posted period because the Employer has a right to change employee's schedules other than the "posted" schedule
3. all persons who worked the Holiday received proper holiday pay.

Union's Position

The Union argues that the method of scheduling which prohibits regular days off (R days) from falling on Holidays violates § 26.02 and § 13.07. Section 26.02 prohibits the

employer from changing days off to avoid holiday premium pay. The Union argues that when you label a 7 day employee's R day as a Holiday and add a new R day the effect is to avoid 8 hours of premium pay (time + 1/2) for that employee. The employee is paid 8 hours straight time for the Holiday but looses 8 hours time and a half because the addition of the extra R day keeps the employee at 40 hours.

The Union argues that interpretation of § 26.02 and § 13.07 cannot be set in a vacuum. This issue has a long history which adds context to the sections and defines the words "regular" and "posted". The Union points to the comparable section in the prior contract (Exhibit 4) and the analogous section in the "Members-Only" Contract (Exhibit 3). The Henline decision essentially decided the same issue under that contract and resolved the issue against the employer. The Union points to the letter of February 9, 1981 as supporting the Union's position. That letter reads in salient part:

> In order to reduce overtime spending, some institutions have been rescheduling employees "regular" day off so that it does not fall on a holiday. A recent mediator's decision determines that this is in violation of that part of our contract with the labor organizations which state:
>
> > "No employees' posted regular work shift and days of the week shall be changed to avoid the payment of overtime to that employee."
>
> The key words in this section are "posted" and "regular". If the employee's "posted" day off or his "regular" day off is changed with the intent of avoiding overtime pay, regardless of how the change is made, it is a violation of the contract. Even a fourteen day

written notice is not adequate if the purpose of the change is to prevent the payment of overtime.

If you do not wish to have an employee's day off fall on a holiday then it will be necessary for you to eliminate "regular" days off and post schedules which last for a limited period of time. This would mean that your job postings would no longer specify certain days off but would indicate "rotating" or "irregular" days off. Any major change in your scheduling system may also mean compliance with the work rules article of the contract. Schedules would be for a certain period of time, say a month, and would be posted about two weeks before the start of the month. This would allow the scheduling of no days off on the holiday yet still allow the employee to know what days he is working for the next two to six weeks.

Moreover, the Union points to the Pemberton grievance to support the position that at least part of the State government (MRDD) reads the contract as the Union does. Mr. Pemberton grieved the practice of splitting regular days off by substituting the Holiday for one and adding a second R day. The Superintendent granted the grievance and agreed that Pemberton's grievance was upheld by "a strict interpretation of the contract."

Discussion

Since the Employer has essentially admitted the practice in question by the testimony of Mr. Nash, the issue focuses narrowly on the interpretation of § 26.02 and § 13.07. The Employer argues that § 26.02 only forbids changing "posted" schedules, a practice with which the Union did not charge the Employer. The Employer apparently sees § 26.02 and § 13.07 as forbidding the Employer

from taking a "posted" (i.e., publically displayed) schedule which allocated overtime to a particular employee and changing that schedule to eliminate overtime for that particular employee. The Employer's interpretation of § 26.02 and § 13.07 leaves certain words in the text unexplained. In § 13.07, the schedule is described as "regular"; in § 26.02 the schedule is described as "regular", and the rule also forbids changing "days off" to avoid premium Holiday pay. The Employer maintains that no one who worked the Holiday was denied "premium Holiday pay" and that all other employees received pay for the Holiday. Therefore, under the Employer's interpretation, the employee whose R day was changed to a Holiday and who then was given another R day later in the week was not denied premium Holiday pay. Under the Employer's interpretation, that employee received regular Holiday pay. The Arbitrator finds this argument disengenous. When the R day becomes a Holiday and another R day is assigned, the employee looses 8 hours at time and a half which is exactly the same as "premium Holiday pay". The question is whether this practice is forbidden by § 26.02 and § 13.07. Sections 26.02 and 13.07 taken on their face create confusion. One reasonable reading of § 26.02 forbids "days off" being changed to "avoid holiday premium pay". Moreover, the Union's focus on "regular" as the controlling word is just as reasonable as the Employer's focus on "posted" as the controlling word. Sections 26.02 and 13.07 are not clear on their face.

Before looking behind those sections, the issue of "regular"

schedule must be addressed. The Employer argues that these employees did not have "regular" schedules beyond the "posted" schedule. That statement simply does not comport with the evidence. Mr. Nash testified that he scheduled predictably except for moving R days off holidays. Moreover, he testified that he divided the employees into three work pattern sections. A perusal of the work schedules introduced indicates a "regularity" to the schedules well beyond each individual schedule. The question is not whether the Employer is required to have "regular" schedules but whether the Employer may change those regular schedules to avoid paying premium Holiday pay. Obviously, the preceding contracts do not control the meaning of the contract under which this grievance is arbitrated. Nor is the Henline decision, which was a non-binding mediation, binding in any way. Lastly, the Arbitrator recognizes that the letter of February 9, 1981 applied to a different contract. Nonetheless, where the contract is unclear, as here, these documents and decisions are reasonable ones to consult to understand the sections in question. Of particular help is the letter of February 9, 1981. The section of the contract discussed in that letter is extremely similar to § 26.02. In that letter, the Employer warned "If the employee's 'posted' day or his 'regular day off' is changed with the intent of avoiding overtime pay . . . it is a violation of the contract." The Employer recognized that "Even a 14 day written notice is not adequate" to justify the change. Thus, the Employer recognized that "Posting" per se was not the key issue. The letter goes on

to suggest ways to accomplish the same purpose by eliminating "regular" days off. Whether this advice would work is not at issue in this grievance because regular days off still existed. The testimony of Mr. Nash was that he strove for predictability and regularity and that only the "philosophy" of not letting R days coincide with Holidays interrupted this regularity. The Arbitrator finds the Pemberton grievance at least suggestive that Ohio Department of Mental Health's purported interpretation is not the only one possible by reasonable people. This factor lends weight to the Arbitrator's decision that § 26.02 is not clear on its face but ambiguous. Grievance G-8-70, introduced by the Employer, did not address the issues at hand.

The Arbitrator finds that on July 4, 1986, the employees under consideration had "regular schedules" which the Employer deliberately changed to avoid paying premium holiday pay, i.e., overtime, in that pay period.

Award

The Grievance is sustained.

1. The Employer is directed to cease any future violations of the contract consistent with this opinion.
2. The Employer is directed to pay 8 hours of overtime pay to all current employees whose R days were changed to a Holiday on July 4, 1986 and who were given another R day in that week.

3. The Employer and the Union are directed to ascertain to whom and on what holidays similar rules were applied between July 4, 1986 and the date of this award; the Employer and the Union are directed to arrive at a fair and equitable plan to compensate current employees adequately for any such contract violations.

The Arbitrator retains jurisdiction over this matter to the extent necessary to assure an equitable compensation to the injured parties. If the parties cannot agree, the Arbitrator will hold an evidentiary hearing to determine the extent of violations between July 4, 1986 and the date of this award and to calculate a reasonable award to affected employees.

February 1, 1988
Date

Rhonda R Rivera
Arbitrator