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STATE OF OHIO/OHIO HEALTH CARE EMPLOYEES UNION DISTRICT 1199

In the Matter of the Arbitration -- between -- Ohio Health Care Employees Union District 1199 -- and -- Central Ohio Psychiatric Hospital	Grievance No. 23-06-89-11-03-0118-02-11

ARBITRATOR'S DECISION AND AWARD

Cheryl Hill
For the Union

George R. Nash
For the Employer

June 1, 1990

Calvin William Sharpe
Arbitrator

On October 17, 1989, Virginia Clear, a delegate of the Ohio Health Care Employees Union District 1199 (Union) filed a grievance against the Central Ohio Psychiatric Hospital (COPH or State) protesting a days-off scheduling change by the State. The State denied the grievance. Unable to secure satisfactory relief at earlier stages of the grievance procedure, the Union has now brought the matter to arbitration. A hearing was held on May 2, 1990, at Columbus, Ohio.

I.

STATEMENT OF THE CASE

A. THE ISSUE

1. Did the employer violate the Agreement, when it changed the Grievants' bi-weekly days off schedule?

2. If so, what is the remedy?

B. RELEVANT PROVISIONS OF THE 1989-1992 AGREEMENT

ARTICLE 1 - PURPOSE AND INTENT OF THE AGREEMENT

> It is the purpose of this Agreement to provide for the wages, hours and terms and conditions of employment of the employees covered by this Agreement; and to provide an orderly, prompt, peaceful and equitable procedure for the resolution of differences between employees and the Employer. Upon ratification, the provisions of this Agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and conditions of employment; and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein.

All references to the Ohio Revised Code within this Agreement are to those sections in effect at the time of the ratification of this Agreement.

This Agreement may be amended only by written agreement between the Employer and the Union. No verbal statement shall supersede any provisions of this Agreement.

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement, will continue in effect under conditions upon which they had previously been granted through out the life of this Agreement unless altered by mutual consent of the Employer and the Union.

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 the invalidating any contract position.

ARTICLE 24 - HOURS OF WORK AND OVERTIME

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§24.13 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 he 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.

§24.14 Weekends

The present practice of weekend-off scheduling shall be continued. Any changes shall be discussed in the Agency Professional Committees.

C. BACKGROUND FACTS

The Central Ohio Psychiatric Hospital, located in Columbus, Ohio, is one of sixteen hospitals operated by the Ohio Department of Mental Health. The COPH provides both acute and long term treatment for mentally ill adults and is divided into two functions: the Moritz Forensic Center and the Civil Mental Hospital. The Civil function has approximately 400 beds and the Forensic function about 64 beds. Patients come from Franklin and other surrounding counties, and the Forensic patients are referred for evaluation by the courts.

Ruth McCoy and Sherry Edgerton are both Psychiatric Nurse 2s who work the third shift, 10:45 p.m. to 7:15 a.m., at the COPH. The Grievants are two of approximately sixty RNs employed by the COPH. Until October, 1989, the Grievants had regularly scheduled bi-weekly off days of Friday and Saturday. On alternate weeks their off days varied depending upon the scheduling needs of the hospital but were never Friday and Saturday like the bi-weekly set schedule. Ms. Edgerton was hired as a Psychiatric Nurse 2 on September 25, 1978, and had maintained the bi-weekly Friday and Saturday off days schedule for 10 years. Ms. McCoy was hired as a Psychiatric Nurse 2 on June 20, 1977, and had maintained the Friday and Saturday bi-weekly off

days schedule for 12 years. The other 58 RNs have maintained a regular schedule of Saturdays and Sundays off.

Ms. Joan Woodland became Associate Director of Nursing at the COPH in October, 1989. She immediately noticed a staffing imbalance on Fridays, caused the the off days schedules of the Grievants. This problem was caused also in part by the termination of a supplementary nursing services contract on September 24, 1989. Under the contract "Net Care" had supplied 19 nurses, six supervisors and two administrators who operated three units. After termination of the supplementary nursing services contract, the COPH absorbed nine of the "Net Care" full time employees who had provided direct care services under the contract and took over the staffing of the three units no longer serviced by contract employees.

Thus, the Friday staffing imbalance noticed by Ms. Woodland occurred in the context of a larger staffing shortage and led to the State's decision to unilaterally change the Grievants' days off schedules. Following the decision, the State gave the Grievants two weeks advance notice of the change.

II.

CONTENTIONS OF THE PARTIES

A. THE UNION'S POSITION

The Union argues that the hospital's unilateral change in the Grievants' schedules violated Articles 1 and 24.14 of the Agreement. It argues that the biweekly days off schedule for both Grievants were past practices that were binding upon the State because of their clarity, uniformity and mutual recognition by the parties. As past practices, the Union continues, they were to be continued in effect under Article 1 and Article 24.14. The Union asserts that the State could only change the

practice after discussion with the Agency Professional Committee or with the agreement of the Grievants. Since the State did neither in this case, it has violated the Agreement and, in the Union's view, the Grievants should be returned to their previous days off schedule.

B. POSITION OF THE EMPLOYER

On the other hand, the State argues that it has a management right under both the Agreement and the Ohio Revised Code to make scheduling changes that promote the efficiency of the hospital. It asserts that this right had not been limited or waived by any express provision of the Agreement. The State further argues citing Elkouri and Elkouri, How Arbitration Works, that the days off schedule of the Grievants does not constitute a binding past practice. The State also cites the Hopwood Foods, Inc. and St. Regis Paper Co. cases in support of this proposition. Also, the State argues that is has not violated Article 24.14, since it has continued the practice of weekend off scheduling and the article does not prevent a change in the scheduling of particular weekend days off. For the State, the Union's interpretation of Article 24.14 would have required language mandating the continuation of the present practice of "days off". The State concludes that the Union has failed to prove that the State gave up its management right to schedule as provided in Article 5 of the Agreement and Ohio Revised Code section 4117.08 (C) (1) - (9).

III.

DISCUSSION AND OPINION

Article 5 of the Agreement and Section 4117.08 (c) (1) - (9) of the Ohio Revised Code, cited by the State, specifically reserve certain rights including the scheduling of employees exclusively to management "[e]xcept

to the extent modified by [the] Agreement". Thus, the question of whether the State has absolute discretion in scheduling days off turns upon whether the Agreement contains a modification of this right. The State argues that its scheduling discretion has not been "limited or waived by any express provision of the Agreement". The Union, on the other hand, cites Article 24.14 of the Agreement as a limitation on the State's scheduling right.

As noted above, Article 24.14 mandates the continuation of weekend-off scheduling and a discussion of any scheduling changes in the Agency Professional Committees. Thus, the issue in this case is not whether management has the absolute discretion to schedule days off in the absence of contractual limitation or even whether management had a legitimate basis for making scheduling changes. The Agreement itself limits that discretion, when limits are contained in the Agreement. And when such limits exist, management is bound despite good reasons for exercising a broader discretion, not sanctioned by the Agreement. Rather, the issue in this case is whether Article 24.14 is a limitation on management's scheduling right; and, if so, whether that limitation prevented the State from changing the Grievants' biweekly days off in this case.

The threshold issue is easily resolved by reference to Article 24.14 of the Agreement. In two sentences that provision uses mandatory language, "shall", to preserve the practice of weekend-off scheduling and require the discussion of such changes in the Agency Professional Committees. It is difficult to imagine language more clearly limiting management's right to schedule weekend-off days. Thus, the State does not have absolute discretion to schedule weekend days off and must comply with Article 24.14 of the Agreement.

The more difficult issue concerns the meaning of Article 24.14 of the Agreement. Does it mean that the State must merely continue the practice of scheduling days off on weekends? Or does it mean that specific days off that may have been scheduled as a practice must be continued? If it means the former, the State has not violated the Agreement, since the Grievants continued to receive weekend days off after the scheduling change. If it means the latter, then the State has violated the Agreement, if the Grievants' bi-weekly weekend schedules were binding past practices.

Past Practice

The essence of the State's argument is that it would be inappropriate to find a binding past practice of scheduling biweekly Fridays and Saturdays off for the Grievants. In support of this argument the State sights Elkouri and Elkouri, How Arbitration Works pp.437-446 Fourth ed. (1985). Drawing from the incisive observations of Umpire Harry Shulman and Ford Motor Co., 19 LA 237,241-242 (1952), the State argues that the Grievants' schedules were mere happenstance developed without design or deliberation, a choice of management as to the convenient methods of scheduling at the time and involving no thought, commitment or obligations for the future: and as a product of managerial determination are subject to change in the same discretion. However, the State's argument overlooks Umpire Shulman's preparatory remarks, which distinguish practices that arise from agreement or mutual understanding from those that are not the result of joint-determination at all. Practices growing out of mutual agreement, whether express or implied, are a part of the contract and obviate any inquiry into the nature of the practice to determine whether it has binding effect. The parties in Article 24.14 of the Agreement have themselves answered the mutuality question. They have agreed expressly that the practice of

weekend off scheduling shall be continued. This provision not only assumes the existence of a weekend days-off scheduling practice, it also expressly makes that practice binding.

Similarly, the State cites Hopwood Foods, Inc., 73 LA 418 (Leahy 1979) and St. Regis Paper Co., 51 LA 1102 (Solmon 1968) where employers for economic reasons changed employee work schedules. In both cases the arbitrators rejected union claims that the pre-existing schedules were binding past practices that prevented the scheduling changes. However, in both cases the arbitrators were unwilling to infer binding past practices, because of the nonexistence of mutual agreement as evidenced by contractual language. By contrast, the parties in this Agreement have evidenced such mutual agreement in Article 24.14.

In the face of clear language in Article 24.14 the State is not aided by the foregoing authorities that discuss whether practices may be binding in the absence of clear contractual language. The Arbitrator finds that the parties mutually agreed to preserve the practice of weekend-off scheduling and that this practice is binding on the State.

Scope of the Practice

Whether a past practice existed is separate from the question of scope. The State's liability turns on the breadth of the practice preserved by Article 24.14. The State argues that it has not violated Article 24.14, since it has preserved the practice of weekend-off scheduling. It asserts that in order for the Union to enjoy the broad limitation on management's scheduling discretion that it seeks, it would have had to negotiate language preserving "the present practice of days off". The Union argues the weekend-off scheduling language in Article 24.14 refers to days off. Thus, the nub of this dispute turns on the scope of the Article 24.14 limitation.

While the COPH has not had occasion to define the meaning of "weekend-off scheduling" in Article 24.14, the Dayton Mental Health Center (DMHC), also covered by the Agreement, considered the issue in detail during June, July, and August, 1988. The DMHC inquiry was precipitated by a nurse's request to change her weekend days off from Saturday and Sunday to Friday and Saturday. Her supervisor refused the request claiming that it would violate the Agreement. At that time, the parties were operating under the 1986-1989 Agreement, which contained in Article 22.14 a provision identical to Article 24.14 of the current Agreement. After a series of meetings between management and union representatives, the parties at DMHC defined the past practice of weekend scheduling and formulated a procedure for changing weekend days off. The past practice specifically referred to days off for employees working the day, evening, and night shifts. The scheduling change request form spawned by these discussions, specifically required requesting employees to state existing and proposed days off. The parties treatment of the weekend-off scheduling issue at DMHC is strong evidence that the parties' intended the broader limitation on management discretion urged by the Union rather than a more narrow one permitting management to alter weekend days off as long as weekends off are preserved.

The State argues that the DMHZ case is irrelevant, since the COPH was not involved in the DMHC case discussions. However, the Ohio Department of Mental Health is a signatory to the Agreement and, as noted earlier, that department administers sixteen hospitals including the COPH and the DMHC. Article 1 purports to provide wages, hours and terms and conditions of employment of employees covered by the Agreement. The Agreement does not single out the employees or management of individual

hospitals for unique treatment under its terms. Accordingly, the Arbitrator finds that the State's interpretation of Article 24.14, flies in the face of pesuasive evidence supporting the Union's view.

While the State gave the Grievants two weeks advance notice of the scheduling change in this case, it did not refrain from making the change. Nor did it discuss the change in the Agency Professional Committees as required by Article 24.14.

IV.

AWARD

The Grievance is sustained. The State shall return the Grievants to the biweekly days off schedule that had been effective before the October, 1989 scheduling change.

Calvin William Sharpe
Arbitrator

Date