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

#783

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF
MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,
MT. VERNON DEVELOPMENTAL CENTER

-and-

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

GRIEVANT: Sherrie Ware (Temporary Reassignment)

CASE NUMBER: 24-09(89-02-28)-0179-01-05

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: June 18, 1992

APPEARANCES

For the Union	
Sherrie Ware	Grievant
Laurie Stelts	Chief Steward
Brenda Goheen	Staff Representative
For the Employer	
Glenna Beckholt	Food Service Manager 2
Wilber Severns	Labor Relations Officer
Elliot Fishman	OCB Legal Counsel - 2nd chair
David S. Norris	Deputy Director

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Mental Retardation and Developmental Disabilities, Mt. Vernon Developmental Center, 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 July 1, 1989 (Joint Exhibit #1).

The arbitration hearing was held on November 7, 1991 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected Dr. 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 submit briefs. Briefs were submitted on or before February 11, 1992.

ISSUE

Did the Employer violate Article 13 of the Collective Bargaining Agreement (Joint Exhibit 1) when it changed the work schedule of Sherrie Ware, the Grievant? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to , the rights listed in ORC Section 4117.08 (A) numbers
1-9.

(Joint Exhibit 1, Pg. 7)

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

Section 13.01 - Standard Work Week

The standard work week for full-time employees covered by this Agreement shall be forty (40) hours, exclusive of the time allotted for meal periods, consisting of five (5) consecutive work days followed by two (2) consecutive days off.

Work days and days off for full-time employees who work non-standard work weeks shall be scheduled according to current practice or so that each employee shall have at least two (2) days off in any nine (9) day period. In addition, the Employer agrees to schedule each employee with at least seventeen (17) weekends off per year in the Department of Mental Health, the Department of Mental Retardation and Developmental Disabilities and the Ohio Veterans' Home. The parties may mutually agree to other scheduling arrangements than those specified in this Section.

The week shall commence with the shift that includes 12:01 A.M. Sunday of each calendar week and end at the start of the shift that includes 12:00 midnight the following Saturday.

Part-time employees shall be surveyed to determine the number of hours they would like to work. The Employer shall attempt to schedule each part-time employee for his/her preferred number of hours in seniority order.

(Joint Exhibit 1, Pgs. 17-18)

Section 13.02 - Work Schedules

For purposes of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e. hours of the day) and days of the week and work area.

Work schedules for employees who work in five (5) day operations need not be posted. However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such.

Work schedules for employees who work in seven (7) day operations shall be posted at least fourteen (14) calendar days in

advance of the effective date. The work schedule shall be for a period of at least twenty-eight (28) days and shall not be changed within that period, except in accordance with reassignment as provided for in Section 13.05.

...

(Joint Exhibit 1, Pg. 18)

...

Section 13.05 - Reassignments

A. Temporary reassignments, within institutions, may be required:

1. To meet abnormal work loads;

2. In the temporary absence of an employee where delay of the performance of duties would be unreasonable;

3. Pending recruitment.

Temporary reassignments under this Section shall in no case exceed eighteen (18) work days (unless mutually agreed to by the Union and the Agency). Reassignment shall be on a seniority basis within the work area within the classification needed to provide the temporary coverage. Should more than one employee desire the available temporary reassignment, such reassignment shall be awarded on the basis of seniority, with the most senior employee being given first choice. Should no employee desire the reassignment, the least senior employee shall be reassigned first.

...

(Joint Exhibit 1, Pg. 19)

Section 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designed has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designed shall have the right to require the least senior employee(s) who normally performs the work to perform designed overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

...

An employee's posted regular schedule shall not be changed to avoid the payment of overtime.

...

Section 13.10 - Payment for Overtime

All employees except those in current Schedule C shall be compensated for overtime work as follows:

1. Hours in an active pay status more than forty (40) hours in any calendar week shall be compensated at the rate of one and one-half (1 1/2) times the regular rate of pay for each hour of such time over forty (40) hours;

2. For purposes of this Article, active pay status is defined as the conditions under which as employee is eligible to receive pay and includes, but is not limited to, vacation leave, sick leave and personal leave.

(Joint Exhibit 1, Pgs. 20-21)

CASE HISTORY

During the Parties' 1986 contract negotiations, they mutually agreed to solve a definitional dispute by submitting the matter to Arbitrator Elliott H. Goldstein. The disputed matter dealt with the definition of a "work area" as the term is used in Article 13 of the Parties' initial Collective Bargaining Agreement. Specific attention was placed on Section 13.02 - Work Schedules and Section 13.05 - Reassignments. Arbitrator Goldstein's services were mutually requested because the Parties failed to negotiate a definition regarding the term "work area." Impasse in negotiations took place even though the Parties agreed to the inclusion of a definition in an appendix to the Agreement (Joint Exhibit 2).

Arbitrator Goldstein fashioned a specific definition for the Departments of Mental Health and Mental Retardation and Developmental Disabilities. "Work area" was defined as:

> ...the smallest subdivision of regular work assignment in the physical setting wherein an employee performs his or her assigned work on a regular basis...

Arbitrator Goldstein, moreover, ordered the Parties to meet within sixty (60) days of receipt of the award; at which time they would attempt to negotiate a final and binding provision defining work area in line with the guidelines contained in his award (Joint Exhibit 2).

The Parties did, in fact, negotiate a Memorandum of Understanding (Joint Exhibit 3) on or about September 29, 1987. And, the above-mentioned definition was agreed to with incorporated examples. The examples which were referenced included, but were not limited to, the following assignments: a ward; unit; module; cottage or 1/2 a cottage; kitchen; laundry; building; or facility.

Shortly after the fashioning of the Memorandum, the Employer posted the work area assignments. The assignments, more specifically, included the following characteristics: classification; the exact work area; the regularly scheduled days off pursuant to Article 13; and the shift. Affected employees were canvassed jointly by the Employer and the Union in institutional seniority order with the most senior person asked his/her preference; followed by the next most senior employee. These employees were allowed to select their preferred work area.

Sherrie Ware, The Grievant, is a Food Service Worker employed at the Mr. Vernon Developmental Center, the Employer. She was originally hired on November 28, 1983 as a worker in Rian Hall Kitchen. At some unspecified later date, she successfully bid on

the Float position in the cottage area. As a "Float," she did not have one regularly assigned area but worked in different areas on an as needed basis.

The Grievant took part in the "pick-a-post" selection process. She selected a Cottage Float position based on her institutional seniority. In this capacity, she worked Monday through Friday from 7:00 a.m. to 3:30 p.m. As such, her normal work schedule called for Saturday and Sunday as her non-working days.

The above-mentioned work schedule remained in tact until February 13, 1989. On this date, Glenna Beckholt, the Food Service Manager, provided her with a Fourteen (14) Day Notice of Temporary Reassignment (Joint Exhibit 8). The reassignment engendered a number of scheduling changes. The Grievant would only work in the main kitchen (i.e. Rian Hall Kitchen) for nine (9) weekends in the months of March and April of 1989. During these weekend assignments, the Grievant's hours of work would be 5:00 a.m. until 1:00 p.m. The record indicates Beckholt allowed the Grievant to select her days off; she chose Thursday and Friday. It should be noted the Grievant continued her normal hours of work, and activities in the cottages, on Monday, Tuesday and Wednesday of each work week.

On February 27, 1989, the Grievant challenged the temporary reassignment decision. The Statement of Facts contained in the grievance included the following particulars:

> "...
> On February 13, 1989, Roger Marra, Food Service Manager I, gave Sherrie Ware, a fourteen day notice of temporary reassignment. Sherrie was reassigned from her work area of

the cottages to Rian Hall. This changes her regular work hours and her regular work days. The purpose of the reassignment was to correct scheduling problems for weekends. ..."

(Joint Exhibit 9)

Throughout the various steps of the grievance procedure, the Employer denied the grievance. It based its denials on the fact the Grievant was the least senior employee in the work area most able to provide the coverage. Also, the reassignment was implemented in accordance with Section 13.05 requirements, and justified on the basis of the seventeen (17) weekends off provided for in Section 13.01 (Joint Exhibit 9).

Neither Party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

In the Union's opinion, the rescheduling of the Grievant's workweek to cover for weekends off in the kitchen area was improper. By selecting the Cottage Float position via the pick-a-post process, the Grievant's assignment, in terms of shift, days off and work location were specified and could not be modified. This conclusion was supported by the minimum Staff Requirements (Joint Exhibit 11), the Position Description (Joint Exhibit 7) and the Parties joint stipulations.

The Union, moreover, distinguished this Arbitrator's Kinney Award from the present fact situation. Unlike the Department of Transportation in the Kinney case, the present Employer's

management rights are more restricted since its actions are subject to the Pick-a-Post Agreement (Joint Exhibits 2 and 3). Within this context, the Employer may only reassign positions according to Section 13.05.

The scheduling change, moreover, was improper under the guidelines specified in Section 13.02. The provision referenced by the Employer covers employees who work in seven (7) day operations. The Grievant, however, was an employee who worked in a five (5) day operation. As such, her work schedule could not be changed unless her work hours were determined "by schedules established by parties other than the Employer." Just because the Grievant was assigned to the kitchen, which is a sever (7) day operation, this was not her work area. Even though the institution, itself, is a seven (7) day operation, the Grievant was a five (5) day operation employee.

The Union asserted the Employer misapplied Sections 13.02 and 13.05. The later provision was intended to cover reassignments within institutions, while the former provision covers other agencies. An alternative construction would render Section 13.05 as superfluous and unnecessary.

It was also alleged the reassignment was improperly implemented under Section 13.05. The criteria specified in this provision were not supported by the Employer. An abnormal work load did not exist in the kitchen. The training of new employees did not cause the kitchen to suffer minimum staffing problems on the weekends in question.

The Employer's attempt to justify the temporary

reassignment based on the temporary absence of several employees also seemed misplaced. Individuals were never reassigned to cover for the absences of Lucille Wilson and Donna Smith. The Grievant's weekend assignment would hardly efficiently cover these absences. Also, testimony indicated the Union and Employer created a float pool of employees to cover leaves of absence. This pool became a work area and selected by employees on the basis of seniority status. A process such as the one described could have been used to cover the leaves in question.

The reassignment should not have been implemented as a way to comply with the seventeen (17) weekend requirement contained in Section 13.01. Operational need is not specified as an appropriate criterion in Section 13.05. As such, even if this requirement was established, it does not serve as a legitimate justification negotiated by the Parties.

If the Arbitrator does view this criterion as legitimate and applicable, the weekend scheduling data do not support this conclusion. On more than one occasion, employees were accommodated in excess of the standard. Thus, the Employer could have met its Section 13.01 requirement if it had scheduled properly.

For argument purposes, the Union assumed Section 13.05 was, in fact, properly applied. Under this assumption, however, the Employer violated the eighteen (18) workday proviso by reassigning the Grievant for a sixty (60) day period. In the Union's opinion, the days in question start on the day of the assignment and end eighteen (18) workdays later. The Employer's procedure would

violate the agreed to pick-a-post procedure because it would allow the reassignment of individuals on a piecemeal basis.

The Parties never intended application of Section 13.05 for long-term reassignment purposes. The Section, itself, speaks of "temporary" reassignments for fixed term events. It also specifies eighteen (18) days as the appropriate duration; another indicator of the short-term application intended by the Parties.

Within the previously described context, the Union opined the reassignment in question was deliberately implemented to avoid the payment of overtime. A number of reasonable alternatives were available. The Employer could have scheduled weekend work more efficiently; this would have eliminated the Section 13.01 problem dealing with the seventeen (17) day standard. Intermittent employees could have been hired in accordance with Section 7.03; which would have dealt with leave of absence issue. Also, a mutually agreed to pooling arrangement could have been entered into with the Union; an approach utilized in the past to deal with the Stelts' situation.

The Position of the Employer

The Employer argued it properly changed the Grievant's work schedule in accordance with Section 13.02 requirements. The Grievant, more specifically, was notified (Joint Exhibit 8) at least fourteen (14) calendar days in advance of the effective change.

A number of operational reasons were offered by Beckholt in support of the scheduling change. First, a number of Food Service

Worker positions were turned over during 1988 and 1989 and two (2) lengthy leaves of absence caused a number of vacancies. The unpredictable nature of these absences, and the repeated short request for extensions, precluded the filling of these vacancies via interim appointments. Once these vacancies were finally filled, orientation and on-the-job training further depleted the Food Service Worker manpower pool.

Second, the previously described shortages frustrated the Employer's responsibilities as specified in Section 13.01. Beckholt testified Section 13.01 requires the scheduling of seventeen (17) weekends off per year for all full-time employees. At the time in question, moreover, Beckholt was also under the impression the Employer was required to apply the same standard to part-time employees. Although she was subsequently advised that Section 13.01 only applies to part-time employees once full-time employees receive their seventeen (17) weekends, this misapplication also led to scheduling difficulties requiring the assignment of the Grievant.

The Employer asserted neither the Union nor the Arbitrator have the authority to schedule employees even though alternative scheduling schemes may have been more efficient. The scheme selected by Beckholt was reasonable in light of the Parties' custom and practice, and her understanding of Section 13.01 requirements.

Even though the Employer did legitimately schedule the Grievant in accordance with Section 13.02, it exceeded the requirements of the Agreement (Joint Exhibit 1) by incorporating

the provisions contained in Section 13.05. Operational needs caused by minimum staffing requirements justified the scheduling change under Section 13.05. Beckholt identified the cottage area as a possible pool for the temporary reassignment. The cottage area merely required one (1) Food Service Worker in each of the three (3) cottages. Rescheduling by selecting an employee from another work area was not deemed possible because other work areas were already at the minimum number required. Based on this analysis, the Grievant was assigned to the Main Kitchen because she was the least senior of the four (4) Food Service Workers in the cottages.

The Employer argued if one interprets the scheduling change as a reassignment, it did not violate the eighteen (18) day standard specified in Section 13.05. The standard refers to work days rather than consecutive days or calendar days. Since the language is clear and unambiguous, the Parties' intent regarding the standard should not be questioned. To do so would result in a Section 25.03 violation because the Arbitrator would be subtracting from the terms of the Agreement (Joint Exhibit 1).

In the event the Arbitrator ruled in the Grievant's favor, the Employer strongly contested the payment of any overtime. Neither the Union nor the Grievant requested overtime as remedy during the various stages of the grievance procedure. A remedy of this sort is improper because the Grievant never worked more than forty (40) hours in any week during the temporary reassignment. As such, a payment of this sort would violate Section 13.10 which compensates

employees for each hour of time in excess of forty (40) hours. The proposed remedy, moreover, is improper because the Union never established the scheduling change was solely implemented for the purpose of avoiding the payment of overtime.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record, it is this Arbitrator's opinion that the Employer did violate Article 13. The scheduling change and associated temporary reassignment are neither supported by the application of Section 13.02 nor Section 13.05.

Unlike this Arbitrator's interpretation in the Kinney award, the Employer's ability to implement scheduling changes is restricted by the "work area" language negotiated by the Parties. The Memorandum of Understanding (Joint Exhibit 3) and the related pick-a-post outcomes were never considered by this Arbitrator in Kinney because they were not applicable in that particular setting. Here, the way "work area" is operationalized plays a critical role in the analysis which follows.

The Memorandum of Understanding (Joint Exhibit 3) contains the following definition of "Work Areas:"

> Work areas, for the purposes of this memorandum, shall be defined as the smallest subdivision of regular work assignment in the physical setting wherein an employee performs his/her assignment work on a regular basis. (Examples include, but are not limited to, a ward, unit, module, cottage or 1/2 a cottage, kitchen, laundry, building or facility.

The Parties, moreover, operationalized "work area" for Food Service Workers by identifying several specific areas: main kitchen, cafeteria and cottages. A Cottage Float position was also

specified within the "cottages" work area. This conclusion was supported by the job groupings contained in the pick-a-post posting (Joint Exhibit 10) and the Grievant's job description (Joint Exhibit 8).

Section 13.02 provides for work schedule changes in five (5) day and seven (7) day operations but those, in any view, must be confined to the work area selected via the pick-a-post process. To disregard an employee's pick-a-post selection by changing a work area would directly violate the negotiated work area provisos. As such, all the justification in the world, including operational needs, cannot be used to bypass the work area requirements contained in the Memorandum of Understanding (Joint Exhibit 3), and by reference Section 13.02.

Here, the Employer unilaterally changed the Grievant's work schedule by improperly changing her work area. At some point in time she bid and was granted the Cottage Float position. This selection restricted her potential assignment to other cottages; the physical setting wherein she performed her assigned work on a regular basis. The Rian Hall Kitchen work area is totally outside the domain of her work area; even though the duties might be similar. One has to realize, however, employees have selected, via a bidding process, specific work areas; Rian Hall Kitchen and the Cottages represent two examples of work areas. The unilateral assignment of the Grievant not only violates the Grievant's rights but those holding similar positions in Rian Hall Kitchen at the time of the schedule change. Benefits, such as potential overtime

assignments, might be negatively impacted by such a unilateral change.

Whether the Grievant worked in a five (5) versus a seven (7) day operation is irrelevant. The Employer's violation of the work area procedure by making an assignment outside of the Grievant's work area serves as the critical defect.

The Employer proferred a unique, but confusing, additional argument. It maintained the scheduling change was not a temporary reassignment but incorporated Section 13.05 into its decision. This explanation makes little sense; which forces this Arbitrator to view the Employer's Section 13.05 arguments as equally plausible alternative. It appears the Employer attempted to bolster its argument by acting as if it somehow restricted itself by abiding by the criteria contained in Section 13.05. Even if these criteria were met, the Employer's decision still proves defective for a number of reasons. The provision states in pertinent part:

> "Reassignments shall be on a seniority basis within the work area within the classification needed to provide for temporary coverage. Should more than one employe desire the available temporary reassignment, such reassignment shall be awarded on the basis of seniority, with the most senior employee given the first choice. Should one employee desire the reassignment, the least senior person should be reassigned first."

Once again this provision places a great deal of emphasis on work area as the focus for any reassignment. There is no need to repeat the previous analysis; the Grievant was reassigned outside her work area. This provision also underscores the potential impact on other bargaining unit members if it is breached. It recognizes the possibility of a contest between individuals for the reassignment;

one which is settled on a seniority basis. So, the Employer further violated this provision by failing to post the temporary reassignment for bidding by Food Service Workers in Rian Hall Kitchen. As such, it violated the provision by unilaterally selecting an individual outside of the work area. Being in the same general work classification does not establish the sufficiency of this decision. Section 13.05 nests the classification requirement within the work area needed to provide temporary coverage. The work area, therefore, serves as the primary factor in any temporary reassignment.

The remedy portion of the Opinion and Award deserves some discussion. Here, we have an employee who through an illegal scheduling/temporary reassignment decision was forced to work weekends; her normal days off. Granted, her total hours per week never exceed forty (40) hours. And yet, under normal conditions, any hours worked on the weekend would have resulted in premium pay.

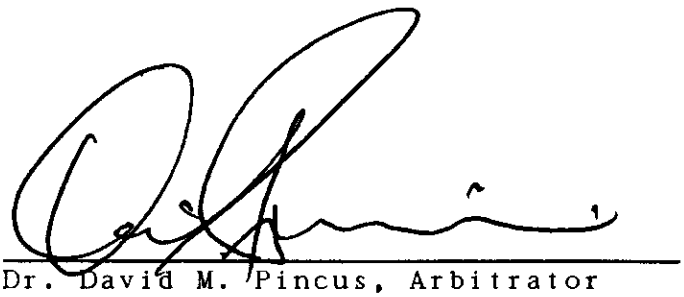
This Arbitrator cannot support the Employer's argument that the Grievant should not be compensated for time not worked. Normally, this Arbitrator would agree with such an assessment. The present facts, however, support a remedy which exceeds a mere cease and desist order. Make-up overtime could never rectify this situation. In fact, it could engender further overtime equalization problems by the assignment of extra overtime to the Grievant. Here, the contractual guarantee of schedule changes and temporary reassignments based on negotiated work area designations would be valueless unless compensation is provided for the breach.

As such, the Grievant is entitled to compensation based upon the "damages" engendered by the reassignment decision, rather than any foregone earning theory. Her right to compensation arose at the time the Collective Bargaining Agreement (Joint Exhibit 1) was breached.

AWARD

The Employer did violate Article 13. As such, the grievance is granted. The Employer shall compensate the Grievant for the premium pay lost as a result of the Employer's temporary reassignment decision.

6/18/92
Date



Dr. David M. Pincus, Arbitrator