

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: #1418

OCB GRIEVANCE NUMBER: 27-11-980603-0847-02-11

GRIEVANT NAME: Robert Travis

UNION: District 1199/SEIU, AFL-CIO

DEPARTMENT: Department of Rehabilitation and Correction

ARBITRATOR: Robert G. Stein

MANAGEMENT ADVOCATE: Pat Mogan

2ND CHAIR: Beth Lewis

UNION ADVOCATE: Patrick Hire

ARBITRATION DATE: November 30, 1999

DECISION DATE: January 14, 2000

DECISION: Grievance granted

CONTRACT SECTIONS: Article 24 and 43

HOLDING: The Employer violated the Collective Bargaining Agreement ("CBA") by implementing a program where Staff Psychologists were required to work weekend hours on "suicide watch." If the Employer wanted to validly implement a program, the Employer should have complied with Section 24.14 of the CBA and formally discussed the changes with the Union prior to implementation.

COST: \$1,575.00

#1418

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199/SEIU, AFL-CIO

AND

THE STATE OF OHIO/DRC

Before: Robert G. Stein

Direct Appointment

Case # 27-11-980603-0847-02-11 (Robert Travis)

Principal Advocate for the UNION:

Patrick Hire, Administrative Organizer

DISTRICT 1199/SEIU, AFL-CIO

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Principal Advocate for the EMPLOYER:

Patrick Mogan, Chair, Dispute Resolution

Beth Lewis, 2nd Chair, Dispute Resolution

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INTRODUCTION

A hearing on the above referenced matter was held on November 30, 1999, in Lebanon, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted closing arguments in lieu of filing briefs. The hearing was closed on November 30, 1999. The parties agreed that the Arbitrator's decision is to be issued by January 14, 2000.

ISSUE

The parties agreed upon the following definition of the issue:

Did Management violate the Contract when it began scheduling 1199 staff Psychologists to cover weekend suicide rounds beginning July 5, 1999? If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE/

ARTICLE 24 CLASSIFICATION CHANGES
Sections 24.01, 24.03, 24.14, 24.18

ARTICLE 43 WAGES
43.05, 43.06

See Agreement for specific language (Joint Exhibit 1)

BACKGROUND

The issue in this case involves compensating Staff Psychologists who work in the Lebanon and the Warren Correctional facilities. Specifically, the Psychologists argue that they should be paid standby pay and call back pay for working a forty (40) hour per week schedule that differs from a five (5) day, Monday through Friday work week.

Beginning July 5, 1998, the Employer began a program that required Staff Psychologists to rotate working weekends in order that those inmates, on "suicide watch", could be monitored at least once every twenty-four (24) hours. The Staff Psychologists were informed of this change on May 26, 1998 (JX 3). The monitoring requirement was based upon a requirement initiated by Dr. Kathy Burns, Director of Clinical Mental Health Services for the Ohio Department of Corrections.

During the week a Staff Psychologist would have weekend watch duty, his or her work schedule was adjusted in a manner that would require them to work four (4) hours on Saturday and four (4) hours on Sunday. In order to maintain a forty (40) hour week, the Staff Psychologist would have off a weekday of their choice. Staff Psychologists were also permitted to make trades of weekends with other Staff Psychologists. A Staff Psychologist would be required to work "split-hour weekend schedule every thirteenth (13th) week (JX 3,4). Prior to this change, three (3) exempt (non-bargaining unit) employees had been required to work weekends.

The impetus for the new Suicide Prevention Policy was a Consent Decree issued by United States Magistrate Judge Robert Steinberg on July 10, 1995 (JX 9). The Decree gave the Department of Corrections flexibility, on an institution by institution basis, in order to comply with its mandate to improve mental health services. James Barron, Mental Health Administrator for the Lebanon and Warren Institutions (the "Southwest Cluster") developed the rotating weekend coverage and the Wardens at each institution approved it. During the weekend suicide rounds, Staff Psychologists also conducted institution rounds in order to prevent problems from escalating.

The above listed change in hours implemented by the Employer did not include the payment of overtime or premium time. The Union grieved the Employer's actions claiming that several sections (See Relevant Contract language section above) of the Collective Bargaining Agreement were violated. In essence, the Union argues that the Employer should have maintained the Monday through Friday work schedule and pay Staff Psychologists overtime or call back pay for weekend suicide watch work. This was the basis for its grievance.

UNION'S POSITION

The Union does not dispute the importance of having Staff Psychologists perform the duties involved daily monitoring of inmates who are on suicide watch. However, the Union disagrees on how this was implemented by the Employer. It is the position of the Union that the Employer violated Articles 24.01 and 24.14 when it changed the twenty (20) year-plus practice of providing Staff Psychologists with a five (5) day, Monday through Friday work schedule. The Employer committed a further violation of Article 24.14 when it did not discuss said proposed change with the Union at the Agency/Facility Professional Committees meetings.

The Union also argues that the Employer improperly changed the schedules of Staff Psychologists to avoid paying overtime for weekend coverage in violation of Article 24.03. The Union further asserts that the weekend hours that the Employer is seeking to cover were not assigned by seniority in accordance to the provisions of Article 24.18. If the Employer needs to cover suicide watch on weekends, it can do so under the provisions of Articles 43.05 and 43.06 that address standby pay and call-in pay, contends the Union.

The Union rejects the Employer's threshold contention that the grievance before the Arbitrator is not a class action grievance that covers all Staff Psychologists in the Southwestern Cluster. The Union argues that the Employer accepted the grievance at all

steps of the grievance procedure (except that no step 3 answer was issued) without raising the issue of whether the grievance was a class action grievance or was only confined to Staff Psychologist, Robert Travis. The Union further argues that the grievance refers to “Grievants” and not a single Grievant.

EMPLOYER’S POSITION

The Employer first argues that the grievance is an individual grievance, covering only Staff Psychologist, Robert Travis. As far as the merits are concerned, the Employer first contends that its actions in this matter were based upon a serious and legitimate operational need to improve mental health services to inmates. The “Consent Degree” commonly referred to as the “Dunn Decree” provides the legal basis for the need to provide suicide coverage on a seven (7) day a week basis, asserts the Employer. The Employer argues that the requirement of having a licensed Psychologist see all “suicidal inmates” on a daily basis is a necessary component of providing necessary mental health services to inmates. It is also important to understand that Lebanon Correctional Institution had three (3) suicides occur on weekends which provided further impetus for the Employer to implement a policy of daily suicide coverage.

Prior to July 5, 1998, three exempt Psychologists, including the Director, Dr. Barron, provided all weekend coverage for suicide rounds. On May 26, 1998, Dr. Barron sent a memo to all Southwest Cluster Staff Psychologists that he was requiring them to cover eight (8) hours of weekend suicide rounds once every thirteen (13) weeks, states the Employer. The Employer argues that its requirement that Staff Psychologists provide

coverage four times a year is a small inconvenience and is reasonable in light of the serious need to provide suicidal inmates with care seven (7) days a week. The Employer also points out that Staff Psychologists in the Southwest Cluster have the option of trading weekend coverage with another Staff Psychologist if it is inconvenient for them to work a particular assigned weekend.

DISCUSSION

I find that the grievance in this matter is a class action grievance. The Employer did not raise the issue of the grievance's jurisdiction at any steps of the grievance procedure and the grievance refers to psychologists and not a single psychologist.

The Employer in this matter had a serious operational need to meet that was underscored by the issuance of the Dunn Consent Decree. I also find that the Employer, namely Dr. Barron and the Wardens, had good reason to provide daily coverage for suicidal inmates. However, in the execution of the change in schedules, the Employer violated Article 24.14 and a long-standing practice of providing Staff Psychologists with the benefit of having two days off per week.

The Union failed to meet its burden of proof that the Employer violated Articles 24.03 or 24.18 of the Agreement. Article 5 of the Agreement gives The Employer the right to adjust schedules of Staff Psychologists to cover weekends without incurring overtime costs. However, I do find that in making scheduling changes the Employer unreasonably and arbitrarily required Staff Psychologists to work a six (6) day week and limited them to only one day off. In addition, the Staff Psychologist had to incur the

added expense of an additional round trip to work each week. Moreover, the Employer did not make a good faith effort to discuss these changes prior to their implementation. The Employer's actions violated Article 24.14 and past practice related to the benefit of having two days off per week.

Article 24.14 reads as follows:

"The present practice of weekend-off scheduling shall be continued. Any changes shall be discussed in the Agency/Facility Professional Committees."

This provision is not clear in its intent. It says the practice of weekend-off scheduling, which applies to Staff Psychologists, is to be continued. However, it also says that any changes shall be discussed in the Agency/Facility Professional Committees. It is reasonable to interpret this Article to mean that unless the Employer has a demonstrable operational need, the practice of weekend scheduling shall continue. If there is a specific operational need, the Employer shall discuss it with the Union in meetings of the Agency/Facility Professional Committees.

It is also reasonable to presume that barring an urgent need to implement an immediate schedule change, such discussions would be conducted in good faith and would occur prior to any changes. This would allow the Union to provide formal input into this situation from a local and a statewide perspective (which is the contractual scope of Article 24.14). Inasmuch as the Union was an equal partner in negotiating language to permit this to occur, it only seems reasonable it would be given the respect of being informed and being able to react to a proposed change, rather than having to respond to a "fait accompli." In summary, I find the Employer does not have an unfettered right to change weekend scheduling in this case. It must comply with the procedures it

negotiated. It must have a demonstrable operational reason, and it must in good faith discuss the necessity of said changes with the Union in the Agency/Facility Professional Committees prior to implementation. In addition, it must evaluate every schedule change as to its impact upon benefits.

The facts indicate that the Employer made an attempt to discuss the need for seven (7) day a week coverage with the Staff Psychologists through the memo issued by Dr. Barron on May 26, 1998 (JX 3). However, I find this approach did not conform to the specific requirement that this issue be discussed in Agency/Facility Professional Committees. Furthermore, its content and tone did not invite formal input. The Employer is the moving party in this matter. It is seeking to depart from the practice of weekend-off scheduling and therefore must bear the burden of formally bringing this issue before the Union in the forum it agreed upon.

The Employer eventually responded to this issue at an Agency Professional Committee Meeting on September 15, 1998, some two months after the change was implemented (JX 10). This was a brief response, and as the minutes indicate, the issue came up through a question posed by the Union and was not initiated by the Employer. No formal discussion took place at this meeting.

It is apparent that, in the instant matter, the Employer had a serious operational need to provide suicide watch coverage and a reasonable need to involve Staff Psychologists. However, there was no evidence presented that it represented an urgent or an emergency situation. In fact, in Dr. Barron's May 26, 1998 memo he stated that three (3) exempt Psychologists had been covering weekends since March of 1997. This may have represented an operational burden, but the fact is the necessary service was being

provided by three (3) exempt employees for some fourteen (14) months. The Employer failed to comply with the provisions of Article 24.14 when it did not bring the issue of weekend scheduling to the Agency/Facility Professional Committees.

However, the Employer's actions in changing schedules went beyond a periodic switch in the days off of a Staff Psychologist. The Employer split an eight (8) hour workday and required each Staff Psychologist, who had weekend coverage, to limit their days off to one day during the week. This had the effect of requiring an employee to work six days, make an extra round trip to work, and to have only one day free from work. I find this change to be substantial and to affect the working conditions of these employees.

Article 24.01 of the Agreement states:

"The standard work week for full-time employees shall be forty (40) hours exclusive of time allotted for unpaid meal periods."

This language does not specify a particular configuration of days and hours. However, the Union presented unrefuted testimony that for at least twenty (20) years employees have worked five (5), eight (8) hour days. The impact of a long-standing practice involves the establishment of a predictable and promised benefit of providing Staff Psychologists with two days off per week. In addition, it can be reasonably inferred that these working conditions were contemplated by the parties when wages and benefits were negotiated over several contracts.

What is in the balance here is the importance of weekend suicide coverage versus the long standing past practice of providing Staff Psychologists with two days off during a work week. I find the Employer arbitrarily and in violation of a long-standing practice

caused Staff Psychologists to lose days off and to assume the additional burden of working six (6) days a week without additional compensation. I do not find that the Articles 43.05 or 43.06 have applicability to this dispute.

I do not disagree with the Employer's need to provide weekend suicide coverage. What the Employer was asking from Staff Psychologists did not seem to be unreasonable on its face. However, the Agreement must be complied with when such changes are necessary. In this case the Agreement was violated as was an established practice related to the number of days off an employee is entitled to during a week. The split shift designed by the Employer was meant to impact every bargaining unit member four times a year. This may not seem significant in a typical 50 plus workweek year, but what happens if there are fewer Staff Psychologists in the employ of the Department? Theoretically, the Employer may be forced to require an employee to work additional weekends under split-shift arrangements. This would have the effect of further reducing the weeks an employee would have two days off. Clearly, splitting shifts and requiring an employee to work six (6) days, rather than the five (5) days a week he has worked for more than twenty (20) years, is a reduction of a benefit.

AWARD

An appropriate remedy in this matter goes to the Employer's violation of Article 24.14 and to past practice. However, the remedy needs to be practically fashioned to preserve inmate care. It appears impractical to upset established schedules at this juncture. Given the importance of suicide coverage and the fact it has been in place for more than six months the following Award is made:

1. The present schedule for Staff Psychologists shall remain the same, unless the Employer determines otherwise (see 2. below).
2. The Employer is required to comply with Article 24.14 and is to formally meet with the Union in Agency/Facility Professional Committees in order to discuss the matter of weekend coverage that involves working some weekends. This must occur before any further changes that impact weekends are enacted. This option may be set aside if the parties decide to defer this issue to contract negotiations.
3. As a way to address the benefit loss of having two days off per week and the additional cost incurred by employees having to work six days a week, the Employer is directed to provide each Staff Psychologists in the bargaining unit of the Southwest Cluster with four (4) hours of compensation time for each weekend worked under the split-shift configuration. This benefit shall be retroactive to July 5, 1998 and shall continue as long as the split-shift arrangement is in place (See 2 above).

Respectfully submitted to the parties this 14th day of January 2000.

A handwritten signature in black ink, appearing to read "Robert G. Stein", written over a horizontal line.

Robert G. Stein, Arbitrator

