ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 651

OCB GRIEVANCE NUMBER: 23-07-900410-0028-01-01

GRIEVANT NAME: CHARLES, ANNETTE ET AL

UNION: OCSEA/AFSCME

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: PINCUS, DAVID

MANAGEMENT ADVOCATE: RAUCH, JOHN

2ND CHAIR: DAUBENMIRE, DICK

UNION ADVOCATE: FALCIONE, DENNIS

ARBITRATION DATE: JUNE 25, 1991

DECISION DATE: AUGUST 13, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: DID THE EMPLOYER VIOLATE THE AGREEMENT WHEN IT IMPLEMENTED THE KRONOS TIME CLOCK SYSTEM AT CLEVELAND PSYCHIATRIC INSTITUTE?

HOLDING: "THE CRITICAL TRIGGERING EVENT TOOK PLACE WHEN THE EMPLOYER IMPLEMENTED THE TECH TIME SYSTEM IN 1986...IN ACCORDANCE WITH THE AGREEMENT IN EFFECT AT THE TIME....AND WELL WITHIN THE 90 DAY PROVISO. THE KRONOS INSTALLATION WAS NOT AN ADDITION BUT A REPLACEMENT OF A FAULTY, INEFFICIENT SYSTEM."

COST: $619.45

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

#651

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF
MENTAL HEALTH, CLEVELAND PSYCHIATRIC INSTITUTE

-and-

OHIO CIVIL SERVICE EMPLOYEE ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO

GRIEVANCE: Annette Charles et. al.

OCB Case No.: 23-07-(90-04-10)-28-01-01

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: August 13, 1991

APPEARANCES

For the Employer

Ella Thomas	Chief Executive Officer
Richard Thomas	Director of Operations
Dick Daubermeir	Office of Collective Bargaining
John Rauch	Labor Relations Manager and Advocate

For the Union

Annette Charles	Union President
Dennis A. Falcione	Advocate

INTRODUCTION

This proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Mental Health, Cleveland Psychiatric Institute, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union, for the period July 1, 1989-December 31, 1991 (Joint Exhibit 2).

The arbitration hearing was held on June 25, 1991 at the office of the Cleveland Psychiatric Institute. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

Did the Employer violate Article 13, Section 13.16 when it implemented the Kronos time clock system at Cleveland Psychiatric Institute?

PERTINENT CONTRACT PROVISIONS

Article 13 - work week, schedules and overtime

...

Section 13.16 - Time Clocks

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

...

(Joint Exhibit 2, Pg. 25)

CASE HISTORY

Cleveland Psychiatric Institute, the Employer, is an acute care hospital with 190 beds and approximately 400 employees. Annette Charles, the Grievant and Local Union President, filed a grievance on behalf of all bargaining unit members.

The circumstances surrounding the present matter, for the most part, are not in dispute. In September of 1986, a timekeeping system was installed at the Employer's facility. A similar system was installed in most of the other Ohio Department of Mental Health facilities. Tech Time was selected to provide the software and equipment for the automated timekeeping system. The purpose of the automated timekeeping system was to provide timely management information regarding attendance, use of leave time, and to break-up staff for other purposes.

The Tech Time system proved to be inefficient and generated many operational problems. These difficulties centered on numerous software and hardware problems. The vendor was never able to comply with the proposed system outcomes and failed to provide the Department with the

expected results. As a consequence, on May 20, 1987, Pamela Hyde, the Director, decided to remove the system by discontinuing its use at various facilities by June 4, 1987. She also informed all impacted facilities that an alternative automated timekeeping system would be installed as a replacement in the future (Joint Exhibit 5).

Richard Thomas, the Director of Operations, testified that he initiated an analysis of the Tech Time system and a needs assessment as early as October of 1986. This analysis resulted in a report submitted by Ella Thomas on July 18, 1988 (Joint Exhibit 3, Item 15). The report summarized the steady-state conditions which were engendered by the use of a manual logging system put in place after the removal of the Tech Time system. Time accounting responsibilities exceeded available person-hours which resulted in the "borrowing" of personnel from other areas. Additional personnel, moreover, could not be added because of a projected budget deficit. The existing manual system generated too many mistakes by employees on their sign-in sheets. Some of these mistakes were inadvertent, while others were intentional. The system, itself, proved to be unwieldy and redundant which generated excessive errors.

As a substitute, the report (Joint Exhibit 3, Item 15) contained a proposal for a Kronos Timekeeping Central System. System options did away with the existing manual approach leading to more accurate information. It also provided the Employer with a management information system which allowed the production of a series of additional reports. These reports increased attendance control by providing accurate and timely feedback. System outcomes, moreover,

allowed the production of these additional options without the existing personnel problems and associated errors.

The Parties negotiated a new Collective Bargaining Agreement (Joint Exhibit 2) which became effective on July 1, 1989. It contains language in Section 13.16 which is identical to the time clock language contained in the predecessor Agreement (Joint Exhibit 1).

It appears that the Department of Mental Health approved the installation of the New Kronos system on September 5, 1989 (Joint Exhibit 3, Item 22). The system, itself, became effective on April 22, 1990. On this date, all staff, including contract staff, were required to account for their time via their assigned time clocks (Joint Exhibit 3, Item 25).

In anticipation of the Kronos installation, Annette Charles, the Local Union President, filed a grievance on April 9, 1990. It contained the following Statement of Facts:

"...

> Uinion (sic) contract states beginning (90) (sic) ninety days after the effective date of this Agreement the Employer shall not add time clocks.

..."

(Joint Exhibit 3)

Both Parties agreed that the disputed matter should be directly processed to Step III of the Grievance Procedure. On June 15, 1990, John Rauch, the Step III Designee, denied the grievance. Rauch contended that the language in the present Agreement (Joint Exhibit 2) was inapplicable because the timekeeping project was properly initiated

under the terms of the predecessor Agreement (Joint Exhibit 1).

The Parties were unable to settle the grievance. Since neither Party raised substantive nor procedural arbitrability concerns, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

It is the position of the Union that the Employer did violate Section 13.16 when it added time clocks at the facility in April of 1990. The Union asserted that the contract language in question is clear and unambiguous. By adding the time clocks in April of 1990, the Employer exceeded the ninety (90) day proviso negotiated by the Parties.

The Union maintained that the Kronos system was added and did not merely serve as a surrogate for the defunct Tech Time system. Both projects, in the Union's opinion, were independent and unrelated interventions. In support of this premise, the Union referred to the time lag between the removal of the Tech Time system and the eventual installation of the Kronos system. Approximately three (3) years transpired between those two unrelated events with the employees manually logging time clock data during the interim period. The Tech Time system, moreover, was physically removed from the facility. Documents (Joint Exhibit 3) introduced at the hearing, moreover, indicated that the Employer referred to the Kronos system as a pilot project; terminology also used to characterize the Tech Time system prior to its implementation. Since both were deemed to be pilot

projects, one could hardly argue that the Kronos system merely served as a continuation of the Tech Time system.

The Union opined that its interpretation of the Employer's actions was supported by an internal Employer document. On August 21, 1989, Carol A. Hernandez, Assistant Deputy Director, authored a memo to Pamela S. Hyde, Director, which contained the following particulars:

"...

> I am requesting approval to authorize Ella Thomas, C.E.O., to install an automated time accounting system per the attached proposal. Substantial staff cost savings will accrue once installed.
>
> The new Union contracts permit installation of these systems during the first ninety (90) days of the contract period. Thus, we need to move rapidly.

..."

(Joint Exhibit 3, Item 21)

Hernandez's view completely complied with the Union's interpretation of the situation. The urgency of her comments indicated the Employer was legitimately concerned with the ninety (90) day proviso negotiated by the Parties. As such, the Employer was well aware that it could be adding time clocks in possible contravention with the Agreement (Joint Exhibit 2). Otherwise, Hernandez would never have concerned herself with the timing requirement.

As a remedy, the Union requested the Arbitrator to enter a cease and desist order. An order requiring the Employer to immediately cease the use of time clocks. This prohibition should remain in effect until the present Agreement (Joint Exhibit 2) terminates and a new contract is negotiated by the Parties.

The Position of the Employer

It is the position of the Employer that it did not violate Section 13.16 when it installed the Kronos system in April of 1990. The installation of the Kronos system was not added but merely replaced the problem plagued Tech Time system. The reasoning for this interpretation follows.

The Employer asserted that the installation of the Kronos system should not be viewed as an isolated incident but as one phase in the addition of the automated timekeeping system initiated in 1986. As such, the phrase "shall not add time clocks" does not mean time clocks have to be installed and in use, but rather, the process or the project has been initiated. The installation of the Kronos system was, therefore, viewed as a mere replacement of a defective system. The process of adding time clocks was in effect triggered by the installation of the Tech Time system in July of 1986. This installation was done in accordance with the particulars in effect at the time; identical language was negotiated by the Parties in the most recent Agreement (Joint Exhibit 2). Since the "addition" process was properly initiated in 1986, the timing requirement contained in Section 13.16 of the new Agreement (Joint Exhibit 2) is non-binding and irrelevant.

Testimony provided by the Director of Operations adequately supported the extensive period of time between installations. He contended that the Employer did not wish to re-visit the extensive problems brought about by the Tech Time installation. As such, extensive analysis and the bureaucratic requirements underlying the

eventual purchase of the Kronos system led to the delay. In no way did the most recent installation reflect an initiation of a new process; it merely continued a process already initiated in July of 1986. Delays were also engendered because of potential legal entanglements initiated by Tech Time after its equipment had been removed from the facility.

Notice considerations were also raised by the Employer. The Employer maintained it clearly notified the Union of its intent to replace the Tech Time system. Hyde authored a letter on May 20, 1987 (Joint Exhibit 5) which indicated that replacement information would be communicated to all employees and the Union on Thursday, May 21, 1987.

Hernandez's letter (Joint Exhibit 3, Item 21) referencing the timing requirement contained in Section 13.16 was thought to be erroneous. The error contained in the second paragraph was based on Hernandez's inexperience within the Department. It did not reflect the prevalent view held by more experienced personnel involved with labor relations issues.

A ruling in the Union's favor would lead to devastating outcomes. All the benefits gained as a consequence of the replacement would be lost. For example, it would result in a financial loss, staffing levels would increase, control and accountability would suffer, and the new reports would be lost. Such negative outcomes would be unfortunate in light of the bargaining unit's acceptance of the Kronos system.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing it is this Arbitrator's opinion that the Employer did not violate Section 13.16. As such, the grievance in dispute must be denied.

The primary goal of any rights arbitrator is to carry out the mutual intent of the parties. When an arbitrator attempts to determine the intent of the parties, the intention will be given effect if it is clearly discoverable. Ascertaining the mutual intent of the parties to an agreement does not require the interpreter to look outside the instrument to determine the intention of the parties when the instrument contains language sufficient to express the mutual intent.

Here, the language is clear and unequivocal. As such, this Arbitrator is unwilling to fashion his own brand of industrial jurisprudence and engage in gap-filling. Clearly, the Union's point of view would require this Arbitrator to add certain conditions to the time clock language which would result in the legislation of new contract language. A practice I am willing to undertake, and one which directly conflicts with Section 25.03. This Section states in pertinent part:

"...

> The Arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

..."

In my view, the critical triggering event took place when the Employer implemented the Tech Time system in 1986. During this time period, the Employer added time clocks in accordance with the Agreement

Joint Exhibit 1) in effect at the time. The Union did not file a grievance contesting the implementation because it was done well within the ninety (90) day proviso. The Kronos installation was not an addition but a replacement of a faulty inefficient system. It would have been an illegal addition if the time limits agreed to under the predecessor Agreement (Joint Exhibit 1) had been violated. The most recent version of Section 13.16 (Joint Exhibit 2) would have played a role in the present interpretation if the facility had erroneously violated the guideline during 1986 and/or attempted to implement a system beyond the time frame agreed to by the Parties.

The present fact situation suggests that the Kronos system merely reflects a continuation of a more sophisticated timekeeping process initiated under the defunct Tech Time system. As such, nothing was added but the accounting system became more automated, reliable and valid. System process improvements even if they involve total system replacement, should not be equated with the addition of new approaches. The Employer's characterization of the Kronos system as a pilot does not detract from this conclusion.

Obviously, if an initial process or procedure is merely implemented as a guide to superficially comply with Section 13.16 time requirements, any subsequent replacement or modification would be viewed as an "addition". The triggering event would be considered a pretext. The Union was unable to properly support this conclusion. The legal ramifications surrounding the termination of the Tech Time process and the application of the process throughout the Department subvert the

Union's contentions. Mere allegations of some "bogus" motivation underlying rapid implementation do not properly support a change implying a direct and specific contravention of a negotiated term and condition of employment. It may very well be the case that the time frame negotiated by the Parties serves as a restrictive barrier to prudent decision making. The Parties, however, negotiated the contested time frame and will have to negotiate a change, if one is desired, during the upcoming negotiations. This Arbitrator cannot allow the Union to achieve an outcome via the arbitration process which it did not bargain for during contract negotiations.

A ruling in the Union's favor would add conditions to Section 13.16. Nothing in this Section restricts the Employer's right to replace components of a time clock system, nor the entire system, as long as the primary goals of the modified system or process remain relatively the same; and the other guidelines are complied with. Specific replacement language would have to be negotiated to establish such a limitation. Installation parameters in terms of system components or system terminations would also need to be identified if the Union desires to change the status quo.

Hernandez's letter of August 21, 1989 (Joint Exhibit 3, Item 21) does not, itself, modify the previous finding. Her reference to the ninety (90) day proviso does not necessarily reflect the Department's view of this matter. Testimony, moreover, suggested that her inexperience and lack of tenure led Hernandez to this conclusion. Without any additional corroborating evidence, I am unwilling to alter

my interpretation of the Parties' intent when faced with the unambiguous language negotiated by the Parties. This Arbitrator's interpretation, more specifically, might have been altered if the Union provided evidence and testimony dealing with what the language meant to the Parties when Section 13.16 was negotiated. Information of this type might have resulted in a ruling in the Union's favor.

AWARD

The grievance is denied. The Employer did not violate Section 13.16 when it replaced the Tech Time system with the Kronos timekeeping system.

August 13, 1991

Dr. David M. Pincus
Arbitrator