

#338

OFFICE OF THE ARBITRATOR

November 7, 1989

In the Matter of the Arbitration between:

THE STATE OF OHIO)	
OFFICE OF COLLECTIVE BARGAINING)	
Columbus, Ohio)	
)	Grievance Nos.
and)	23-09 (881206) 0079-02-12
)	23-09 (890317) 116-02-12
OHIO HEALTH CARE EMPLOYEES UNION)	23-09 (890907) 0162-02-11
DISTRICT 1199 WV/KY/OH)	
NATIONAL UNION OF HEALTH CARE)	
EMPLOYEES, AFL-CIO)	

APPEARANCES

For the State

Tim D. Wagner	Chief, Arbitration Services
Meril Price	Office of Collective Bargaining
Barbara D. Peterson	Chief Executive Officer,
	Fallsvew Psychiatric Hospital
Carol S. Mills, Ph.D.	Director of Psychology and
	Clinical Programs
Merri D. Foltz	Director, Human Resources

For the Union:

Robert J. Callahan	Secretary-Treasurer, District 1199
Gary P. Baumgardner	Delegate, District 1199
Robert W. Robinson, Ph.D.	Grievant

Arbitrator:

Earl M. Curry, Jr.

BACKGROUND

The instant arbitration arose as the result of a series of four grievances filed between December 6, 1988, and September 7, 1989, by the Ohio Health Care Employees Union, District 1199 WV/KY/OH, National Union of Hospital and Health Care Employees, AFL-CIO (the "Union") protesting, on behalf of Psychologist II Robert W. Robinson, Ph.D. (the "Grievant"), the action of the Fallsview Psychiatric Hospital, Akron, Ohio (the "State" or "Hospital") in changing his part-time work schedule, and then imposing, in sequence, a two-day disciplinary suspension, a six-day disciplinary suspension and removal from his position. When the parties were unable to resolve these matters through their negotiated grievance procedure they consolidated the grievances and referred them to arbitration pursuant to their Agreement.

STATEMENT OF FACTS

The Grievant has worked a part-time evening and Saturday schedule as a Psychologist II at the Fallsview Psychiatric Hospital since 1976. The Hospital is operated by the Ohio Department of Mental Health and is a full care facility treating all types of mental illness and is generally categorized as a medium term care facility. From 1976 until January 1, 1989, the Grievant had worked a regular schedule on Saturdays of 8:00 a.m.

to 4:30 p.m. The rest of the week he had no regular schedule. coming in on the evenings he was free to do so (2 or 3 evenings per week) and working four hours each evening. Under this arrangement the Grievant worked between 16 and 20 hours per week. For many years this schedule worked well for both the Grievant and the Hospital.

Early in 1988, Ms. Barbara D. Peterson was appointed Chief Executive Officer of the Hospital. Ms. Peterson came to the Hospital with the intention of upgrading the quality of treatment of the patients through the use of innovative methods that were evolving in the mental health field. To this end, Ms. Peterson increased the role and responsibility of the treatment teams, including and requiring the attendance of all treatment team members, including the psychologist, whenever their patient's cases were to be discussed. The quality and number of in-service training sessions were also increased. As this new focus at Fallsvew unfolded, the changes came into direct conflict with the Grievant's part-time evening and weekend schedule since he was unable to attend staff meetings, in-service training sessions or treatment team meetings held during regular work hours.

The reason the Grievant was unable to attend these meetings was his full-time day employment as Superintendent of the Cambridge city school district. Consequently he could not work a 8:00 a.m. to 12:00 noon or 12:00 noon to 4:00 p.m. shift. Initially, the new management at Fallsvew thought that the

Grievant was a contract employee and that they would have to adapt a schedule to him until his contract expired. However, in November, 1988, management discovered that the Grievant's actual status was that of a regular part-time employee covered by the Collective Bargaining Agreement. As a result of this discovery, Dr. Carol S. Mills, Director of Psychology and Clinical Programs wrote to the Grievant on November 25, 1988, informing him that it would be necessary for him to arrange his work schedule in order to attend staff and treatment team meetings. Since most of these meetings occurred in the morning hours Dr. Mills recommended that he work a 8:00 a.m. to 12:00 noon schedule Monday through Friday and that this new schedule was to take effect January 1, 1989. She also stated in her letter to the Grievant, that if he could find another schedule that would address these needs equally well (of attending meetings), she would not object and asked that he contact her to discuss it. After the Grievant received this letter the first of the four grievances involved in this matter ensued. The parties met on a number of occasions to attempt to work out some sort of an arrangement to meet the needs of both the Hospital and the Grievant. These meetings, however, were not productive and management imposed the needed work schedule to start on January 1, 1989, as per the November 29, 1988 letter.

The Grievant was unable to work this morning schedule due to his full-time job commitments to the Cambridge city school district. When he failed to do so, he was charged with

insubordination and neglect of duty and suspended for two days at which point the Grievant filed the second grievance. After the suspension the Grievant was ordered back to work. He failed to report to his new schedule and did not work his old schedule. Prior to giving any further discipline a meeting was held with the Grievant and his Union representative to attempt to work something out that would accommodate both parties needs. This too failed and since the Grievant refused to work the new schedule he was disciplined again with a six-day suspension. At this time the third grievance was filed. After the six-day suspension the Grievant was again ordered back to work, with additional discussion on how to accommodate him. After these discussions and the Grievant's refusal to work the new schedule, management decided to terminate him, due to his inability to meet the needs of the job and the mission of the Hospital. After a pre-disciplinary conference the Grievant was notified by letter that he was removed from his position as a Staff Psychologist II effective August 29, 1989. The fourth grievance then ensued. During the grievance procedure the Union withdrew the third grievance involving the six-day suspension, so that there are now three grievances, involving the schedule change, the two-day suspension and the removal before the Arbitrator.

1 ISSUE

The parties have stipulated the issue to be as follows: Was the Grievant, Robert Robinson, disciplined for a two-day suspension and later removed for just cause? If not, what shall the remedy be?

PERTINENT CONTRACT 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 - HOURS OF WORK AND OVERTIME

§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.

ARTICLE 25 - EMPLOYEE STATUS

§25.02 Part-Time

A part-time employee is an employee who regularly works less than forty (40) hours per week. The agency shall not use part-time employees to avoid full-time benefits.

CONTENTIONS OF THE PARTIES

Union's Contentions

The Union contends that the Grievant was disciplined and discharged without just cause. It argues that the Grievant was the beneficiary of a thirteen-year past practice of scheduling his work to accommodate the needs of his primary job. The change of hours in the new schedule imposed upon him was a schedule management knew he could not meet and is unjust. It argues that the State is in violation of Article 22, Section 22.11 regarding flexible work schedules in changing the Grievant's schedule. It argues further, that the discipline imposed upon the Grievant was in retaliation for engaging in a protected activity, i.e., filing a grievance, and should be revoked. It also argues that it was not necessary for the Grievant to attend the above discussed team treatment and staff meetings and that his time would have been better spent working with patients. It argues that the Grievant

delivered one-third of all the psychologist services to patients at the Hospital and removing him and the resulting vacancy is far worst for the patients than his not being able to attend team meetings. It asks, accordingly, that all of the grievances be sustained and that the Grievant be reinstated to his former position under his original schedule and made whole for all lost benefits and wages.

State's Contentions

The State denies that it did not have just cause to impose the discipline and removal upon the Grievant. It denies that it has violated any provision of the parties Agreement in doing so. In the past the Grievant's part-time evening and Saturday schedule had worked well for both the Grievant and the Hospital. However, as the years passed two changes have occurred. First, the method of treatment of mental illness has changed and evolved and; secondly the mission and the methods to carry out that mission at the Hospital have also changed. It argues that this is a clear exercise of its rights under Article 5 of the Agreement and ORC § 4117.08c, in that the mission of the Hospital is to be determined by management as well as setting the standards to be followed. The efforts of management to upgrade the services provided by the Hospital conflicted with the Grievant's former schedule. It argues that it was not obligated to accommodate the Grievant's needs regarding his work schedule. It does not dispute that the Grievant is a good psychologist,

however, his former schedule does not meet the needs of the Hospital. It points out that in all the meetings and discussions held on this matter the Grievant never proposed a new schedule that could accommodate both his and the Hospital's needs. It argues that management was fair to the Grievant regarding the necessary change in schedule and gave him a months notice of the change.

It also argues that it has not violated Article 22, Section 22.11 as alleged by the Union. It argues that Section 22.11 does not preclude a schedule from being changed and simply says that the present practice of flex time will continue. It asks, accordingly, that the grievance be denied.

DISCUSSION

In the opinion of the Arbitrator the grievance must be denied. Clearly, it was within management's right to change the method of treatment to be used at the Hospital, including requiring the attendance of the psychologist along with others on the treatment teams to be present when patients' cases are discussed. Clearly, it was within management's prerogative to determine that it was necessary for the Grievant to attend these staff meetings, in-service training sessions and treatment team meetings to be an effective psychologist under the new standards being instituted by the new management team. Pursuant to these changes it was clearly within management's authority to change

the Grievant's schedule to accommodate the needs of the Hospital and the new treatment program.

Had the Grievant been a contract employee as management first assumed he was, then there would be merit to the Union's claim that the State could not change his schedule, at least for the duration of his current contract. However, as a part-time employee covered by the Collective Bargaining Agreement management clearly had a right to change his schedule to meet the needs of the treatment program.

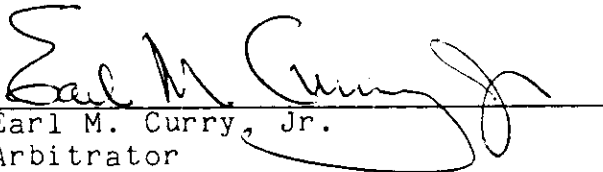
It is regrettable that the Grievant's primary job commitments prevent him from working this new schedule. However, in disciplining and removing the Grievant from his position for insubordination and neglect of duty the State has not violated the parties Agreement as alleged by the Union. Nothing that the State did in this matter violates the provisions of Article 22, Section 22.11. The Union's argument that flex time cannot be changed without its consent is simply without merit. Nothing in the language of Article 22, Section 22.11 would lead one to this conclusion.

Further, whether the Union, Grievant or Arbitrator believe that the new treatment program along with its required meetings is necessary, or even an improvement over the prior treatment program, is irrelevant. That decision is clearly management's to make. The Arbitrator's only authority is to determine whether

the State violated the parties Agreement in disciplining and removing the Grievant herein. He concludes that it did not.

AWARD

The grievances are denied for the reasons set forth just above.


Earl M. Curry, Jr.
Arbitrator

Shaker Heights, Ohio
November 7, 1989