ARBITRATION AWARD SUMMARY

OCB Award Number: 297

OCB Grievance Number: 29-02-880606-0044 James Toth

Union: 1199

Department: RSC

Arbitrator: Howard Silver

Management Advocate: John Connally

Union Advocate: Robert Callahan

Arbitration Date: 6-15-89

Decision Date: 7-14-89

Decision: Denied

Howard D. Silver
Arbitrator
Columbus, Ohio

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In the Matter of Arbitration
Between

The State of Ohio

Grievant:
James Toth

29-02-880606-0044

and

The Ohio Health Care Employees Union
District 1199, WV/KY/OH
National Union of Hospital and
Health Care Employees, AFL-CIO

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APPEARANCES

For The State of Ohio

John Connelly, Management Representative
Ohio Rehabilitation Services Commission

Rodney Sampson, Management Representative
Office of Collective Bargaining

For The Ohio Health Care Employees Union,
District 1199, WV/KY/OH
National Union of Hospital and
Health Care Employees, AFL-CIO

Robert Callahan, Labor Representative
Ohio Health Care Employees Union,
District 1199

ISSUE

Did the Employer violate Article 22 of the collective bargaining agreement between the parties by changing Grievant Toth's schedule in June, 1988? If so, what should the remedy be?

The hearing in this matter was held on June 15, 1989, within the offices of the Ohio Department of Administrative Services's Office of Collective Bargaining, 65 East State Street, Columbus, Ohio. The parties were afforded a full and fair opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and make arguments supporting their positions. The record in this matter was closed on June 15, 1989.

BACKGROUND

The grievant, James Toth, is a fifteen year employee of the Rehabilitation Services Commission. Mr. Toth works as a vocational rehabilitation counselor and serves within a position presently classified Vocational Rehabilitation Counselor 4.

When Mr. Toth was originally hired by the Rehabilitation Services Commission on June 10, 1974, he was directed to work from 8:00 a.m. to 4:45 p.m. Mr. Toth worked this tour of duty until September 1, 1978, at which time the Rehabilitation Services Commission extended to its employees an opportunity to change their scheduled work hours. Mr. Toth requested and was granted permission under this policy to change his work schedule to 7:00 a.m. to 3:45 p.m., and worked this tour of duty with relatively few exceptions from September 1, 1978 through June 3, 1988. Mr. Toth's 7:00 a.m. to 3:45 p.m. work schedule remained intact during these ten years, even surviving Mr. Toth's transfer from the Akron

Bureau of Vocational Rehabilitation Office to a similar office in Ravenna, Ohio in May, 1981.

The 7:00 a.m. to 3:45 p.m. shift worked by Mr. Toth from September 1, 1978 through June 3, 1988 was not, however, unalterable. There were deviations for one to two days at a time on one to two occasions per year, usually when Mr. Toth attended training sessions offered by the Commission's central office or one of its regions.

On May 26, 1988 Mr. Toth received a memorandum from David D. Suveges, Rehabilitation Supervisor, informing Mr. Toth that following the close of business on June 3, 1988, all previously approved flexed time allowances, defined as work schedules outside the 8:00 a.m. to 4:45 p.m. tour of duty when a forty-five minute lunch break is taken, would no longer be allowed. This memorandum informed Mr. Toth that new work schedules would be implemented Monday, June 6, 1988, and any employee desiring hours other than 8:00 a.m. to 4:45 p.m. with a forty-five minute lunch break was to make his request known to his supervisor by June 1, 1988. This memorandum informed Mr. Toth that any request so received would be reviewed by management and the resulting schedule would be based on operational need. Mr. Toth was assured in this memorandum that he would be informed of his new schedule prior to the close of business on June 3, 1988.

Within the May 25, 1988 memorandum directed to Mr. Toth there is included a reason (among two) which reads as follows, "A review of Ravenna's Staggered Hours schedule (7/87) which does not

routinely staff that office with a counselor between the hours of 8:00 a.m. to 4:45 p.m., in view of Winnie Sneller's approved leave of absence" (See Union Exhibit 1).

Following the receipt of the May 25, 1988 memorandum Mr. Toth made a timely request to his supervisor to continue his work schedule within the Ravenna office from 7:00 a.m. to 3:45 p.m. This request was denied and Mr. Toth was instructed to work, beginning June 6, 1988, from 8:00 a.m. to 4:45 p.m. Mr. Toth was informed of this decision through a memorandum from Mr. Suveges dated June 3, 1988, wherein Mr. Toth was informed that his request had been denied due to an operational need to have a counselor regularly scheduled to service clients from 8:00 a.m. to 4:45 p.m. (See Union Exhibit 3). The operational necessity for scheduling Mr. Toth from 8:00 a.m. to 4:45 p.m. daily was repeated in a brief conversation between Mr. Toth and Mr. Suveges. Mr. Toth then filed a grievance as to the rescheduling of his work time.

Following the filing of the grievance Mr. Toth continued to arrive for duty at 7:00 a.m. at the Ravenna office rather than 8:00 a.m., and worked until 4:45 p.m. Mr. Toth worked this schedule for one hundred thirty-four work days until mid-December, 1988, at which time an interim vocational counselor was hired and assigned responsibility for serving clients within the Ravenna office from 3:45 p.m. to 4:45 p.m. each work day. When the interim employee was hired Mr. Toth was granted permission by his Employer to work from 7:00 a.m. to 3:30 p.m. with a thirty minute lunch period.

Mr. Toth also identified State's Exhibit 1 as his original written request for approval to change his working hours to 7:00 a.m. to 3:45 p.m., dated September 25, 1978. Also attached to State's Exhibit 1 is the response of Mr. Toth's supervisor, dated November 14, 1978, wherein Mr. Toth was officially granted permission to work from 7:00 a.m. to 3:45 p.m.

Mr. Toth also identified State's Exhibit 2 as a memorandum dated August 31, 1978 which was the policy in effect on August 31, 1978 and thereafter for the allowance of staggered work hours to employees of the Rehabilitation Services Commission. This policy permitted flexibility in scheduling daily work hours between 7:00 a.m. and 6:00 p.m. of each work day and also provided that such staggered hours had to be approved by an area supervisor. Within paragraph 3 of this policy it is stated that staggered hour days are a privilege, not a right. Paragraph 6 of this policy reads as follows:

> Staggered hours may be permitted due to the theory that it can improve the flow of services to clients. If clients and RSC offices cannot be served appropriately during the CORE time daily schedules must be adapted in order to allow the client service within the usual 8:00 to 5:00 working day.

Mr. Toth testified at hearing that the policy contained within State's Exhibit 2 was in effect at the time the present collective bargaining agreement between the parties took effect.

Mr. Toth also testified that he was ordered by his supervisor between June and December, 1988, to work from 8:00 a.m. to 4:45

p.m. but continued to report for duty at 7:00 a.m. each working day during this period. Mr. Toth agreed that at no time was he ordered to work more than forty hours per week during the latter half of 1988.

RELEVANT CONTRACTUAL PROVISIONS

Article 5, Management Rights

Except to the extent modified by this agreement, the employer reserves, exclusively, all of 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 rights expressed in Section 4117.08 (C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities, the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations.

Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

Article 22

Section 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.

Section 22.03b Overtime Assignment

In non-institutional settings, the agency reserves the right to schedule and approve overtime. In emergency situations overtime may be approved after the fact. Required overtime that can be worked by more than one (1) employee at the work site (that which

is not specific to the particular employee's case load or specialized work assignment) will be offered on a rotating, state seniority basis. If no qualified employee volunteers for the work, or where an emergency exists, then the qualified employee with the least state seniority at the work site will be assigned on a rotating basis.

Section 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 per day and the number of days worked per week.

Section 22.13 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.

Employees may voluntarily switch work days with other employees with the prior approval of the supervisor.

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

UNION'S POSITION

The Union grounds its arguments in Section 22.13 of Article 22 of the collective bargaining agreement between the parties. The last paragraph of this section provides that in non-institutional settings where the work schedule is fixed, the agency shall not change an employee's schedule to avoid the payment of overtime. The Union argues that the evidence in this matter reflects that Mr. Toth's schedule was fixed for the ten years previous to June 6, 1988, and was changed in order to elicit one more hour's work from Mr. Toth, an hour running from 3:45 p.m. to 4:45 p.m., the one hour following the conclusion of his previously fixed schedule which for

ten years ran from 7:00 a.m. through 3:45 p.m. The Union contends that in adjusting Mr. Toth's fixed schedule from 7:00 a.m. to 3:45 p.m., to 8:00 a.m. to 4:45 p.m., Management changed Mr. Toth's schedule in order to secure the extra work desired from the grievant without having to compensate Mr. Toth for overtime work.

The Union claims that under these circumstances the Employer, in changing Mr. Toth's work schedule in June, 1988, violated Article 22 of the contract between the parties and this violation should be remedied through, among other things, the compensation of Mr. Toth for the one hundred thirty-four hours of overtime he provided between June 6, 1988 and December 16, 1988.

The Union also points to Section 22.11 of Article 22 of the contract between the parties, entitled Flexible Work Schedules. This section reflects agreement between the parties that the practice of flex time in effect at the time the contract took effect would be continued. This provision also reflects agreement by the parties that flexible work schedules can include adjusting the starting and quitting times of work days and/or the number of hours worked per day and the number of days worked per week.

The Union emphasizes that policies written by Management, including policies on flex time, should not be viewed as superior to language bearing on flex time appearing within the collective bargaining agreement between the parties. The Union points out that within the flex time policy in effect between the parties at the time the collective bargaining agreement took effect, a policy found within State's Exhibit 2, a memorandum dated August 31, 1978

from the Director of the Bureau of Vocational Rehabilitation to the Deputy Administrator for Rehabilitation Services, there is language which is ambiguous as to its meaning, especially that language appearing within paragraphs 5 and 6 of this policy. The Union urges therefore that when any ambiguities arise within this policy, all choices in interpreting the policy should be resolved in favor of the intent of language bearing on this subject contained within the collective bargaining agreement between the parties. The Union urges that this policy, found within State's Exhibit 2, not be used to override conflicting language appearing within the collective bargaining agreement between the parties.

The Union concluded its arguments at hearing by contending that Mr. Toth was on a ten year fixed schedule, his fixed schedule was changed by Management in June, 1988 in order to avoid the payment of overtime, and these facts reflect a violation of Article 22 by the Employer.

MANAGEMENT'S POSITION

Management points out that the term fixed schedule is not defined within the collective bargaining agreement between the parties. Management stresses that the only language related to a definition of flexible work schedules is found within Section 22.11 of Article 22 of the contract wherein flexible work schedules are described as schedules which can include adjusting the starting and quitting times of the work days and/or the number of hours worked

per day and the number of days worked per week. Management contends that the schedule worked by Mr. Toth prior to June, 1988 was not a fixed schedule, but was rather a flexible work schedule permitted by the Employer at the request of Mr. Toth. It follows, argues Management, that if Mr. Toth was not working a fixed schedule prior to June, 1988, the change of that schedule is not controlled by any language within Article 22 of the collective bargaining agreement between the parties. The Employer contends that Section 22.13 of the contract, the section which the Union alleges the Employer violated, prohibits changing an employee's schedule to avoid the payment of overtime in a non-institutional setting only if the work schedule changed was originally fixed. According to Management since Mr. Toth's previous work schedule was not a fixed schedule but a flexible schedule, there is nothing within this grievance which triggers the impact of Section 22.13 of Article 22 of the collective bargaining agreement between the parties.

Management also contends that in order for the grievant to prevail the Employer must be shown to have changed his schedule in order to avoid the payment of overtime compensation. The Employer contends that the change in Mr. Toth's schedule during the latter half of 1988 was not done to avoid paying him overtime as no more than forty hours of work were required of Mr. Toth during any week of the time period in question. The Employer points out that the decision to arrive at the Ravenna office at 7:00 a.m. rather than the assigned starting time of 8:00 a.m. was Mr. Toth's and pointed

out Mr. Toth was repeatedly directed not to appear for duty except at the assigned starting hour of his shift.

Management contends it changed Mr. Toth's work schedule between June and December, 1988 for operational needs and not to avoid the payment of overtime. The Employer therefore argues that without such intent Section 22.13 of Article 22 of the contract is not violated and provides no basis for the grievance. Management stresses that nothing within the flexible schedule policy within either the collective bargaining agreement between the parties or the policy in effect at the time the contract went into effect, requires reference to seniority in determining whether flexible schedules should be approved, denied or revoked.

ANALYSIS

The arbitrator was presented five arbitration decisions and requested to review them during his deliberations. The arbitrator has examined these decisions, in detail, and finds as follows.

The arbitral decision and award issued by Arbitrator Pincus on September 28, 1988 addressed a grievant employed by the Ohio Department of Human Services within a bargaining unit represented by the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO. The issue in this arbitration addressed a grievant's claim for overtime compensation for overtime hours not approved by his employer. Under the contract between the parties Arbitrator Pincus determined that prior approval was necessary to the payment

of overtime and found the employer had not violated the collective bargaining agreement between the parties by refusing the overtime pay demanded by the grievant. This decision tends to support the view that Mr. Toth's 7:00 a.m. to 8:00 a.m. work from June 6, 1988 through December 16, 1988 does not require overtime compensation as these extra hours were not approved nor requested by his employer.

The arbitration decision and award issued by Arbitrator Klein on February 6, 1989 addressed a grievant employed by the Ohio Department of Transportation within a bargaining unit represented by the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO. The issue in this case involved the unilateral establishment of a night patrol and the refusal of the employer to pay overtime compensation for this shift. Arbitrator Klein found that the institution of this tour of duty occurred due to an operational need, was within the managerial prerogatives of the employer under an article of the contract between the parties covering management rights, and was not done with the intention to avoid overtime payment.

A very similar finding can be found within Arbitrator Pincus's arbitration decision issued October 10, 1988, an arbitration matter involving a grievant within the Ohio Department of Transportation and his union, Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO. In this case the employer adjusted the work schedule of five Project Inspectors and a Highway Worker. The arbitrator found that the change was for an operational need, and

was within managerial prerogatives granted to the employer under a management rights article within the collective bargaining agreement between the parties, and was not done to avoid the payment of overtime compensation.

The arbitral decision and award issued by Arbitrator James Paradise on September 9, 1988 addressed a parole officer employed by the Adult Parole Authority who had had his work schedule changed from 8:00 a.m. to 4:45 p.m., to hours outside this shift. Arbitrator Paradise found that the grievant was not on a fixed work schedule as it was a schedule subject to change and fluctuation. As the language of the contract between the parties covered only changes to fixed work schedules, Arbitrator Paradise found no violation of Article 22, the same article at issue in the matter herein.

The last arbitral decision and award presented was issued by Arbitrator Joseph M. Klamon on December 26, 1950. The parties to this arbitration were the Tin Processing Corporation and the Oil Workers International Union. In this case a new shift was established by the employer and grieved by the union. The arbitrator found that in the absence of proof that the change was arbitrary or capricious, the establishment of such a shift was within the rights of the employer.

None of these arbitration decisions addresses exactly the issues raised in the matter herein, though all touch on some aspects of this matter. In Mr. Toth's case, the grievant went from a non-routine shift to a more routine one, a shift which mirrored

the hours during which the Ravenna office was open to clients. In four of the arbitration decisions presented employees were changed from standard daily working hours to non-standard ones. In Mr. Toth's case, his schedule was changed from a non-standard shift back to a standard one. In the remaining arbitration a grievant was working through a lunch hour and claiming overtime pay for this extra work.

If there is a common thread through these decisions applicable to Mr. Toth's grievance, it is management's right to set work hours for operational needs, and if such changes occur these arbitrators have found that the changes were not done with the intention to avoid the payment of overtime compensation.

In the matter at hand, the Union has grounded its arguments within the last paragraph of Section 22.13 of Article 22 of the collective bargaining agreement between the parties. This is the specific contractual language which the Union alleges the Employer violated when the Employer changed the grievant's work schedule unilaterally in June, 1988. This language, allegedly violated by the Employer, reads as follows:

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

This language requires a showing of two separate things to prove that the intention behind this agreed language has been breached.

[redacted]

It has been argued by the Union that the 7:00 a.m. to 3:45 p.m. shift worked by Mr. Toth was a fixed schedule because he had worked it almost continuously for the ten years previous to the June 6, 1988 change of his schedule. The Union emphasizes that from early September, 1978 through June 3, 1988, Mr. Toth, with a very few exceptions, worked each work day from 7:00 a.m. to 3:45 p.m.

The arbitrator does not to find that the length of time during which Mr. Toth worked from 7:00 a.m. to 3:45 p.m. is sufficient, in and of itself, to base a conclusion that Mr. Toth was working a fixed work schedule as that term is intended within Section 22.13 of Article 22. The arbitrator is of the opinion that of greater significance in determining whether Mr. Toth was working a fixed schedule on June 3, 1988 is the fact that the 7:00 a.m. to 3:45 p.m. schedule originated under a request from Mr. Toth and unilateral approval from Mr. Toth's employer. The fact that that permission had been extended, to Mr. Toth's benefit, for ten years does not alter the fact that the schedule worked by Mr. Toth from 1978 through mid-1988 was a schedule worked under the sufferance of the Employer. The policy under which the 7:00 a.m. to 3:45 p.m. daily schedule worked by Mr. Toth was originally approved, found

within State's Exhibit 2, [redacted] Section 22.11 specifically provides that the practice of flex time in effect when the contract became effective was to be continued.

The arbitrator finds that Mr. Toth's 7:00 a.m. to 3:45 p.m. schedule was a flexed schedule and not a fixed schedule because permission from his employer was needed in order to change Mr. Toth's original 8:00 a.m. to 4:45 p.m. work schedule; because Mr. Toth was originally hired to work 8:00 a.m. to 4:45 p.m.; and because 8:00 a.m. to 4:45 p.m. are the hours during which clients of the Rehabilitation Services Commission are to be served within the offices of the Commission, including the Ravenna office. The fact that Mr. Toth needed permission to vary from the 8:00 a.m. to 4:45 p.m. schedule previously worked, hours utilized by clients of the Commission to meet with counselors within the offices of the Commission, leads the arbitrator to the view that the 7:00 a.m. to 3:45 p.m. shift was at variance with the norm; an exception to the general rule; a schedule requiring flexibility on the part of the Employer in granting permission to an employee to work this non-routine schedule; hours not representative of a fixed schedule as referred to within Article 22. The fixed schedule intended by Article 22 is more reasonably defined as 8:00 a.m. to 4:45 p.m.

Article 5 of the collective bargaining agreement between the parties invests in Management a broad range of operational

prerogatives which are restricted only by other language within the collective bargaining agreement. There is no dispute in this matter that Management had the right to determine the need for counselor coverage within the Ravenna office from 3:45 p.m. to 4:45 p.m. during the latter half of June, 1988. This is clearly a determination impacting an operational need. When the Employer determined that Mr. Toth's services were needed to provide counselor services during the final hour of the Ravenna office's office hours for clients of the Rehabilitation Services Commission, Management was within its contractual authority to change Mr. Toth's flexible work schedule and require him to work from 8:00 a.m. to 4:45 p.m. [redacted]

The arbitrator is of the opinion that the change of Mr. Toth's flexible schedule from 7:00 a.m. to 3:45 p.m., to 8:00 a.m. to 4:45 p.m., between June 6, 1988 and December 16, 1988, was not done by the Employer [redacted] As Mr. Toth was only required to work forty hours per week during these six months no overtime hours were required of him and none require compensation. Therefore the arbitrator finds that Mr. Toth's changed schedule was not a fixed schedule; [redacted]

[redacted] these facts, violate Article 22 of the contract.

AWARD

1. The Employer did not violate Article 22 of the collective bargaining agreement between the parties by changing Grievant Toth's schedule in June, 1988.

2. The grievance is denied.

Howard D. Silver
Arbitrator

July 14, 1989
Columbus, Ohio