In the Matter of the Arbitration between:

OHIO HEALTH CARE EMPLOYEES UNION, District 1199

and

DEPARTMENT of REHABILITATION and CORRECTION, ADULT PAROLE AUTHORITY

OCB Grievance No. 087-2056
Gr. Stephen L. Phillips

ARBITRATOR'S DECISION and AWARD

Appearances:

Jack Burgess, Chief of Arbitration Services, O.C.B., for the Agency

Bob Callahan, Secretary-Treasurer Local 1199, for the Union

This matter was heard by me as arbitrator on August 23, 1988. The parties were afforded full opportunity to adduce evidence and to argue orally. They waived the filing of post-hearing briefs.

On August 10, 1987 the grievant a Parole Officer, filed a grievance claiming that the Agency had violated the collective bargaining agreement by denying him overtime pay for 3½ hours in the week ending August 7, 1987. His immediate supervisor, denying the grievance at Step 1, stated that on August 3rd and 6th, 1987 the grievant "was instructed to Flex this 3½ hours off for the week ending August 7" and that no priorauthorization of overtime had been given. In its Step 3 response the Agency argued that, contrary to the Union's claim that, in violation of Section 22.13 of the collective bargaining agreement, it had changed the grievant's work schedule in order to avoid the payment of overtime, there had been no violation of that section because the grievant was not on a "fixed work schedule".

The issue is: Did the Adult Parole Authority violate the contract when it rescheduled the grievant's hours of work on August 7, 1987, by reducing them by 3½ hours in order to avoid payment of overtime.

THE PERTINENT CONTRACT PROVISIONS

Sec. 22.01 Work Week

The standard work week for full-time employees shall be forty (40) hours exclusive of time allotted for unpaid meal periods.

Sec. 22.02 Rate of Overtime Pay

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

Sec. 22.03 Overtime Assignment

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B. In non-institutional settings the agency reserves the right to schedule and approve overtime -----.

Sec. 22.11 Flexible Work Schedules

The present practice of flex time shall be continued. Extending the use of flexible work schedules shall be a subject for discussion in the Agency Professional Committees. Flexible work schedules can include adjusting the starting and quitting times of the work days and/or the number of hours worked prt day and the number of days worked per week.

Sec. 2213 Posting of Work Schedules

Where appropriate in institutional settings, a four week schedule shall be posted two (2) weeks in advance. An employee shall not be required to change his/her posted schedule to avoid the payment of overtime to such employee.

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In non-institutional settings where the work schedule is fixed, the agency shall not change an employee's schedule to avoid payment of overtime.

THE FACTS

As a parole officer in the Toledo office of the A.P.A. the grievant supervises adult male and female prisoners who have been released, often visits them at their homes, frequently meets with them in the evening when they are not available during the day, and attends parole revocation hearings and other meetings when necessary. The latter functions commonly involve substantial travel time and result in overtime hours being worked.

The grievant had considerable advance notice that he was to attend a revocation hearing in Chillicothe on August 5, 1987. Knowing that this would involve overtime hours, he asked his supervisor, Dave Knepper, to approve overtime pay for this assignment. Knepper refused and instructed the grievant to "flex his schedule" to avoid overtime pay. On Friday, August 7, the grievant was instructed by Knepper to leave work early enough to offset the three and one-half overtime hours he had worked on August 5. The grievant complied and promptly filed a grievance claiming that his work schedule had been changed to avoid the payment of overtime in violation of the contract.

THE CONTENTIONS OF THE PARTIES

The Union asserts that this is a case of forced rescheduling to avoid payment of overtime in violation of the clear intent of the contract toprohibit that practice; that the practice of the "voluntary flexing of schedules" which antedates the execution of the collective bargaining agreement, does not justify such changes to avoid overtime under the agreement; that the grievant was working

on a "fixed schedule" within the meaning of Sec. 22.13 and that the change in that schedule on August 7, 1987 was a violation of that section. Finally, the Union argues that its position is supported by precedents in the form of a grievance settlement dated September 29. 1986involving an A.P.A. employee named Barbara Griswold, and a decision by Arbitrator Calvin Wm. Sharpe dated May 4, 1987 in a case involving Youth Counselors in the Ohio Department of Youth Services.

The Agency contends that Sec. 22.13 is not applicable because the grievant's work schedule was not fixed and, considering the nature of his work could not be fixed; that his position description states that his hours may vary; that Sec. 22.03B reserves the right to management to schedule and approve overtime in non-institutional settings and that management's denial of overtime in this instance was consistent with its practice in such cases. Finally, it asserts that the Union is attempting to obtain through arbitration what it was unable to obtain through negotiations.

DISCUSSION and OPINION

Although the Union argues that one of its major goals in the bargaining which led to the current contract was to eliminate the changing of work schedules to avoid overtime, the contract does not prohibit such changes absolutely and in all cases. Thus, Sec. 22.13 requires the posting of a four week schedule two weeks in advance "where appropriate in institutional settings" and bars the changing of such a schedule to avoid the payment of overtime. With regard to non-institutional settings, such as the one in the instant case, a change in an employee's schedule to avoid the payment of overtime is prohibited only"where the work schedule is fixed".

The essential question, then, is whether the grievant was on a fixed work schedule. If he was the grievance would have to be sustained. If he was not there would be no contractual bar to what the Agency did in this case.

The Union claims that the grievant's schedule was fixed because the job description of a Parole Officer, issued in 1982 states that his normal working hours are from 8:00 A.M. to 5:00 P.M. The grievant testified that when he was hired in 1979 he was told that his hours would be from 8:00 A.M. to 4:45 P.M. The Agency asserts that parole officers' work schedules are not and cannot be fixed because of the nature of their duties which require them to visit clients in their homes, or to see them in the evening if the client has a job, to travel to parole revocation hearings several times a year and to other meetings and conferences. Therefore, argues the Agency, parole officers must exercise discretion in scheduling their hours in order to meet their professional responsibilities. Some parole officers work out of their homes, a practice recognized and encouraged by Sec. 22.12 of the contract, and their hours are obviously even less subject to supervisory control than those of the officers who are headquartered at the regional office.

In support of its claim that the parole officers' work schedules are not fixed the Agency submitted a Position Description for Parole/Probation Officer evidently printed in May, 1981 and signed by the grievant and the Agency representative in April, 1986, which states that the normal working hours are "From 8:00 A.M. to 4:45 P.M. On call 24 hours a day, hours may vary".

That the working hours of the grievant do, in fact, vary is shown by his daily log sheets, in which he recorded his starting and finishing time and his daily activities. These sheets cover about sixty-five days over a period of about four months and show that his recorded starting times varied from 7:45 A.M. to 8:00m 8:15, 8:20, 8:25, 8:45 and 9:10.On only 40% of the days did he start at 8:00 A.M. With regard to his quitting times, these varied even more widely, ranging from 3:15 P.M. to 9:00 P.M. His "normal" quitting time of 4:45 P.M. appears on only about four percent of these log sheets, an earlier quitting time on about six percent, and a later time on the remaining days. It is clear, and I find, that the grievant's work schedule is not, in fact, the "normal" one mentioned in his job description, and that his hours of work have, more often than not, varied widely from that so-called norm.

A fixed work schedule is one that is not subject to change or fluctuation. It need not be posted, but the employee must be put on notice that he is to report for duty at a specified time each day and to complete his day's work at a specified time. If he has discretion to change his starting or quitting times depending on the demands of his job, his schedule is not fixed. The Union itself provided an excellent example of parole officers who were put on a fixed schedule. It produced a memorandum issued by the A.P.A. in Cleveland Unit I, reminding them that effective February 29, 1988 their working hours are from 8:00A.M. to 4:45 P.M., and further:

> "All parole officers are expected to be in the office at 8:00 a.m., and depart at 4:45 p.m. Officers who are not in the office by 8:30 a.m. will submit leave forms to Margaret Saker by the end of the day.
>
> Officers are expected to take a 45-minute lunch, plus two (2) fifteen minute (15) breaks.

Further note, all parolees will be cleared from the office area and instructed to report at such time that all parole matters can be discussed prior to 4:45 p.m. Thus securing the office at the close of the day.

Note further, that your attendance will be monitored for compliance.

ANY ADJUSTMENTS OR DEVIATIONS FROM THE ABOVE WILL BE APPROVED BY ME PRIOR TO ANY CHANGES WITH THIS SCHEDULE."

That memorandum established a fixed schedule for the parole officers in Cleveland Unit I, and is in sharp contrast to the working arrangements in the Toledo office. The evidence is convincing that the grievant was not on a fixed work schedule.

The Union argues that Sec. 22.13 prohibits any schedule change to avoid overtime payment, regardless of the qualifying words "where the work schedule is fixed" which appear in that section, asserting that those words are surplusage and should be ignored. It would be wholly inappropriate for the arbitrator to make such a finding even if there were no bargaining history to illuminate the intent of the parties. The fact is that Sec. 22.13 was a serious bargaining issue and was the subject of conflicting proposals by the parties. Thus, the second Union proposal would have prohibited all "scheduling or schedule changes to avoid overtime". That proposal was rejected and the compromise language of Sec. 22.13 was ultimately adopted. The Union now argues that that section has precisely the same meaning as its proposal that was rejected. There is merit in the Agency's assertion that the Union seeks to obtain in arbitration what it could not gain at the bargaining table.

It is to be noted that the Agency does not deny overtime pay in all instances in which a parole officer works more than eight hours in a day. If he has to attend a revocation hearing or perform some other duty that requires substantial overtime, overtime pay may be

and has been authorized, depending on the circumstances. These include the officer's work load and whether he had sufficient advance notice of the assignment to handle it within the forty-hour week conveniently by rescheduling other duties. If that cannot be done the Employer, exercising the discretion vested in it by Sec. 22.03(B) of the collective bargaining agreement, authorizes overtime pay. That discretion should, of course, be exercised impartially and on the basis of guidelines that are applied uniformly. It is not claimed, nor is there evidence, that that was not done in the instant case, that the refusal of supervision to authorize overtime was arbitrary or capricious, or that the grievant suffered any hardship because he was not allowed to work more than forty hours in that week.

The Union cites two determinations which it claims, have precedential value. The first is the disposition of a grievance of another parole officer at the Toledo office, one Barbara Griswold, on May 13, 1987. The circumstances in that case were somewhat similar to those in the instant case except that Griswold had had no advance notice of her out-of-town assignment and was not told that she would have to adjust her schedule until after she had incurred the overtime. For these reasons her grievance was granted at Step 3 and she was awarded overtime, on the express condition that said disposition was "without prejudice or precedent" (Union Ex.5). The Union argues that this condition was not part of the grievance settlement but was inserted by management unilaterally. Whether or not that was the case, the fact is that that was the stated condition of the settlement on the official grievance form. If that condition was unacceptable to the Union it could have rejected the settlement and taken the grievance to arbitration. In these circumstances I conclude that the Griswold settlement must be held to have been"without prejudice or precedent".

The second determination cited by the Union as a precedent is the decision and award of Arbitrator Calvin Wm. Sharpe dated May 4, 1987 in a case which arose in the Ohio Department of Youth Services (Grievance No. G.87-0134). It involved a claim for overtime pay by Youth Counselors for time spent in counseling sessions after their normal work day, for which time they had been permitted to take an equal amount of time off, with supervisory approval. Arbitrator Sharpe does not discuss the "fixed work schedule" requirement in Sec. 22.13 nor is there anything in his decision to indicate that the applicability of that language was an issue in his case. In these circumstances he concluded that Sec. 22.13 clearly and unqualifiedly directs the agency "not to change an employee's schedule to avoid payment of overtime", omitting any mention of the requirement that the employee's work schedule must be a fixed one for that prohibition to become operative. Since Arbitrator Sharpe's decision does not deal with the essential issue in the instant case, I consider it to be inapposite. On the record of the instant case I cannot find that the action taken by the Agency violated Section 22.13.

I make no finding concerning the applicability of Sec. 22.11 to the instant grievance. That section, headed "Flexible Work Schedules". requires the continuation of "the present practice of flex time' and then speaks of extending the use of flexible work schedules. I find this section ambiguous since it appears to use "flex time" and "flexible work schedules" interchangeably. In the instant case the grievant was instructed "to flex this 3½ hours off for the week ending

August 7". This suggests that he may have considered the irregular hours of the parole officers a form of flex time. However, since the Agency defends its action, not under Section 22.11 but rather on the ground that since the grievant was not on a fixed work schedule, the Agency's action was permitted under Sections 22.13 and 22.03(B), I find it unnecessary to rule on the meaning of applicability of Section Section 22.11.

AWARD

The grievance is denied.

Dated at Cincinnati, Ohio

September 9, 1988

James C. Paradise, Arbitrator