#1105

In the Matter of Arbitration	
Between	Case Number:
District 1199/SEIU	34-08-94-06-02-165-02-11/12
and	Before: Harry Graham
The State of Ohio, Bureau of Workers' Compensation	

Appearances: For District 1199/SEIU:

Charles Lester
Staff Representative
District 1199/SEIU
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Columbus, OH. 43215

For Bureau of Workers' Compensation:

Eugene Brundige
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Bureau of Workers' Compensation
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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 not filed in this dispute and the record was closed at the conclusion of oral argument.

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

> Did the Employer violate the Collective Bargaining Agreement when it denied requests for Flex-Time? If so, what shall the remedy be?

Background: The events prompting this proceeding are not a matter of dispute. As will be set forth more fully below, the parties have been to arbitration over the issue of flex-time on another occasion. In that instance, Arbitrator David Pincus issued an award supporting the Union. Subsequently the parties met to discuss the manner in which Arbitrator Pincus' award was to be implemented. In the various meetings between the parties they came to agree that flex-time requests should be granted based upon reasonable operational needs.

In May, 1994 various employees at the Dayton office of the Bureau of Workers' Compensation were denied flex-time. In their view, this represented a violation of the Labor Agreement. A class action grievance was filed in order to protest this perceived contractual violation. It was not resolved in the procedure of the parties and they agree it is now before the Arbitrator for determination on its merits.

Position of the Union: As noted above, the question of flex-time has been addressed by Arbitrator David Pincus. In Case No. 35-10-12-23-92-01-02-12 Arbitrator Pincus held that the Employer (in that instance the Department of Youth Services) had violated the Agreement when it denied a request for a four day, ten hour per day work schedule. He determined that under the terms of the Agreement the employer may not dismiss requests for flex-time by a policy of denying such requests. Arbitrator Pincus also held that the Employer must establish

that a refusal to implement flex-time is rationally based on the Employer's right to schedule. In order to support that position, the Employer must present "more than a mere supposition...." (Pincus award, p. 12). In this situation the Employer departed from the strictures set forth by Arbitrator Pincus. At the Dayton office the Employer instituted a requirement that employees work within a core period of 7:00 a.m and 4:45 p.m. Various employees at Dayton prefer a different schedule. In particular, a work week of four, ten hour days was sought by some people. At Article 24, Section 11 the Agreement provides that such a schedule is to be considered by the Employer. In the opinion of the Union, any such consideration was perfunctory at best. When the requested work schedule was denied the Employer cited a concern with security. Specifically there was alleged to be a lack of keys for locks on one of the buildings housing the Dayton office. That reason is not bona fide according to the Union. Prior to June 20, 1994 keys had been issued to all employees. There is no true security concern as Case Managers routinely work alone.

The Union also points out that the agency serves a diverse clientele. Enterprises and individuals may be more accessible outside of normal business hours. To deny institution of a four day, ten hour per day schedule strikes the Union as unreasonable. The Bureau of Workers'

Compensation is a service organization. Its constituency is better served by flexible work arrangements than the schedule implemented by the Employer. As that is the case, the Union asserts the Agreement has been violated in this instance. It desires that the flex-time arrangement for Dayton be restored and that hours outside of 7:00 a.m - 4:45 p.m. be permitted.

Position of the Employer: As does the Union, the Employer cites Article 24, Section 11 in support of its position in this dispute. In relevant part it reads:

> The present practice of flex time shall be continued. Extending the use of flexible work schedules shall be a subject of 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.
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> 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.

Roughly coincidently with filing of the grievance the Employer undertook a reorganization of its resources. Employees were placed into "teams" to deliver service on a more coordinated basis than was the case in the past. That has meant that nurses and rehabilitation case specialists must be available to work with their co-workers, claims service specialists. This has resulted in the Employer

denying requests for a four day, ten hour day work schedule. Requests for other work arrangements at Dayton have been approved. For instance, starting times of 7:00 a.m., 7:15 a.m, and 7:30 a.m. have been approved. Ending times have been adjusted commensurately.

In Dayton the relevant work sites are in two buildings, about a half mile away from one another. One is at the end of a road, next to a truck depot. To deal with these security concerns and to serve clients the Employer decided its facilities would be open from 7:00 a.m. to 4:45 p.m. Under the Agreement it may do so it asserts. Furthermore, if employees work the four day, ten hour per day schedule, supervision may be compromised. Under the schedule implemented by the Employer there is always a supervisor present. That would unlikely be the case if the grievance is sustained.

At Dayton the Employer has not experienced a problem with recruitment or retention of nurses or other employees. As that is the case, the language in the second sentence of the second paragraph of Article 24, Section 11 is inapplicable to this dispute according to the State. That language provides that the Employer is to consider the four/ten schedule and other schedules to assist in the recruitment and retention of nurses. That is not a problem now. Hence, the language is irrelevant according to the Employer.

As the Employer has shown that it has considered and approved flex-time at Dayton, that it has a reasonable concern with security and supervision and that the work has been reorganized, its decision to deny a four day, ten hour work day is reasonable. As such, the Union must show that the decision to deny that schedule was unreasonable. It cannot do so, hence the grievance should be denied according to the State.

Discussion: In Case No. 35-10-(12-23-92)-01-02-12 Arbitrator Pincus adopted a standard of rational accommodation to operational needs (p.12) that should met by the Employer in cases of denial of flex-time. The Pincus decision must be read in the context of the Labor Agreement. Article 24, Section 11 provides considerable discretion to the Employer to approve or disapprove flex-time requests. Attention is directed to paragraph 2 of Article 24, Section 11. The first sentence provides that "The Employer agrees to consider flexible work schedules for particular employees or classifications." In this situation, the Employer met that requirement. It approved some flex-time requests and denied others. The first sentence of paragraph two of Article 24, Section 11 does not guarantee approval of a flex-time request. It merely guarantees that such a request will be considered. That consideration may not be perfunctory, cursory or less than bona fide. Presuming that a serious,

good faith consideration is given to the request, it may be rejected based on the operational needs test.

In this situation the Employer cited security concerns as one reason for denying the proposed work schedule. There are two buildings, separated by some distance, in the Dayton operation. This Arbitrator cannot conclude that the decision to limit key access is unreasonable. Local management is better suited to decide such matters than the Arbitrator. The burden is on the Union to show the decision to be unreasonable. It has not done so in this instance.

Similarly, if the Employer believes it is advantageous to have supervision at the work site during designated core work hours that is a reasonable business decision. Certainly as professionals employees at the Dayton site are expected to work without supervision regularly. They exercise their professional judgement. That observation must be set alongside the responsibility of the Employer to manage the work and deliver services to its clientele. If the Employer determines supervision is necessary, it is entitled to have that decision respected by a neutral reviewer in the absence of a showing its decision was not reasonable. Such a showing has not been made by the Union in this instance.

When the work was reorganized past patterns of staffing changed. The team approach, rather than more independent work, came to be utilized. When that occurred the Employer

was provided a rational basis, an operational need, to restrict the use of flex time sought by employees.

When, in the second sentence of the second paragraph of Article 24, Section 11, the Employer agreed to consider "such options as four (4) ten (10) hour days" it did so under a specific set of circumstances. This was when it was experiencing difficulty in the "recruitment and/or retention of nurses and other employees." That is not the case in this situation. There is nothing on the record to indicate that the Employer is experiencing difficulty in the recruitment or retention of employees at Dayton.

The final sentence of Article 24, Section 11, paragraph 2 provides "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 operational needs test is specifically cited in that language. In this situation the State has demonstrated that it has the requisite "operational need" at Dayton to deny requests for four ten hour work days. It is not necessary that this, or any other Arbitrator, agree with the State. All that is required is that the actions of the Employer meet the contractual test of operational needs and be reasonable. In this case, those standards were met.

Award: The grievance is denied.

Signed and dated this 26th day of December, 1995 at Solon, OH.

Harry Graham
Arbitrator