#941

VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE DEPARTMENT OF YOUTH SERVICES, ATHENS REGIONAL OFFICE

-AND-

DISTRICT 119, THE HEALTH CARE AND SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

GRIEVANT: JIM TENNYSON (FLEXIBLE WORK SCHEDULES)

CASE NO: 35-10 (12-23-92) 01-02-12

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

DATE: DECEMBER 24, 1993

APPEARANCES:

For The Employer

David S. Heber	Labor Relations Officer
Carol Mason-Loubor	Labor Relations Officer
Granville "Bud" Potter, Jr.	Regional Administrator
Georgia Brokaw	Second Chair
Michael P. Duco	Assistant Legal Counsel

For The Union

Jim Tennyson	Grievant
Ellie Inglesi	Observer
Dave Regan	Ohio Area Director

INTRODUCTION

This is a proceeding under Article 7, entitled Grievance Procedure of the agreement between the State of Ohio, the Department of Youth Services, Athens Regional Office, hereinafter referred to as the "Employer", and District 1199, the Health Care and Social Service Union, Service Employees International Union, AFL-CIO, hereinafter referred to as the "Union", for the period 1992-1994 (Joint Exhibit 1).

The arbitration hearing was held on November 8, 1993 at the Office of Collective Bargaining, Columbus, Ohio. 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.

STIPULATED ISSUE

Did the Employer violate Article 24.11 when it denied Mr. Tennyson a four (4) ten (10) hour day schedule? If so, what should 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.

(JOINT EXHIBIT 1, PAGE 7)

ARTICLE 24 - HOURS OF WORK AND OVERTIME

24.11 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.

The Employer agrees to consider flexible work schedules for particular employees or classifications. The Employer agrees to consider such options as four (4) ten (10) hour days, twelve (12) hour shifts, and/or other creative scheduling patterns that may assist in the recruitment and/or retention of nurses and other employees. Subject to the Employer's right to schedule employees to satisfy its

operational needs, such a schedule will be implemented upon the request of the Union and affected employees.

Should recruitment difficulties become more severe in certain classifications, the Employer may explore and implement various arrangements to assist in recruiting such as shift differential, pay supplements, and variable weekend work plans.

In order to be able to implement some flexible work schedules, the Employer may allow a full-time employee(s) to work less than forty (40) hours in a week and more than forty (40) hours in the other week within the same pay period. An employee(s) permitted to shift his/her work hours shall be eligible for overtime pay or compensatory time only after eighty (80) hours in an active pay status in a pay period.

(JOINT EXHIBIT 1, PAGE 46)

CASE HISTORY

Jim Tennyson, the Grievant, has served as a Social Worker with the Ohio Department of Youth Services, the Employer, for approximately eighteen (18) years. He has worked at the Athens Regional Office for approximately thirteen (13) years. This office employs eight (8) Social Workers who cover twenty-three (23) counties in the State of Ohio.

The Grievant's working title is Youth Counselor, and his actual work assignment causes the performance of aftercare duties similar to those performed by Parole Officers. As such, he supervises youth parolees and monitors their progress. In performing these duties, he ascertains their needs and attempts to facilitate their adjustment and aftercare by referring them to appropriate agencies. These duties require his ongoing interaction with the following institutions: Public Schools;

Children Service Agencies; the Department of Youth Services; Mental Health Agencies, Drug and Alcohol Specialists; Foster Care programs; and the Juvenile Court System. His caseload consists of thirty-seven (37) juvenile parolees scattered amongst three (3) counties: Perry, Morgan and Muskingum.

Prior to on or before November of 1992, the Grievant had been working a five (5) day, eight (8) hour weekly work schedule. This schedule included one office day per week, typically a Tuesday, which lasted six (6) hours. Bud Potter, Jr., the Regional Administrator, testified the office day designated by Youth Counselors was independently determined based on the needs in any particular service area. The Employer does not require an office day appearance on any specific day; Youth Counselors are expected to be out in the field the majority of the time. The Grievant testified he and other similarly situated employees are required, as a matter of practice, to submit a weekly itinerary one (1) week in advance to their supervisor.

The facts surrounding the disputed matter are for the most part not in dispute. The Grievant submitted his itinerary for the second or third week of November 1992. It reflected a four (4) ten (10) hour day work schedule, and it was initially approved by his immediate supervisor without any discussion. On the second day into the work schedule, the Grievant's immediate supervisor, Gary Bowmann, informed him the submitted schedule was revoked based on operational need requirements.

On November 17, 1992, the Grievant contested the Employer's decision by filing a grievance. The Grievance Form contained the following relevant particulars:

> *" . . . I have been denied the right to work four ten hour work days per week contrary to the contract. . . ."*
>
> *(JOINT EXHIBIT 2)*

The Employer denied the grievance at each step of the grievance procedure. It believed that a four (4) ten (10) hour day schedule would impose a costly operational hardship. A number of related justifications were provided to support the application of Section 24.11.

During the interim period, the Grievant initiated another work schedule which consisted of four (4) nine (9) hour days with the fifth day amounting to a four (4) hour day. The work schedule resulted in a thirty-six (36) hour per week schedule because the Grievant submitted leave requests for the four (4) hour day. Vacation and/or personal leave requests were granted on each of the occasions. The modified work schedule and the related personal leave requests have been approved for approximately eleven (11) months.

The Parties were unable to resolve the grievance. Neither side raised procedural nor substantive arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

In the opinion of the Union, the Employer's rejection of the Grievant's modified work schedule violated Section 24.11 of the Collective Bargaining Agreement (*JOINT EXHIBIT 1*). The argument in question was supported by focusing on bargaining history surrounding Section 24.11, and the application of the disputed provision to the circumstances giving rise to the grievance.

Dave Regan, the Ohio Area Director, provided testimony regarding the bargaining history surrounding Section 24.11. Prior to bargaining the present Agreement (*JOINT EXHIBIT 1*), the flexible work schedule issue was viewed as a

serious concern. Several agencies had developed blanket unilateral policies denying the possibility of alternate work schedules. The Union, moreover, lost several arbitration cases dealing with this issue. As such, the Union leadership felt the contract had to be modified to allow consideration for these scheduling requests. As bargaining for the new Agreement (*JOINT EXHIBIT 1*) commenced, the bargaining committee realized economic related gains would be difficult to obtain. The Union's leadership, however, felt a reasonable compromise, protecting the Parties' interests, could be fashioned in this limited contract domain.

Regan stated that Frank Flynn, the former Deputy Director of the Office of Collective Bargaining, proposed the present language contained in Section 24.11. Specific emphasis was placed in the addition of the following phrase, which was accepted by the Union:

> *...Subject to the Employer's right to schedule employees to satisfy its operational needs, such a schedule will be implemented upon the request of the Union and affected employees.*

The acceptance of this provision clearly reflected the Parties' intent to materially alter the predecessor provision (*UNION EXHIBIT 3*) in a meaningful manner. The Employer could no longer continue to unilaterally discount these alternative scheduling requests. The Union, however, realized certain institutional arrangements and requirements, such as three shift operations, might preclude the adoption of flexible work schedules. Across-the-board implementation of these approaches was never proposed by the Union; operational needs had to be considered on a case-by-case basis.

The language in question requires a certain set of protocols. Once an individual employee and/or the Union formally request the implementation of a flexible work schedule, the Employer can only refuse such an arrangement if it

can prove its operational needs were somehow hampered. The Union, in turn, would have the burden of demonstrating that operational needs would not be diminished if the proposed schedule was accepted by the Employer.

The Union opined that application of the previously mentioned interpretation clearly evinced the propriety of the Grievant's scheduling request. The operational needs of the Athen's office would not be diminished as a consequence of implementing the alternative work schedule. Coupling leave requests with flexible schedule arrangements would not engender staffing problems. Leave requests need not be granted automatically; especially if doing so hampers the management of the office which is a management right. Scheduling difficulties could be held to a minimum based on existing office custom and practice. Only the monthly "cluster" meeting requires an absolute scheduling commitment. Submission of work schedules one week in advance results in sufficient advance notice; potential scheduling conflicts can be anticipated, and therefore, eliminated. The proposed schedule would cause an increase in productivity because the Grievant would be able to spend four (4) more hours a week in the field. A highly desirable outcome considering the Grievant has only worked thirty-six (36) hours per week for the last eleven (11) months. For this period of time, neither his performance nor the office's operational needs have been raised as plausible justifications for denying his thirty-six (36) hour weekly work schedule.

In terms of a proposed remedy, the Union argued the proposed work schedule should be implemented. Also, all personal leaves utilized by the Grievant over the last eleven (11) months should be returned to the Grievant's leave banks. He utilized these leaves as a consequence of the Employer's unilateral and unreasonable denial of his formal flextime request.

The Position of the Employer

The Employer agreed that Section 24.11 was meaningfully changed as a consequence of the most recent contract negotiations. A complete review of the entire provision still renders the "Subject to the Employer's right to schedule..." clause with sufficient ambiguity to reduce the plausibility of the Union's interpretation. Even if the disputed clause is not ambiguous, the Employer did not violate Section 24.11. It agreed to implement a flexible work schedule offered by the Grievant. Here, the Employer referred to the four (4) day nine (9) hour weekly schedule which was supplemented by a fifth four (4) hour day. By agreeing to this arrangement, the Employer complied with the terms and conditions negotiated by the Parties. Nothing in Section 24.11 requires the implementation of a particular scheduling format. It has the right to select a scheduling option among a variety of flexible work schedule alternatives. In this instance, the Employer chose to provide the Grievant with some flexibility by adopting a four (4) day nine (9) hour per day schedule. An option totally in tune with the terms and conditions negotiated by the Parties.

The Employer agreed with the Union's interpretation of Section 24.11, but disagreed with the application of the provision in this instance. Bargaining history clearly indicates Section 24.11 and Article 5-Management Rights must be viewed in tandem if one is to operationalize the compromise testified to by Regan. An interpretation of this sort requires a "shifting" burden analysis within the context of a rebuttable presumption requirement. Once the Employer provides an operational need that cannot be met if an employee's flexible workweek schedule is adopted, a rebuttable presumption in the Employer's favor is established. This presumption, then, must be overcome by the Union in terms of demonstrating that operational needs will not be hampered if, in fact, the proposed schedule is implemented.

Here, in the Employer's opinion, the Union has been unable to properly rebut the Employer's operational needs justification. A legitimate operational need does in fact exist. All of the institutions the Grievant interacts with on an on-going basis operate on a five (5) day work schedule. This condition was supported by testimony provided by Potter and the Grievant. The Union was unable to provide any means by which the Employer could modify this institutional arrangement. As such, it failed to meet its burden regarding the rebuttable presumption raised by the Employer.

The Employer admitted it complied with the Grievant's most recent request regarding the four (4) day nine (9) hour work schedule plus the one (1) day four (4) hour arrangement. It, moreover, agreed that it honored his weekly leave request which resulted in a thirty-six (36) hour workweek. Such compliance, however, was done under duress in an attempt to thwart claims of unreasonable leave request denials and retaliation. The Employer chose not to challenge these leave requests because they were reasonable, requested in the proper fashion, and could be honored based on existing operational needs.

The Employer, however, was extremely concerned about the impact on operational needs if the Grievant initiated leave requests once his four (4) day ten (10) hour work schedule was adopted. Under this set of circumstances, the Grievant's ability to perform his field responsibilities would be dramatically hindered causing a severe operational hardship.

The remedy request offered by the Union was thought to be unreasonable. If the Arbitrator ruled in the Grievant's favor, he should not reconstitute the Grievant's leave balances. The Grievant worked thirty-six (36) hours per week and asked to use his available leave balances.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing, and a full review of the record including pertinent contract provisions, it is my judgment the Employer did violate Section 24.11 by denying the Grievant's four (4) ten (10) hour day work schedule. An analysis supporting this conclusion follows in the remaining portion of this document. It is based upon unrefuted bargaining history and proper application of the terms and conditions negotiated by the Parties as evinced in Section 24.11

Section 24.11 establishes a number of procedural requirements. First, the Employer is required to consider flexible work schedules "upon the request of the Union and affected employees." This mandate is clearly specified in the second paragraph of the provision where "the Employer agrees to consider flexible work schedules for particular employees or classifications." The language, moreover, does not precondition this request but merely requires a legitimate offering which must be considered in good faith and dealt with in a reasonable and non-arbitrary fashion. As such, the Employer cannot dismiss these requests by blanket policies which unilaterally deny such requests. This language also precludes the unilateral implementation of a work schedule which an employee and/or the Union have not offered for consideration. As such, the Employer's implementation of the four (4) day nine (9) hour schedule plus a one (1) day four (4) hour arrangement does not in any way detract from the propriety of the Grievant's initial submission. That submission has to be dealt with independently in accordance with the terms and conditions contained in Section 24.11.

Second, bargaining history and contract language mutually support the Employer's rebuttable presumption theory. Once a proper request has been provided by the Union and/or the employee, the burden then shifts to the Employer to establish that its refusal was rationally based on its "...right to schedule

employees to satisfy its operational needs." The initial burden is placed on the Employer because it primarily controls the information regarding operational needs. As such, it has the initial responsibility to provide this information in order to meet its burden. This phrase, moreover, supports the Employer's rebuttable presumption theory because it incorporates language contained and referred to in Article 5-Management Rights. The presumption is with the Employer because the Employer retains the right to manage its workforce. Regan's testimony, moreover, reinforces this interpretation because it was agreed to as part of the compromise causing the inclusion of the "Subject to Employer's right..." clause. Once a rational basis of operational needs has been shown, the burden shifts to the Union to overcome by clear and convincing evidence that the Employer's decision was erroneous or based in bad faith or not in the public interest. This Arbitrator has selected a clear and convincing standard because Section 24.11 in no way diminishes the Employer's right to manage or schedule its workforce.

Here, the record clearly indicates the Employer's decision was not rationally based on an operational needs requirement. As such, the burden does not shift to the Union to overcome by clear and convincing evidence that the decision by the Employer was erroneous. The Employer's reliance on institutional scheduling arrangements does not sufficiently support the operational needs argument. More than a mere supposition needs to be presented to support such a premise. In fact, the record established by the Employer totally disaffirms this notion. The Employer agreed to the most recent scheduling arrangement which resulted in a thirty-six (36) hour workweek because it accepted the Grievant's leave requests. Operational needs and scheduling difficulties were never raised by the Employer. Over an eleven (11) month period the Athen's office's performance was not diminished, nor the Grievant's individual performance as viewed by his supervisors. Also, similar

concerns were never documented on or about the time of the initial submission. Scheduling and other staffing related concerns never surfaced during this time period nor during the time of the initial submission. As such, Potter's concerns about staffing coverage and potential problems surrounding futuristic leave usage are totally unpersuasive based on the present set of circumstances. The Employer can always refuse leave requests if the decision is reasonably supported; and fear of grievances and retaliation concerns do not in any way diminish this reserved management right. Also, future working requirements might better support an operational needs argument. Implementation of a flexible workweek schedule does not necessarily guarantee unlimited continuance of this approval if operational needs change.

Even though I have determined the Employer has violated Section 24.11, I am unwilling to fully comply with the Union's remedy request. That is, the Grievant's leave balances will not be credited nor reconstituted to reflect the leave requested and awarded over the eleven (11) month period. The Grievant could have filed a grievance and continued to work on a five (5) day eight (8) hour schedule. He modified his schedule, with the agreement of the Employer, which resulted in a thirty-six (36) hour work schedule. No one forced him to initiate these leave requests nor deplete his existing leave balances. A ruling in his favor regarding the remedy portion of my Award would result in an unintended windfall. He never worked forty (40) hours per week and his record should not reflect such a condition.

AWARD

The Employer did violate Section 24.11 by denying the Grievant's four (4) ten (10) hour day proposed working schedule. The Employer is ordered to implement this schedule by the next scheduled pay period. For the aforementioned reasons, the

Grievant's leave banks shall not be credited, but will continue to reflect the leave requests granted by the Employer during the contest time period.

December 24, 1993

Dr. David M. Pineus
Arbitrator