
In the Matter of Arbitration

Between

District 1199/SEIU

and

The State of Ohio, Department of
Mental Retardation and
Developmental Disabilities

Case Numbers:

24-04-931122-0536-
02-11

24-04-930726-0502-
02-11

Appearances: For District 1199/SEIU:

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For Department of MR/DD:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on September 20, 1995 and the record in this dispute was closed.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Whether management violated the Collective Bargaining Agreement by reducing the hours of the two grievants without mutual consent? If so, what shall the remedy be?

As part of the agreed upon issue:

The parties agree that the question of whether part-time employees are covered by Section 29.05 is not an issue in this case.

Background: The parties agree upon events prompting this proceeding. One Grievant, Simone Wesner, was initially employed by the Cambridge Developmental Center on February 29, 1998. She was classified as a Psychology Assistant 2. Another Grievant, Shirley Betts-Hollins, was employed at Cambridge on May 22, 1988. She was a Psychiatric Nurse 2. both Ms. Wesner and Ms. Betts-Hollins were full-time employees.

In early 1990 Ms. Wesner requested that her work hours be reduced. She became a part-time employee in April, 1990. Ms. Betts-Hollins requested part-time status in 1991. That was approved on April, 1992.

While these events were transpiring the population of the Cambridge Developmental Center was declining. As one response to that decline Ms. Wesner's work hours were reduced from 30 to 20 per week. This occurred in July, 1993. In November, 1993 Ms. Betts-Hollins experienced a work-week reduction from 24 to 18 hours per week.

In order to protest these hours reductions Ms. Wesner and Ms. Betts-Hollins independently filed grievances. Both

proceeded through the grievance adjustment machinery of the parties without resolution. The parties agree that both have been properly combined and are properly before the Arbitrator for resolution on their merits.

Position of the Union: The Union points to Article 29 of the Agreement and asserts it has been violated in this instance.

In relevant part Article 29 reads:

If the work force is to be reduced, it shall be accomplished by layoff and not by any hours reduction. Only by agreement between the appropriate parties can the regular hours of employees be reduced. (Art. 29.05)

Both Ms. Wesner and Ms. Betts-Hollins voluntarily moved to part-time status during their tenure at Cambridge Developmental Center. When that was done they reached agreement with Center administration over the number of hours they were to work per week. There was mutuality in determining the schedule. When their work hours were reduced it was done unilaterally by the Employer. The mutual agreement that marked the initial reduction of work hours was lacking.

When the hours of both Grievants were reduced there were full-time employees in their departments who were junior to them. These junior employees were not affected by an hours reduction. As the Union urges this dispute be viewed, Management reduced the work hours of part-time employees in order to avoid a layoff. The total number of work hours at Cambridge declined in 1993 as a consequence of its reduced

population. In the Union's opinion, if there is less work available, the appropriate managerial response under the Agreement should be layoff, not hours reduction for the Grievants.

Article 29.05, cited above, makes no differentiation between full-time and part-time employees. It expresses the agreement of the parties to accommodate to a reduction of work by layoff, not hours reduction. That agreement applies to part-time as well as full-time employees according to the Union. As the Employer reduced senior part-time, rather than junior full-time employees, the Union asserts the Agreement has been violated.

Subsequent to the events in this proceeding Ms. Betts-Hollins was laid off. That is irrelevant in the Union's view. At the time of the hours reduction experienced by the Grievants the number of work hours at Cambridge was reduced as well. Under the terms of the Agreement the employer may not reduce the workforce by hours reduction. That is what it did in this instance according to the Union. It urges the grievances be sustained and an award of back pay be made.

Position of the Employer: The State asserts that changing hours of work is a managerial right. This is recognized at Article 5 of the Agreement which is the management rights article. The language therein reserves to the Employer the authority to engage in the "determination and management of

its facilities, equipment, operations, programs and services." That is what it did in this instance.

The authority to adjust work hours has been widely accepted by the arbitration community. (See for example Powermatic/Houdaille, Inc. 63 LA 1 Andrews).

The State disputes the interpretation placed on Section 29.05 by the Union. It urges that Section be read in conjunction with the remainder of Article 29. That Article deals with layoffs and recalls. In the State's view Section 29.05 is aimed at preventing an hours reduction to avoid a layoff. Article 29 deals solely with layoff, not hours reduction. It is the latter situation that is at issue in this dispute.

Article 24 represents the only language in the Agreement dealing with hours. It applies to full-time, not part-time employees. As the Grievants are part-time employees the protections afforded by Article 24 do not apply to them in the opinion of the State.

In this case, the hours reduction experienced by the Grievants was not related to a layoff. There was a layoff subsequent to the events under review in this proceeding. It occurred well after the hours reduction experienced by the Grievants. Their reduction of hours was to accommodate to the declining population of Cambridge Developmental Center. It was not part of a layoff.

There is no past practice of securing the consent of employees prior to adjusting their hours. The State acknowledges that a change in hours has been discussed with employees in the past. However, that does not rise to meeting the tests for past practice enunciated by the distinguished arbitrator, Richard Mittenthal. ("Past Practice and the Administration of Collective Bargaining Agreements" Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators, pp. 32-33, BNA Books, Washington, D.C. 1961). The history of hours changes at Cambridge Developmental Center lacks the elements of mutuality and continuing underlying circumstances stressed by Mittenthal. When hours were changed in the past, it was discussed by the parties. There is nothing on the record to indicate that the Grievants ever objected to an hours change or that the Employer determined upon a different course of action as a result of that objection.

Even if there was a practice, which is dispute by the State, with the substantial reduction in client population experienced by Cambridge the underlying circumstances giving rise to it have changed. There is no longer a need for the work once performed by the Grievants. Hence, even if an hours change was discussed with them in the past, it need no longer be as there has occurred a fundamental change in the operations of the Employer at Cambridge.

Section 29.01 of the Agreement reserves to the Employer the determination of whether or not a layoff is necessary. In this situation, a layoff was unnecessary. There was a total hours reduction of 16 hours per week. A reduction of this magnitude does not serve to justify a layoff. As there was no layoff, the seniority rights of the Grievants were not violated.

In opinion of the Employer, there was no violation of the Agreement in this situation. It urges the grievances be denied.

Discussion: The management rights to establish hours of work asserted to exist by the Employer have been abridged by the terms of Article 29. Section 29.05 incorporates the agreement of the parties that "Only by agreement between the appropriate parties can the regular hours of employees be reduced." In this instance the Grievants were working less than full-time. They were nonetheless working the sort of "regular hours" specified by the Agreement. Both were on a schedule that was acceptable to them and the Employer and that had been arrived at mutually. When the Employer came to reduce their hours of work it did not secure the "agreement" of the appropriate parties. It acted unilaterally. The broad authority to manage granted in Article 5, Management Rights, is specifically abridged by the terminology of Section 29.05. The Employer has agreed to reduce the "regular hours of

employees" by "agreement." That did not occur in this instance. The Employer violated the Agreement.

Similarly, the Employer reduced its workforce by reducing the number of work hours available to employees. If the workweek were to have been reduced from 40 hours to one hour, the Employer could not make a cogent argument that the workforce had not been reduced. That the same number of people might actually report to work does not make the workforce reduction any less real. The Agreement specifies that when such a workforce reduction occurs, it is to be done by "layoff," not an hours reduction. In this situation, the Employer did the latter, not the former as required by the Agreement. That is explicitly prohibited.

The State is correct when it points out that arbitrators have been circumspect when dealing with the authority of employers to establish hours of work. It is true, as noted by the State, that arbitrators have generally upheld such authority. In this situation the State has agreed to an abridgement of its managerial authority by agreeing to reduce the workforce solely by layoff and not by a reduction of hours. It did not do so in this instance.

Reliance by the State on the language of Article 24 is misplaced in this situation. In the relevant section, 24.01, the Agreement merely defines a standard work week for full-time employees as 40 hours. That definition is inapplicable

to the Grievants as they were part-time employees at the time their hours were reduced. The Agreement does not exclude part-time employees from coverage. Such employees have available to them the rights granted under Section 29.05 which includes the right not to experience a reduction of hours in lieu of layoff.

It was undisputed in this proceeding that the population of the Cambridge Developmental Center had declined. Nor was it disputed that less work-hours were required from staff to accommodate to the reduced work load. Under such circumstances the State must adjust the workforce to the reduced workload by layoff, not hours reduction. As it did not do so, the inescapable conclusion is that the Employer has violated the Agreement in this case.

Award: The grievance is sustained. The Grievants are to be paid the difference between the number of hours they would have worked and the number of hours they actually worked at the straight time rate.

Signed and dated this 8th day of October, 1995 at Solon, OH.

Harry Graham
Harry Graham
Arbitrator

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