#1193

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	OPINION AND AWARD
	*	
OHIO CIVIL SERVICE	*	Anna DuVal Smith, Arbitrator
EMPLOYEES ASSOCIATION	*	
LOCAL 11, AFSCME, AFL/CIO	*	Case Nos. 02-04-950605-0470-01-09,
	*	02-04-960229-0007-01-09, and
and	*	02-04-960531-0018-01-09
	*	
OHIO DEPARTMENT OF	*	Kenneth Keirns, Grievant for Class
ADMINISTRATIVE SERVICES	*	Arbitrability, Work Schedules

Appearances

For the Ohio Civil Service Employees Association:

Herman S. Whitter, Associate General Counsel
Karen Vroman, Staff Representative
Ohio Civil Service Employees Association
Columbus, Ohio

For the Ohio Department of Administrative Services:

Colleen Ryan, Ohio Office of Collective Bargaining
Angie Plummer, Ohio Department of Human Resources
Columbus, Ohio

I. HEARING

A hearing on this matter was held at 9:40 a.m. on February 18, 1997, at the offices of the Ohio Office of Collective Bargaining, Columbus, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment, pursuant to the procedures of their collective bargaining agreement. Three grievances were presented. The hearing was bifurcated to determine the arbitrability of No. 02-04-950605-0470-01-09. Following dismissal of this grievance by reasoning set forth below, the hearing proceeded to the merits of the remaining grievances, Nos. 02-04-960229-0007-01-09 and 02-04-960531-0018-01-09. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Union were Kenneth E. Keirns (Computer Operator 4), Glenn Cole (Computer Operator 2), Jenny Worden (OCSEA Staff Representative) and Kathy Steward (Chapter President), the latter by speaker phone. Also present was Larry Stiles, Union Steward. Testifying for Management were Shirley Turrell (Office of Collective Bargaining) and Debbie Howell (Department of Administrative Services). Also present was Edie Bargar of the Department of Administrative Services. A number of documents were admitted into evidence (Joint Ex. 1-8, Union Ex. 1, and Management Ex. 1-2). The hearing concluded at 3:45 p.m. on February 18, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. ARBITRABILITY

Statement of Facts

The subject grievance was filed on May 31, 1995 (Joint Ex. 2) and processed through to Step 4 of the grievance procedure. The mediation meeting was held on October 10, 1995 (Management Ex. 1). Thereafter it was the subject of discussion at labor-management meetings, the last of which occurred about February 12, 1996, but no settlement was reached. The Union then appealed the case to arbitration in a letter dated March 5 which was received by the Office of Collective Bargaining on March 11, 1996.

Issue

Was grievance 02-04-950605-0470-01-09 timely appealed to Step 5 of the grievance procedure? If not, what shall the remedy be?

Positions of the Parties

The Employer argues that the grievance is not arbitrable because it was not timely appealed to arbitration under the timelines specified in Step 5 of Section 25.02 of the Collective Bargaining Agreement. Even taking the most lenient date of March 5, the appeal was 86 days late. There being no waiver, the Union had a contractual obligation to appeal in a timely fashion despite there being ongoing discussions following the mediation meeting. The Employer contends that the doctrine of laches applies, asserting that the Union sat on its rights, creating a liability for the Employer. It asks that the Arbitrator uphold the specific language of the Agreement and dismiss the grievance as not arbitrable.

The Union does not dispute that the appeal to arbitration was filed more than 60 days after the mediation meeting, but argues that the discussions that followed that meeting

did not result in impasse until the February 12 labor-management meeting. The grievance ought not to be dismissed because it was appealed within 60 days of the meeting at which it became apparent that there would be no negotiated resolution.

Pertinent Contract Provisions

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

25.02 - Grievance Steps

Step 4 - Mediation/Office of Collective Bargaining

If the grievance is not resolved at Step 3, or if the Agency is untimely with its response to the grievance at Step 3, absent any mutually agreed to time extension, the Union may appeal the grievance to mediation by filing a written appeal and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within fifteen (15) days of the receipt of the answer at Step 3 or the due date of the answer if no answer was given, whichever is earlier. OCB shall have sole management authority to grant, modify or deny the grievance.

...

The mediator(s) may employ all of the techniques commonly associated with mediation, including private caucuses with the parties. The taking of oaths and the examination of witnesses shall not be permitted and no verbatim record of the proceeding shall be taken. The purpose of the mediation is to reach a mutually agreeable resolution of the dispute where possible and there will be no procedural constraints regarding the review of facts and arguments. Written material presented to the mediator will be returned to the party at the conclusion of the mediation meeting. The comments and opinions of the mediator, and any settlement offers put forth by either party shall not be admissible in subsequent arbitration of the grievance nor be introduced in any future arbitration proceedings.

If a grievance remains unresolved at the end of the mediation meeting, the mediator will provide an oral statement regarding how he/she would rule in the case based on the facts presented to him/her.

The disposition of grievances discussed during the mediation meeting will be listed by the representative from the Office of Collective Bargaining on a form mutually agreed to by the parties. A copy of the summary shall be provided to the Union within five (5) days.

The parties will consolidate cases for mediation and, whenever possible, schedule the mediation meetings at decentralized locations. A Union staff representative, grievant and a steward or chapter president as designated by the Union may be present at the mediation of a grievance. No more than two (2) of the Union representatives present including the grievant may be on paid leave by the Employer. Each party may have no more than three (3) representatives present at the mediation of a grievance.

Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of the Office of Collective

Bargaining within sixty (60) days of the mediation meeting unless either party notifies the other that such grievance can not be effectively mediated.

Decision of the Arbitrator

I cannot disregard the clear and unambiguous language of the Agreement, which specifies written notice of appeal to arbitration "within sixty (60) days of the mediation meeting." The labor-management meeting of February 12 does not constitute "the mediation meeting" referred to in Section 25.02. Notably absent was a mediator, who had presumably already provided his advice on how he would rule as arbitrator. While such an opinion might stimulate further discussions that could lead to settlement or withdrawal after the close of the mediation meeting, it is incumbent on the Union either to obtain a waiver of timelines or to appeal the case within the Contractual time limits in order to keep its claim alive. Grievance 02-04-950605-0470-01-09 was untimely appealed, is therefore not arbitrable and accordingly dismissed.

III. MERITS

Statement of the Case

This case arose in the Ohio Data Network, Division of Computer Services of the Department of Administrative Services. The computer operation located in the State of Ohio Computer Center (SOCC), and Print Services and Integrity in the State Office Tower (SOT), is a 24-hour-a-day, 7-day-a-week operation necessitating the scheduling of computer operators around the clock. The instant dispute concerns the holiday schedule.

Debbie Howell testified that there were recurring problems with the former procedure for scheduling holidays, among them inconsistency because of different

implementation in each facility and on each shift, and the burden of working holidays falling differentially on those who regularly worked Mondays. Under the old procedure, only those whose regular work day was the holiday would be canvassed to see if they wanted to work on the holiday, but there were differences in implementation across shifts. For example, on the third shift everyone who usually worked the day came in without regard to work load. On the second shift, however, employees were convassed to fill available slots, with the last person canvassed on the previous holiday asked first on the next one. Howell testified that a Union steward, Jeff Hodges, asked that the procedure be changed to make it consistent and so that the same person would not have to work every holiday. Howell therefore took the problem to the labor-management committee on October 3, 1994, where the parties agreed to address the issue. A subcommittee was formed, consisting in part of Debbie Howell and Shirley Turrell for the Employer and Jenny Worden, Kathy Stewart and Jeff Hodges for the Union. According to Howell, Turrell and Worden told her that she and Hodges should come to a mutual agreement. Hodges suggested adoption of SOCC's first shift method and Howell agreed. Howell made a presentation at the March 30, 1995, labor-management meeting and agreed to draft a memo.

The procedure as implemented began with the Employer determining how many slots to fill for the holiday. Howell testified that because the operation's customers are typically not working on holidays, fewer computer operators than usual are needed. Once the number of slots are determined, the Employer canvasses qualified operators, beginning with the most senior person with the least number of credited holiday hours, until all slots are filled. Those volunteering to work are credited with eight hours, those who decline are

credited with zero. If there are not enough volunteers, then the least senior person with the least number of credited hours is mandated. Rosters are cleared to zero hours each July 1. Each person accepting a holiday slot is asked which of their usual work days they wish to take off as a trade for the worked holiday. If operationally possible, their choice becomes their "good day." In any event, those working the holiday receive holiday pay plus eight hours at the premium rate. Those not working the holiday receive holiday pay. Howell testified this procedure was devised not to avoid payment of overtime, but to provide equal opportunities for having holidays off. She continued that no one said the plan was not ok, but that Worden said she would have to talk to someone about it and there had to be meetings with the affected employees.

Meetings with employees were held to inform them of the changes. Kenneth Keirns, then a Computer Operator 2, testified he learned that employees' regular schedules would be changed around the holidays to avoid overtime payments. Although his own schedule was not then affected, he objected. When it was affected, during Memorial Day week, he filed a grievance (02-04-950605-0470-01-09), which this Arbitrator later dismissed as being untimely appealed to Step 5.

The minutes of the June 27, 1995, labor-management meeting confirm that Howell had met with the bargaining unit, a draft memo had been prepared, the Memorial Day canvass had been done and one was planned for Labor Day. It further states, "The 28 days requirement and 14 day advance notice requirement was met," and that meetings would be set up to educate supervisors and stewards on the overtime/holiday policy. Jenny Worden

testified that it was through these meetings that they became aware the policy would cost a direct benefit to some employees.

Meanwhile, the grievance was processed at Steps 3 and 4. Discussions for resolution continued, including at the aforesaid February 12, 1996, labor-management meeting. Jenny Worden, a staff representative who attended this meeting, testified the Union proposed that the Employer could forego the new arrangement and just follow the canvassing procedure in the Contract. However, both she and Kathy Steward testified that the Union never entered into any agreement, and the minutes of this meeting show Edie Bargar, Labor Relations Officer at the Department, finished the discussion with, "Our side needs to talk about it."

When it later became apparent that the grievance had a potentially fatal procedural flaw, Kenneth Keirns filed a second class-action grievance (02-04-960229-0007-01-09, February 23, 1996) alleging violation of Sections 13.02, 13.07 and 26.02 of the Contract in the scheduling of the February 19, 1996 holiday (Joint Ex. 3). Documents and testimony were offered to show how various members of the class were affected. For example, on the first shift in the State Office Tower, Dyer and Peterson were scheduled to work Tuesday-Saturday three of the four weeks in the February 4, 1996-March 2, 1996 period. For the week of the February 19 holiday, they were scheduled to work Monday and Wednesday-Saturday, then descheduled Monday. Glenn Cole, a Computer Operator 2, testified about his own situation. During the January 28, 1996-February 24, 1996 period, he was scheduled to work Tuesday-Saturday for three of the four weeks. However, in the week containing

the holiday, he was scheduled to work the Monday holiday, and was asked to take a different day off. He thus traded days off, working Monday instead of Thursday.

A third grievance (02-04-960531-0018-01-09) was filed on May 31, 1996, to cover the May 27th holiday (Joint Ex. 4). The parties agreed that this latter grievance would be prospective, obviating the need for grievances covering future holidays. Being unresolved at lower steps, both grievances came to arbitration where they presently reside for final and binding decision.

Stipulated Issue

Were Sections 13.02, 13.07, 26.02 and 26.03 of the Collective Bargaining Agreement violated when employees' days off were changed during the week of a holiday?

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 The Ohio Revised Code, Section 4117.08 (C), Numbers 1-9.

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

13.02 - Work Schedules

...

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.

13.07 - Overtime

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

ARTICLE 26 - HOLIDAYS

26.02 - Work on Holidays

...No employees' posted regular schedule or days off shall be changed to avoid holiday premium pay. The Agency reserves the right to determine the number of employees needed to work the holiday.

26.03 - Eligibility for Holiday Pay

An employee whose scheduled work day off falls on a holiday will receive holiday pay for that day.

Arguments of the Parties

Argument of the Union

The Union contends the evidence shows the computer operators had regularly scheduled work days which they did, in fact, work except during holiday weeks. Further, their schedules were changed, resulting in the reduction of overtime pay. The Union says that while the Union did discuss the issue with the Employer, no official with the authority to bind the Union entered into an agreement. Absent an agreement, the Employer implemented the new practice unilaterally. The Union commends to the Arbitrator, the *Slone & Ladden* decision (*ODMH v. OCSEA*, Grievance No. G-86-103, January 15, 1988, R. Rivera, Arbitrator).

As to the Employer's contention that these two grievances are not arbitrable, the Union argues that since the Employer did not raise the issue prior to arbitration, it should be barred from doing so now. The Union further maintains that these two grievances were filed within the time limits counting from the date the individuals were affected by the change. In addition, a practice of less than a year's standing does not constitute a past practice.

The Union concludes asking that the grievance be granted. As a remedy, it asks that the Employer be directed to cease future violations and to pay overtime to the grievants whose "regularly scheduled" days were changed to avoid the payment of overtime. It also asks that the parties be directed to ascertain to what extent each grievant was financially affected by the schedule changes.

Argument of the Employer

The Employer makes four arguments, one that it did not violate the Contract when it established the holiday canvas practice, three that the grievances were untimely filed.

The first argument is that the holiday canvas practice is permissible under Articles 5, 13 and 26. Under Section 13.02, the Employer has the right to limit the number of persons scheduled off work at any one time. Its 7-day-operation language, which calls for posting of the work schedule 14 days in advance of its effective date, requires the schedule to be for a minumum of 28 days, and prohibits changing the schedule within that period implies that Management has the right to change the schedule at least once every 28 days. With regard to Section 13.07, there was no evidence offered to rebut the Employer's testimony that the posted regular schedules were unchanged after they were posted.

Section 26.02's pertinent language is that "no employees' posted regular schedule or days off shall be changed to avoid holiday premium pay." Again, says the Employer, the schedule was posted in compliance with Article 13 and once posted, there were no changes. Section 26.02, claims the Employer, implies that it has the right to determine the scheduling needs of the Agency including the number of employees needed to work a holiday, and to change an employee's schedule as long as it meets the requirements of Article 13.

Article 5 incorporates Chapter 4117.08(C) O.R.C. which clearly allows the Employer to alter work schedules to improve efficiencies based on operational need. The Employer contends it showed through the testimony of its witness that there was operational need for a consistent practice of scheduling between all the sites of these employees. Because of disgruntled employees and inconsistencies, the Employer worked through the labor-management committee to appease its employees and make the workplace a better environment. It implemented the holiday canvass practice in good faith in January 1995.

Based on this implementation date, by which time the Union was clearly put on notice through the committee and employee meetings, the grievances were untimely filed and therefore not arbitrable. A second timeliness argument takes the triggering event to be when the schedule was posted. The schedule for the February 19 holiday was posted February 5. The deadline for grieving it was 10 days hence, or February 15, but the grievance was not filed until February 28. The schedule for the May 27 holiday would have been posted by mid-May, making the grievance deadline May 23, but it was not filed until May 31. The third timeliness argument is that between the grievance filed protesting the 1995 Memorial Day schedule and the grievance filed to protest 1996 Presidents Day schedule, there were eight holidays, all of which were scheduled by means of the holiday canvass procedure. The fact that no grievances were filed over these holidays, and that the Memorial Day grievance made no mention of "subsequent holidays," lulled Management into believing the issue was resolved.

Management points out that with the dismissal of the first grievance, the remedy, if any, will be limited to Presidents Day, 1996 forward. The Union's witness admitted that the

Union does not have to agree with Management's schedule and that Management can change the schedule pursuant to Section 13.02. Thus, an employee's "regular schedule" is not Tuesday through Saturday, but whatever Management posts. In addition, of the three scenarios put forth by the Union, the only employees harmed were those on a Tuesday-Saturday schedule who were given Tuesday off, scheduled for Monday, then descheduled. Only they lost money, for employees in the other two scenarios were paid for 52 hours.

Finally, with respect to the *Slone* award relied on by the Union, Management points out that the holiday involved was July 4, 1986, which was scheduled by a practice initiated prior to collective bargaining. It contends that Management is not bound by arguments made by an advocate in a prior case and that the issue here is different than in the earlier case.

For all these reasons, the Employer asks that the grievances be denied in their entirety.

Opinion of the Arbitrator

Taking the procedural arguments first, the second and third grievances are timely and therefore arbitrable. The existence and processing of the 1995 Memorial Day grievance put the Employer on notice that there was an issue, for it knew from this grievance that unless it changed its practice, each subsequent holiday week would contain a potential violation and liability. Thus, it was not lulled into creating a liability for itself, but did so with full awareness. For the Union's part, it could not have known it was necessary to file another grievance until it became aware there was a potential fatal flaw to the original grievance and that there was impasse on the merits. This would have occurred sometime around the

February 12, 1996, labor-management meeting that resulted in no settlement. A grievance was filed at the next opportunity, within 10 days of Management going forward with the 1996 Presidents Day week as scheduled. It is therefore timely and arbitrable, as is the 1996 Memorial Day grievance.

Turning now to the merits, as I understand the position of the Union, it does not challenge the right of Management to determine how many computer operators are needed to work on a holiday, nor does it challenge the holiday canvass to fill the slots, nor does it claim employees were improperly paid for the holidays themselves, worked or not. And I, in fact, find no evidence of Contractual violations in these regards, not of Sections 26.02 or 26.03 which govern work on holidays and eligibility for holiday pay, nor of Section 13.02, since there is no evidence that work schedules were changed after they were posted. The sole issue is whether it was proper for the Employer to flex holiday week work schedules by requiring employees to take an unpaid "good day" in exchange for working the holiday. In my opinion, it was not.

Management relies on Article V, asserting this gives it the right to schedule employees to meet its operational needs. The Employer is correct so far as it goes, but overlooks 4117.8(C)'s beginning clause, "Unless a public employer agrees otherwise in a collective bargaining agreement." In this case, the Employer has agreed to limits on its right to schedule. The pertinent constraint is contained in Section 13.07, "An employee's posted regular schedule shall not be changed to avoid the payment of overtime."

The Employer claims the purpose of flexing the schedule was to equalize holiday time-off opportunities and to provide for consistent application of policy. I find this

argument disingenuous. That was no doubt the reason for the holiday canvass, but not of requiring a substitute "good day." Descheduling was to avoid overtime, while the canvass was to provide relief for the least-senior employees who bore the burden of working holidays.

The flexed holiday schedule did, in fact, avoid the payment of overtime. Had Glenn, for example, not been required to take February 22 as a "good day" as the quid pro quo for working February 19, he would have worked an additional eight hours at the premium rate. This practice does not "allow" employees working a holiday "to have a longer weekend" as the Step 3 responses say. It *requires* them to do so and to give up overtime wages in the process. Some employees may like this, others evidently do not. No business reason such as lower staffing needs during holiday weeks or on the day following a holiday were given to justify the deschedule practice, only that it made the holiday canvass affordable. The inescapable conclusion is that the days were descheduled for no other reason than to avoid overtime.

The practice still might be permissible if the deschedule does not constitute a change to the employee's "posted regular schedule." As in the *Slone* case, the Employer emphasizes "posted," saying it has the right to change schedules before they are posted, while the Union focuses on "regular," asserting the descheduling amounted to a temporary break in a regularity that extended throughout and beyond the 28-day period of each posted schedule. As Arbitrator Rivera found, the phrase on its face is ambiguous. It could mean that the Employer may not change "the regular schedule that it then posts," or that it may not change "a regular schedule once posted." The 1988 *Slone* decision gave it the former

meaning, looking to preceding contracts, decisions and documents for guidance. Since then the parties have had numerous opportunities to rewrite the phrase to give it a different meaning, and have failed to do so. This implies a "meeting of the minds" that the dominant word is "regular," with the phrase meaning that the Employer may not change the regularity of a schedule in order to avoid overtime. It is evident that that is what happened here. The regularity of Glenn's Tuesday-Saturday and other employees' posted schedules was interrupted in order to avoid overtime during the weeks in which they volunteered to work on a holiday.

The only question remaining is whether this was by mutual agreement. While the holiday canvass practice was inspired by disgruntled employees including a Union officer who participated in its development, meetings with employees revealed a flaw in the plan that forestalled agreement of the Union, though it met the needs of some members and, evidently, an officer. In the absence of mutual agreement, the descheduling practice was implemented unilaterally, thus violating Section 13.07.

Award

Grievance Nos. 02-04-960229-0007-01-09 and 02-04-960531-0018-01-09 are sustained and the requested remedy granted. The Arbitrator retains jurisdiction for 90 days to resolve any dispute that may arise in the implementation of this award.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
March 26, 1997