

#194

In the Matter of the
Arbitration Between

OCSEA, Local 11,
AFSCME, AFL-CIO

Union

and

Ohio Department of Health

Employer

Grievance No. G-86-0597
(Mills)

Hearing Date: April 15, 1988

Brief Date: June 1, 1988

Opinion Date: July 6, 1988

For the Union: Allyne Beach, Staff Representative

Linda Fieley, Counsel

For the Employer: Michael J. D'Arcy, Advocate

Sue Wolfe, Labor Relations Specialist

Preliminary Matters:

In addition to the Grievant Lyndell Mills, his representatives, and the representatives of the employer, the following persons were present: Bill Hayward (Union witness), Larry W. Johnson (Union witness), Ruby M. Wolfe (Union witness), Dave Katonak (Union witness), Karen Brown (Union witness), Ruth Manuel (Chief ODH Personnel, Employer witness), Charlotte Lowery (Supervisor, Division WIC, Employer witness), William Boehm (supervisor Bureau for Children with Medical Handicaps, Employer witness).

The parties agreed that the Arbitrator might tape the hearing solely to refresh her recollection and on the condition that the tapes are destroyed on the day the opinion is mailed. The parties also agreed that the Arbitrator could submit the opinion for publication.

The parties stipulated that the issue was properly before the Arbitrator.

The parties submitted 7 joint exhibits; exhibit J-7 is attached to this opinion: a copy of the August 26, 1986 letter from Michael J. D'Arcy, Chief, ODH to Russell G. Murray, Executive Director, OCSEA.

The parties stipulated in writing to the following facts:

- 2) Prior to 8/1/86 with two exceptions, there were two starting/quitting times and flexible hours designations for employees of the Ohio Department of Health.
- 3) Before 8/1/86, the starting/quitting times have been:
 - A) 7:45 a.m. to 4:30 p.m. - 45 minute lunch
 - B) 8:30 a.m. to 5:30 p.m. - 1 hour lunch
 - C) Flexible House Designation
 - D) Exceptions: Laboratories - Maintenance staff 6:30 a.m. to 3:15 p.m., 45 minute lunch and milk/water staff work 4, 10-hour days.
- 4) After 8/1/86 with two exceptions, there were four starting/quitting times and flexible hours designations for employees of the Ohio Department of Health.
- 5) Since 8/86, the starting/quitting times have been:
 - A) 7:15 a.m. to 4:15 p.m. - 1 hour lunch
 - B) 7:45 a.m. to 4:30 p.m. - 45 minute lunch
 - C) 7:45 a.m. to 4:45 p.m. - 1 hour lunch
 - D) 8:30 a.m. to 5:30 p.m. - 1 hour lunch
 - E) Flexible Hours Designation
 - F) Exceptions: Laboratories - Maintenance staff 6:30 a.m. to 3:15 p.m., 45 minute lunch and milk/water staff work 4, 10-hour days.

Relevant Contract Sections:

§ 13.16 - Time Clocks

Beginning ninety (90) days after the effective date of this Agreement, the Employer shall not add time clocks.

§ 43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

Facts:

Ohio Department of Health is a state agency with over 1,000 employees at 10 different locations. Effective July 1, 1986, ODH-OCSEA were bound to a three year labor-management agreement (Joint Exhibit 1). On August 1, 1986, employees of ODH began to operate under 6 different starting and quitting times (jointly stipulated facts). ODH had notified the union of these new times in a letter from Michael D'Arcy, Chief ODH Personnel Services, to Russell G. Murray, Executive Director OCSEA, dated July 18, 1986 (State Exhibit No. 4). This notice was given pursuant to Article 43.03 of the Contract.

On August 18, 1986 and September 2, 1986 in two sections of the ODH, sign-in/sign-out sheets were introduced. On August 18,

1986, Ben Slay, Chief Steward for OCSEA, grieved the introduction of these sheets, stating that the introduction violated Articles 43.03, 13.01, and 2.02. On September 18, 1986, Mr. Slay at Step 2 converted his grievance into a class grievance. On September 25, 1986, a Step 2 meeting was held on that grievance. On October 3, 1986, Ruth Manuel, Chief Personnel Unit, concluded in writing that the sign-in/sign-out procedures were introduced prematurely. She

directed that the practices be discontinued and the sheets be destroyed. At the hearing, Ms. Manuel stated that she handed a copy of that Step 2 decision personally to Mr. Slay. Within that decision were these words:

Michael J. D'Arcy, Chief designee of labor relations for the agency, had submitted a letter to Mr. Russell Murray on August 26, 1986 stating our intent to implement a sign-in/sign-out procedure throughout the agency. See attached memo from the Assistant Director of Health, Mat Tannebaum, stating the effective date of this procedure will be October 13, 1986. (State Exhibit No. 1)

Mr. D'Arcy testified that pursuant to Article 43.03, he sent notice to the Union of the planned sign-in/sign-out in a letter dated August 26, 1986. A copy of this letter was jointly introduced (Joint Exhibit No. 7), and a copy is attached to this opinion. Mr. D'Arcy testified that he personally metered the envelope and dropped the letter properly metered into a U.S. Mail Box. Ms. Karen Brown, executive secretary to Russell G. Murray, OCSEA executive director, stated that the letter was not in the files of the OCSEA. She also stated that the OCSEA office did not

use mail logs.

The letter of August 26, 1986, indicated that "With the implementation of a total of four starting times, we have found it necessary to formalize our sign-in/sign-out procedures . . ." The letter indicated that the sheets "will vary from location to location." With regard to the "purpose" of the new procedure, the third paragraph read as follows:

The purpose of this recording device is to allow the individuals who are answering phones to easily determine whether to transfer a telephone call or take a message; allow the receptionist to have an idea where to contact an employee in an emergency; and to ensure that employees are adhering to their designated work schedules.

On October 2, 1986, Tannebaum notified all senior staff that "[e]ffective October 13th, all employees below supervisory level are to sign-in and out" (Union Exhibit No. 1). Subsequent to Tannebaum's directive, section managers sent memos announcing the policies. These announcements varied in length and detail from section to section (See U-2, U-3, and U-4).

The policy became effective October 14, 1986, and on that day Lyndell Mills grieved the policy as violating § 13.16 and § 43.03.

A Step 3 meeting was held on October 23, 1986. Two other grievances on the same issue were incorporated by reference #A86-10-29-07 and #A86-10-17-06, and the grievance was considered a "class grievance for all OCSEA members at all ODH locations". At Step 3, Mr. Mills stated that the contract was violated

1) because the Union had never received notification pursuant to § 43.03 and 2) because the sign-in/sign-out procedure constituted a "time clock" and hence violated § 13.16 because the policy was implemented after September 29, 1986 (Joint Exhibit No. 3). The Union's grievance was denied at Step 3 and was appealed on November 10, 1986 in a letter to OCB by Mr. Mills (Joint Exhibit No. 4).

Mr. Mills, Chapter President of OCSEA and a 13 year employee of ODH, indicated that in early October rumors of a new policy circulated and that in pay checks of October 10, 1986, a notice of the new sign-in/sign-out procedure was included. He said that on October 14, 1986 after the implementation of the policy [October 13 (Monday) was a holiday] he asked for a meeting with management. In that meeting, he asked for an explanation in writing of the relationship of the procedure to discipline and that request was denied. Subsequently, he filed the Grievance because of "lack of respect", the "fiat accompli nature" of the policy, and because "employee concerns were not heard". Mr. Mills was shown Union Exhibits U-2 through U-4 which he felt indicated that the sign-in/sign-out policy was not being administered uniformly. Mr. Mills said the procedure was a "time clock in essence". Some units had to use a "designated" clock. Prior to the use of sign-in/sign-out, Mills stated attendance and tardiness had been monitored and discipline given for tardiness and unexcused absences. The sign-in/sign-out sheets in Mr. Mills area were not accessible to the person who answered the phones. On

cross examination, Mr. Mills indicated that Mr. Slay had received a copy of the Step #3 response to the previous grievance (Joint Exhibit No. 3). Mr. Mills in response to the question "what is a time clock?" said, "a mechanism into which a person puts a card". Mr. Mills said that at Step 3, he had raised the issue of "reasonableness" but could not remember the form in which he raised it.

On behalf of the Union, Mr. Bill Hayward testified. Mr. Hayward is a district Sanitarian in the N.E. District Office and a Union steward. He indicated that prior to the department-wide sign-in/sign-out policy "only clericals" had to sign in and sign out. He testified that under the new policy one sheet was kept at the front door but that the sheet was **not** accessible to the person answering the phone. He indicated that the location was inconvenient for him because he preferred to come in the back door. He indicated that a clerical in the office had been disciplined for not signing the sheet in chronological order (See Union Exhibit No. 6). The witness was unable to resolve with clarity whether the employee discussed in Exhibit No. 6 was ever disciplined over the incident. The supervisor's statement included with Union Exhibit No. 6 indicated that the employee was told that an oral statement on how to sign-in/sign-out was an order and if disobeyed constituted insubordination. The Union also introduced Exhibit No. 7 during Mr. Hayward's testimony (an IOC with time sheet attached). The IOC directed an employee on the correct sign-in/sign-out procedures. During Mr. Hayward's

testimony, the Union also introduced Union Exhibit No. 8 (a series of time sheets with a cover sheet which stated "counseled Linda DiFrancisco and Sue Reiterman on being late"). Mr. Hayward said that people in his unit felt that the sign-in/sign-out procedure was in direct retaliation for the contract. On cross examination, Mr. Hayward was asked "What is a time clock?" His reply was "a machine on a wall into which one inserts a card". For the Union, Mr. Katonak, a lab supervisor and employee of 26 years, also testified. He said that prior to October 14, 1988, sign-in/sign-out sheets had been used sporadically to keep tabs on particular groups who were apparently abusing "time". He testified that at his work station that the sign-in/sign-out sheet is not available to the person answering the phone nor does the sheet indicate a person's whereabouts at all times. The exact method of signing in and signing out varies among supervisors. He testified that some persons had been disciplined over time sheets but that no grievances were filed because they were only oral warnings. He indicated that people were upset by the sign-in/sign-out sheets because they were "professionals" and previously had been accountable only to themselves for their time. Mr. Larry Johnson was also a Union witness, an employee for 2 years, and a steward. His supervisor kept the sign-in/sign-out sheet on his desk and drew a red line on the sheet after 7:45 a.m. which indicated who was late. The sheet is available to the person answering the phone. On cross, Mr. Johnson was asked if he was paid according to the time sheet. He said, "apparently not

because I am never docked when I'm late". He did indicate that the use of the sign-in/sign-out sheet made him more punctual.

Mr. D'Arcy, Chief of Personnel Services for ODH, testified that the genesis of the sign-in/sign-out policy was a discussion of accountability raised by the state auditors. These auditors indicated that given the various hours worked by ODH employees at various locations that accounting for their time was difficult. D'Arcy said that the auditor's comments were not directly mentioned in the August 26, 1986 letter to Murray but that he had referred to the large number of starting times. With regard to discipline, he said that sign-in/sign-out sheets could be an indicator of a tardiness problem; prior to their use, supervisors had to rely solely on personal observation and complaints. He agreed that in the Enberg termination (Union Exhibit No. 17) that sign-in/sign-out sheets played a part in the discipline. He said that a time clock is primarily used as a basis for payment. He said sign-in/sign-out sheets were not so used. Ruth Manuel, Chief of Personnel and ODH employee of 19 years, testified that sign-in/sign-out sheets are not the basis for payroll. The state introduced Exhibits 8, 9, 10 as payroll forms. Two other state witnesses confirmed that sign-in/sign-out sheets are not the basis for payroll decisions. They also indicated that sign-in/sign-out sheets could be used as a basis for monitoring tardiness which could result in discipline.

Issues:

Did the Department of Health violate Section 43.03 of the OCSEA/AFSCME contract which requires the Union to be notified prior to the implementation of a new work rule and given the opportunity to discuss the work rule prior to implementation?

Did the Department of Health violate 13.16 of the OCSEA/AFSCME contract by implementing the sign in and sign out policy?

Is the sign in and sign out policy reasonable as outlined in 43.03 of the OCSEA/AFSCME contract?

Union Position:

The Union maintains that the Employer violated § 43.03 because no prior notice of the sign-in/sign-out policy was received by the Union. Secondly, the Union maintains that the sign-in/sign-out policy violates § 13.06 because the policy constitutes a time clock because the policy operates in the same manner as a time clock in that it provides a permanent record of arrival and departure times and is hence a "defacto" time clock. Lastly, the Union argues that the policy violates § 43.03 in that the sign-in/sign-out policy is "unreasonable". This unreasonableness is manifested because the policy does not carry out the stated purposes as outlined by the Employer and because the policy as applied is inconsistent and nonuniform. Although not listed in the issues presented on the first page in the brief, the issue of "bargaining" was raised in the Union's arguments at the hearing and in the brief. The Union maintains that the

sign-in/sign-out policy is an issue of mandatory bargaining and was, therefore, improperly instituted. The basis of this argument is that the sign-in/sign-out policy significantly changes the terms and conditions of employment. The significant change lies in the use of sign-in/sign-out sheets as a basis of discipline.

Employer's Position:

Section 43.03 was not violated as the Employer gave notice in its letter of August 26, 1988. Section 13.16 is not violated because sign-in/sign-out sheets are not on their face a time clock. In addition, the primary purpose of time clocks are for payroll, and the sign-in/sign-out sheets are not so used.

The issue of reasonableness of the policy is not properly before the Arbitrator because the issue was not raised prior to the Arbitration. However, if the Arbitrator considers "reasonableness", the Employer has shown that given the various starting times, the number of employees, that the sign-in/sign-out sheets are a reasonable management tool for the purposes of accountability.

Discussion:

Notification

Section 43.03 requires "The Union shall be notified prior to the implementation of any new work rules . . ."

The Arbitrator finds that the August 26, 1988 letter (Joint Exhibit No. 7) satisfies this requirement. Mr. D'Arcy testified that he properly posted that letter. Well known and long standing rules of contract interpretation have held that "notification" only requires that a notice be properly posted. Receipt is not an element of notification unless so specified. This rather stark rule is notably mitigated in this case by two factors:

First, the Union only presented evidence that the letter in question "was not in the files" No one testified that the letter was not received.

Second, the Union had constructive notice of the work rule change on October 3, 1986 through the Step 3 response handed to Mr. Slay.

Time Clock

The Arbitrator finds that the sign-in/sign-out policy does not violate § 13.16 as a time clock instituted more than 90 days after the effective date of the Contract. Webster's New Collegiate Dictionary says at p. 1222 that a time clock is "a clock that stamps an employee's starting and quitting times on his time card". Sign-in/sign-out sheets are not "a clock that stamps." The Union argues that the sign-in/sign-out policy is a "defacto" time clock and hence prohibited by § 13.16. If for the sake of argument, we assume that the sign-in/sign-out policy constitutes a "defacto" time clock is such a practice prohibited

by § 13.16? The Arbitrator thinks not. The Arbitrator is bound to interpret and enforce the contract as made by the parties. The thing prohibited is a "time clock". The Union argues that those words should be interpreted to prohibit policies that arguably carry out the same functions as a time clock.

An Arbitrator has two possible ways of interpreting words in a contract. The older more traditional method was to examine "the plain meaning" of words. If the "plain meaning" of the words in question is clear, i.e., unambiguous to the interpreter, the process of interpretation ceases, and no extrinsic evidence may be introduced. Under the "plain meaning" test, a time clock is a mechanical device and sign-in/sign-out sheets are not; hence, sign-in/sign-out sheets do not violate § 13.16. Under the more modern approach to interpretation, favored by this Arbitrator, parties can introduce extrinsic evidence to show that a word is susceptible to two (2) possible reasonable interpretations. No evidence was introduced that showed that time clock also meant sign-in/sign-out sheets. However, a second method exists to convince the interpreter that a word has a second reasonable meaning, i.e., the words in a contract are to mirror the intentions of the parties. Assuming arguendo that the Union cast doubt on the words "time clock" to call their meaning into question, no evidence was introduced to show that the negotiators intended to also prohibit policies that functioned as defacto time clocks. No history of the time clock issue was adduced to cast any doubt on the meaning. The only evidence was introduced by the

Employer which seemed to indicate that § 13.16 was added to deal with time clocks to be introduced by the Department of Mental Health. The Union has not shown that the words of § 13.16 prohibit anything other than "mechanical devices".

Reasonableness

A review of the written grievance trail raises doubt in the Arbitrator's mind that the issue of reasonableness was clearly raised below. However, two paragraphs in both the Step 3 document (Joint Exhibit No. 3) and Mr. Mills' letter of November 10, 1986 (Joint Exhibit No. 4) are sufficiently vague that a broad reading could encompass "reasonableness". Moreover, the grievance itself (Joint Exhibit No. 2) named § 43.03 in its entirety, and § 43.03 covers "reasonableness" as well as notification. The Union's main contentions which bear on its interpretation of reasonableness are that the policy is administered inconsistently and that the policy does not carry out the purposes ascribed to it by the employer; hence, the Union believes the policy is unreasonable.

The evidence, while hardly conclusive, does tend to show that different sections of ODH administer the policy in certain of its details inconsistently. However, all sections appear to require that a person sign-in and sign-out on arrival, on lunch, and on departure. These broad requirements conform to departmental policy. However, within those broad limits, testimony indicates that various sections have idiosyncratic administration. However, idiosyncratic administration does not make the policy itself

unreasonable. A policy can be reasonable and poorly carried out. If idiosyncratic administration causes disparate treatment, that disparate treatment can be grieved appropriately.

The purposes of the rule as stated in management's letter of August 26, 1986 were "to allow individuals who are answering phones to easily determine whether to transfer a telephone call or take a message; allow the receptionist to have an idea where to contact an employee in an emergency; and to ensure that employees are adhering to their designated work schedules." To supplement that statement Mr. D'Arcy, Chief of Personnel Services, testified that state auditors had indicated that a method of accountability of employee time was lacking. Union testimony indicated that the procedure was not helpful in 3 out of the 4 sections discussed with regard to telephone messages. Union testimony also cast doubt on the efficacy of the procedure to assist with emergency contact of employees. However, Union testimony clearly demonstrated that the procedure helped "ensure that employees were adhering to their designated work schedules." One Union witness even stated that he was more punctual at work as a result of the procedures.

If the Union could have shown that the policy did not work at all does that mean that § 43.03 is violated per se. The Arbitrator thinks not. The effectiveness of a work rule is a question of managerial discretion. A management tool can be totally ineffective as long as it is reasonable. Many facially reasonable ideas do not work. The question is whether there is a rational relationship between the rule and a legitimate employer

objective. Accounting for employee time is a legitimate employer objective. Sign-in/sign-out sheets are one method of accounting for employee time. That method is not forbidden by the contract. Reasonableness is in the eye of the beholder to some extent. However, the Arbitrator cannot hold that the Union has proven the rule to be unreasonable.

The Union includes within the "reasonableness" issue a claim that because the policy helps enforce tardiness rules that the policy rendered impermissible. All parties agreed that tardiness was a matter for discipline prior to the implementation of the policy. The methods of ascertaining "tardiness" were supervisor observation and secondhand complaints. Arguably, sign-in/sign-out sheets which involve self-reporting are more objective and hence fairer. Regardless, the use of sign-in/sign-out sheets does not cause discipline but only forms a possible basis for evidence. Such a change does not constitute the creation of a new offense subject to discipline.

The Union apparently wished to claim that the imposition of the sign-in/sign-out rule was an issue of mandatory bargaining. This issue was not raised below in any context. Moreover, such an issue does not fall within the mandate of the Arbitrator (See § 25.01).

Decision:

Grievance denied.

July 6, 1988
Date


Arbitrator

246 N. High Street
Post Office Box 118
Columbus, Ohio 43266-0118

Telephone (614) 466-3543



RICHARD F. CELESTE
Governor

August 26, 1986

Russell G. Murray
Executive Director
Ohio Civil Service Employee's Association
995 Goodale Blvd.
Columbus, Ohio 43212

Dear Mr. Murray:

Last month, we notified you that we intended to offer two additional starting times to employees of the agency. You were notified that these new starting times would be effective with the start of business on August 18.

For several years, various parts of the Department have utilized sign-in and sign-out procedures. With the implementation of a total of four starting times, we have found it necessary to formalize our sign-in/sign-out procedures in all units of the agency. This expansion will apply to all employees represented by your organization. Sign-in/sign-out sheets will vary from location to location; will include the employee's name, the time they reported into work, the time they left for lunch, the time they came back from lunch, and the time they left for the day. Due to the nature of the work performed by several of the employees represented by your organization, some of the sign-in/sign-out sheets may have space for activity time out and in.

3rd
The purpose of this recording device is to allow the individuals who are answering phones to easily determine whether to transfer a telephone call or take a message; allow the receptionist to have an idea where to contact an employee in an emergency; and to ensure that employees are adhering to their designated work schedules.

For flexible-hours employees represented by your organization, the individual supervisor will be establishing "core times" during which the employee, when scheduled to be in the office, must actually be there. These scheduled core times will allow for scheduling of meetings and/or conferences with co-workers and/or supervisors.

As mentioned above, several areas of the agency have had this practice. For those parts of the agency who do not have this practice, we intend to implement it no later than the beginning of the business day on Monday, September 29, 1986.