

7/6/13

IN THE MATTER OF ARBITRATION

BETWEEN

THE STATE OF OHIO

AND

SEIU 1199/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

DR&C CASES:

27-22 -(5-40-02 TO 6-14-02)-670-02-13

27-13-00-07-1801-02-11

Advocate(s) for the UNION:

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Advocate for the EMPLOYER:

**Terri Decker, Department of Rehabilitation and Corrections
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Columbus OH 43215**

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INTRODUCTION

A hearing on the above referenced matter was held on April 24, 2003 in Columbus, 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 made closing arguments in lieu of submitting briefs. The hearing was closed on April 24, 2003.

ISSUE

The parties agreed upon the following definition of the issue:

WHEN THERE IS A NEED FOR ADDITIONAL COVERAGE, WHEN DOES THE AGENCY HAVE TO USE OVERTIME AND WHEN IS IT APPROPRIATE TO USE AGENCY NURSES?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 5 Management Rights

ARTICLE 24.03 Overtime

BACKGROUND/SUMMARY OF ARGUMENTS

This case involves the reconciliation of two provision of the Collective Bargaining Agreement. The provisions are Article 5, Management Rights and Article 24.03, Overtime. In essence, the bargaining unit members who hold the position of nurse argue that Article 24.03 provides that when additional coverage is needed (i. e. additional nurses) they shall always be offered overtime prior to the agency being able to utilize the services of contracts from outside agencies.

The State argues that under Article 5 it has the right to determine when it will use contract nurses and when it will use overtime to provide additional coverage. If it is determined overtime is necessary to provide coverage, the provisions of Article 24.03 will be utilized, contends the State. The State asserts that if it determines that the need for additional coverage can be handled through the use of contract nurses without resorting to overtime, it has a right to use said nurses under its rights specified in Article 5.

DISCUSSION

It is well established in arbitral opinion and in arbitration decisions involving the collective bargaining relations between the parties, that the

determination of the need for overtime is a managerial right as defined by Article 5 and Article 24.03. The first sentence of Article 24.03 unequivocally states:

"A. In institutional settings when the agency determines that overtime is necessary, overtime shall be offered on a rotating basis..." [emphasis added]

B. In non-institutional settings, the agency reserves the right to schedule and approve overtime." [emphasis added]

Although the parties have expressly stated that the Employer retains this right, there is a general expectation that such a right is exercised in a manner that is consistent with the intent of all other provisions of the Collective Bargaining Agreement. In the last sentence of the management rights clause the parties state:

"Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision." [emphasis added]

The central question in this case is: How are the rights retained by management in Article V reconciled with the intent of Article 24.03 to provide overtime opportunities to bargaining unit members? I concur with an observation made by fellow panel arbitrator, Robert Brookins (Ux 1). In a case involving Article 24.03 Arbitrator Brookins cites the following canon of contract interpretation commonly utilized by arbitrators:

"The construction principle requires the arbitrator to avoid an interpretation which tends to nullify or render meaningless any provision of the contract because of the general presumption that the parties do not carefully write into a solemnly negotiated

agreement words intended to have no effect. Thus, if an arbitrator finds that two provisions in an agreement conflict, he will seek a meaning, if possible, that will give some substantial effect to each" (National Academy of Arbitrators, *The Common Law of the Workplace, The Views of Arbitrators* 71 (Theodore J. St. Antoine, ED. 1998).

Arbitrator Brookins' dispute involved the application of Articles 24.03 and 41.01. In his Award Arbitrator Brookins states:

"...the parties clearly intended for Article 41.01 to focus on and generally control subcontracting; they just as clearly intended for Article 24.03 to focus on and control the assignment of overtime. Once the Employer decides that overtime is required, Article 41.01 drops out of the decisional mix, giving way to Article 24.03 which determines to whom and the manner in which overtime is assigned" (See 1199 v DYS, Brookins, November 15, 1999).

Arbitrator Brookins' award and the principle of contract construction previously cited are applicable to the instant matter. It is important to interpret both Article 5 and 24.03 in a manner that gives substantial effect to both. In doing so it is also necessary to place the exercise of these provisions in a "real world context." There must be a clear delineation of when to use contract nurses and when it is important to follow the intent of Article 24.03 in using overtime.

There has been and continues to be a national shortage of registered nurses. Terri Decker, from the Department of Rehabilitation and Corrections, stated that the Department is practically in a constant state of recruiting nurses because of the shortage and the turnover of Registered Nurses. In institutions, absences of employees further exacerbate an already difficult situation.

Absences of employees and vacant positions vary greatly and can be unpredictable. When placed in the context of a constant shortage of qualified personnel, the problems can become acute. However, some employee absences, such as scheduled vacations or personal days are predictable. In addition, short-term use of sick leave is not unexpected, particularly during months when colds and flu are prevalent.

I find that in reconciling Article 5 and 24.03, the parties did not intend to use contract services in a manner that would invalidate Article 24.03. In other words, it was the intent of the parties to use overtime when management determines it is necessary and when employees are available. It is reasonable to surmise that said use of overtime is particularly suitable to predictable as well as periodic short-term absences of a relatively short duration.

The existence of long-term absences, however, is a very different matter. It is well known that the constant mandating of overtime can cause employee "burn out" and place patients and nurses in situations that may compromise safe health care practices. The present real world shortage of nurses has placed employers and employees in this situation all too often. A balance must be struck between the appropriate use of overtime under Article 24.03 and the need to utilize contract nurses. The parties are in need of guidelines to bring this about.

AWARD

1. When the Employer determines additional coverage is necessary the following guideline shall apply:

A. In accordance with Article 24.03 overtime shall be used for:

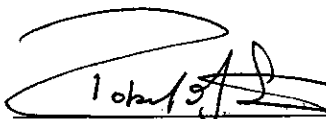
1. Employee absences of less than fourteen (14) calendar days*
2. Coverage for employees on vacation regardless of duration

*The one exception to this condition applies to employees who file for disability. Once they have done so, absences may be covered in accordance with B. below

B. In Accordance with Article 5, the Employer has the sole option to use overtime in accordance with Article 24.03 or to utilize contract nurses in lieu of using overtime as outlined in Article 5 for:

3. Employee absences of fourteen (14) calendar days or more (beginning the fourteenth day)
4. Worker's Compensation leave of any duration
5. Disability leave (or filed pending approval) of any duration
6. Occupational Injury Leave of any duration
7. To cover vacancies which the institution is authorized to fill

Respectfully submitted to the parties this 30th day of April, 2003.


Robert G. Stein, Arbitrator