#1982

OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO RIVER VALLEY JUVENILE CORRECTION FACILITY
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for the Juvenile Correction Facility
Michele E. Ward, Labor Relations Specialist, OCB
Mark Tackett, Labor Relations Officer 3 DYS
Mary Ann Krate, Labor Relations Officer, ORV
Aldine Gaspers, Superintendent

Appearing for OCSEA
David Justice, OCSEA Staff Representative
Cindy Hershberger, Union President
Lena Payne, Juvenile Corrections Officer
Joseph Keeney, Former Juvenile Corrections Officer
Chris Marsh, Juvenile Corrections Officer
Michael Scheffer, OCSEA Staff Representative

CASE-SPECIFIC DATA
Grievance No.
Grievance No. 35-20(12-04-00)-053-01-03
Hearing Held
June 14, 2004

Post-Hearing Briefs Submitted
7/26/04

Case Decided
8/26/04

Subject
Leave of Absence/Timeliness of Agency's Response

The Award
Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

Table of Contents

I. The Facts

The parties to this dispute are the Ohio River Valley Juvenile Correctional Facility, a branch of the Ohio Department of Youth Services, (Agency) and OCSEA, AFSCME Local 11 (Union).[1] The Union represents Ms. Lena Payne (Grievant), a Juvenile Corrections Officer (JCO) with the Agency. When this dispute arose, the Grievant was a second-shift JCO in seven-day operations (seven-day employee).[2]

The Agency had a practice of following a forty-eight-hour rule for employees' requests for either compensatory time (comp time), vacation leave, or personal leave. The Collective-Bargaining Agreement does not explicitly embrace that rule and the Union neither explicitly adopted nor rejected the rule. The forty-eight-hour rule allows the Agency to wait forty-eight hours before leave is to commence before announcing whether the leave has been approved.[3]

This dispute involves an issue of contract interpretation that arose out of the Grievant's request for comp time. On October 9, 2000, the Grievant requested comp time for November 24, 2000, the day after Thanksgiving, when she traditionally begins her Christmas shopping. Thus, the request for leave was submitted approximately forty-five days before the leave was to begin. The forty-eight-hour rule was in effect when the Grievant requested the leave.

On or about November 18, 2000, during roll-call, the Agency announced via memorandum that it was replacing the forty-eight-hour rule with the ninety-minute rule, which allowed the Agency to withhold approval of an employee's leave requests until ninety minutes before the start of the employee's shift on the

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[1] Hereinafter collectively referred to as "the Parties."

[2] Joint Exhibit 5.

[3] *See, e.g.*, Management Exhibit 2, stating "Non Polled Vacation and CompTime request must be submitted at least 47 hours prior to the time requested off. At the 47 hour, Management will either approve or disapprove the request based on Management's assessment of the operational need of the department. This affords the employee the option of taking personal leave at the 48th hour per contract."

day the leave was to commence.[4] The Agency adopted the ninety-minute rule to avoid paying excessive overtime that was primarily due to unforeseeable requests for mandatory personal leave. Pursuant to a binding arbitral opinion, the Agency must grant personal leave requests submitted forty-eight hours in advance. The mandatory personal leave creates problems for the Agency where, for example, a comp time request precedes a personal leave request on the same shift, a situation where the Agency may be understaffed and forced to pay overtime to cover the shift.[5] Theoretically, the ninety-minute rule should have narrowed if not eliminated the window of uncertainty created by the risk of personal leave requests following comp time requests.[6]

Nevertheless, several inherent problems frustrated the ninety-minute rule. First, it burdened employees who usually remained at home by the phone until ninety minutes before their shifts began, in order to learn the status of their leave requests. Also, supervisors had to remain by phones to respond to employees' ninety-minute leave requests. Third, multiple employees often called in with leave requests ninety minutes before their shifts began, thereby forcing management to identify the requesters and their seniority ranking relative to other call-offs. Fourth, the ninety-minute rule spawned at least three grievances, including the instant grievance and were discussed at a labor-management meeting in January 2001. Finally, the Union employed several forums to voice its concerns about the ninety-minute rule.

Although the Agency was not applying the ninety-minute rule when the Grievant requested comp time, the rule was applied retroactively to her request, which was to begin on November 24, 2000. Consequently, it was approximately 12:00 PM on November 24, 2000 before the Grievant knew whether

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[4] Thus, the ninety minute rule was first announced more than a month after the Grievant requested comp time.

[5] Personal leave bumps comp time because requests for personal leave requests are mandatory and, therefore, cannot be denied.

[6] A request for leave granted under the forty-eight-hour rule could trigger overtime if, after the leave was granted, another employee who was scheduled to work could not show up (call-off by contract, i.e., request for personal leave), leaving the shift short of help. This was less likely to occur under the ninety-minute rule.

her leave was granted, i.e. whether she would Christmas shop or work. In other words, the Grievant lost approximately half of the day she had requested to Christmas shop. She, therefore, filed a grievance, arguing that the ninety-minute rule violated the Collective-Bargaining Agreement, which she claimed required the Agency to respond to leave requests no later than twenty-four hours after they are submitted (twenty-four-hour proposal).

The foregoing difficulties with the ninety-minute rule prompted the Agency to reinstate the forty-eight-hour rule on or about December 14, 2000, shortly after a labor-management meeting. The Agency posted its decision on January 18, 2001, stating "JCOs submitting leave request for uncanvassed vacation and comp time are to be informed if this leave has been approved or not at the 48 hour mark."[7] Since March 2001, after the reinstatement of the forty-eight-hour rule, employees have filed no grievances protesting that rule. Furthermore, Mr. Keeney, a former Union President, testified that the reinstatement of the forty-eight-hour rule resolved issues created by the ninety-minute rule.

II. Relevant Contractual Provisions

Article 13.10
Compensatory Time
Any employee who has accrued compensatory time off and requests use of this compensatory time shall be *permitted to use such time off within a reasonable period after making the request* or, if such use is denied, the compensatory time requested shall be paid to the employee at his/her option to a maximum of eighty (80) hours in any pay period.[8]

Article 28.03
Procedure
Vacation leave shall be taken only at times mutually agreed to by the Agency and the employee and shall be used and charged in units of one-tenth (1/10) hour. The Agency may establish minimum staffing levels for a facility which could restrict the number of concurrent vacation leave requests which may be granted.

Employees who work in *seven (7) day operations* shall be given the opportunity to request vacations by a specified date each year. Employees shall be *notified of this opportunity* one (1) month in advance of the date. If more employees request vacation at a particular time than can be released, requests will be granted in seniority order.

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[7] Management Exhibit 5. Note, however, that to some extent employees have the option of using personal leave, which must be granted if requested forty-eight hours in advance.

[8] Emphasis added.

Employees in *seven (7) day* operations can also request vacations at other times of the year. If more employees request vacation than can be released, requests will be granted on a first come/first serve basis with seniority governing if requests are made simultaneously.

Emergency vacation requests for periods of three (3) days or less may be made by employees in *seven (7) day* operations as soon as they are aware of the emergency. An employee shall provide the Employer with verification of the emergency upon return to work.

Other employees shall request vacation according to agency policy (work rules) unless the Employer and the Union mutually agree otherwise. The Employer shall not deny a vacation request unless the vacation would work a hardship on other employees or the Agency. The Employer *shall promptly notify employees of the disposition of their vacation requests*. Unless the Employer agrees otherwise, an employee's vacation will not exceed one (1) year's accrual.[2]

III. Summaries of the Parties's Arguments

A. Summary of Union's Arguments

1. "Promptly," in Article 28.03, requires the Agency to respond to requests for leave within twenty-four hours after the requests are submitted.
2. Language in the fifth paragraph of Article 28.03 covers all employees, regardless of whether they work in seven-day operations.
3. Some provisions in the fifth paragraph of Article 28.03 involve fundamental leave-related procedures found no where else in the Contract. Denying such fundamental procedural rights to employees in seven-day operations would require rewriting the entire section.
4. Except for denials, requests for compensatory time are treated the same as vacation requests made on a first-come-first-serve basis and set forth next to each other in Management Exhibits 1, 2, and 5, indicating no difference between the two.
5. The action taken by management denies employees the use of either vacation or compensatory time for absences that involve long-term planning, reservations, or ticket purchases that were not foreseeable during annual vacation canvassing.

B. Summary of Agency's Arguments

1. Articles 13.10, 28.01, are inapplicable in this dispute. Specifically, the fifth paragraph in Article 28.03 is unavailing to the Union.
2. Article 5, Management Rights Clause, permits the forty-eight-hour rule, since Article 5 reserves to management "all the inherent rights and authority to manage and operate its facilities and programs."
3. Article 13.02–Work Schedules permits the Employer to limit the number of persons to be scheduled off work at any one time, including persons on leave.
4. The issue raised by the grievance is moot, inasmuch as the Agency reinstated the forty-eight-hour rule.

IV. The Issue

The parties stipulated to the following issue: Did the Employer violate the contract, and if so, what shall

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[2] Emphasis added.

the remedy be?

V. Analysis and Discussion

A. Preliminary Considerations

As is customary in disputes involving issues of contractual interpretation, the Union has the burden of persuasion, and to prevail must establish its claims by preponderant evidence in the record as a whole. Similarly, the Agency has the burden of persuasion with respect to its affirmative defenses. With these basic evidentiary considerations in place, the Arbitrator turns to an analysis of the case, which essentially involves two issues: (1) Whether the grievance is moot; and (2) Whether the forty-eight-hour rule properly implements the promptness requirement in the fifth paragraph of Article 28.03.

B. The Range of Issues

The Agency argues that the grievance is moot. In support of this position, the Agency contends that the grievance challenges only the ninety-minute rule and, therefore, became moot when the forty-eight-hour rule was reinstated. Instead of directly addressing the issue of mootness, the Union's Post-hearing Brief argues that: (1) The requirement, in the fifth paragraph of Article 28.03, for prompt responses to leave requests ("Promptness requirement") applies to all employees, including seven-day employees; (2) The ninety-minute rule violated Article 28.03; and (3) The twenty-four-hour rule properly implements the "promptness requirement." Even though the Union does not directly address the mootness issue, it is, nevertheless, an issue in this dispute.

C. Mootness of the Grievance

Indeed, the grievance is partially moot. That part of the grievance that challenged the contractual validity of the ninety-minute rule became moot when the Agency reinstated the forty-eight-hour rule. The Arbitrator shall render no decision on the moot section of the grievance. However, in challenging the validity of the ninety-minute rule, the Union proposed the twenty-four-hour rule. Still, that proposal implicitly challenged the contractual validity of the forty-eight-hour rule and thereby raised another issue.

D. Applicability of the Fifth Paragraph

The fifth paragraph of Article 28.03 states in relevant part: "*Other employees* shall request vacation according to agency policy (work rules) unless the Employer and the Union mutually agree otherwise. . . . The Employer shall *promptly notify* employees of the disposition of their vacation requests. . . ."[10] The issues here are: (1) Whether the fifth paragraph applies to seven-day employees, like the Grievant; and (2) If so, whether the forty-eight-hour rule or the twenty-four-hour rule properly implements the "promptness requirement."

The Agency makes five arguments to support the proposition that the fifth paragraph does not cover seven-day employees. First, the Agency asserts that the intended scope of the fifth paragraph can be determined only by placing that paragraph in the context of Article 28.03 as a whole. The Union does not quarrel with this proposition and the Arbitrator agrees. Second, the Agency argues that paragraphs two-four of Article 28.03 *explicitly* refer only to seven-day employees like the Grievant. Again, the Arbitrator agrees and the Union does not challenge this point. Third, the Agency correctly points out that the first sentence of the fifth paragraph switches the focus from seven-day employees to "Other employees." The Arbitrator agrees. Then, the Agency interprets this refocusing as reflecting an unmistakable intent to address *exclusively* non-seven-day employees and not seven-day employees. But, as discussed below, this interpretation is problematic. Fourth, the Agency argues that the needs of seven-day operations differ from those of non-seven day operations, a fact which, according to the Agency, caused the Parties to establish one set of standards for seven-day employees and a different set for non-seven-day employees. Again, as set forth below, this assertion is not supported in the fifth paragraph. Fifth, the Agency correctly points out that, during cross-examination, the Union's Local President, Mr. Joseph Keeney, freely admitted that "Other

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[10] (emphasis added).

employees" in the fifth paragraph indicates that the paragraph applies to non-seven-day employees.[11] Based on these facts and arguments, the Agency concludes that the fifth paragraph in Article 28.03, including the *"promptness* requirement," is irrelevant to seven-day employees, like the Grievant.

In contrast, the Union maintains that the fifth paragraph, especially the "promptness requirement" covers all employees, including seven-day employees. Thus, the Union argues that provisions following the first sentence in the fifth paragraph address fundamental, leave-related procedures found only in Article 28.03. Therefore, those procedures must apply to all employees. Moreover, in the Union's view, denying seven-day employees the procedural rights in the fifth paragraph would necessitate rewriting the entire section. Finally, the Union contends that Management Exhibits 1, 2, and 5 do not distinguish between vacation and comp time.

Although the foregoing arguments of the Agency and the Union are persuasive to a point, the Union's position–that the fifth paragraph applies to both seven-day and non-seven-day employees–is more persuasive. Consequently, for the reasons set forth below, the Arbitrator holds that the fifth paragraph *was not* intended to apply *exclusively* to non-seven-day employees. First, paragraphs two-four do explicitly refer only to seven-day employees, and that one may reasonably conclude that those paragraphs were intended to apply *only* to those employees. Furthermore, by using the catchall phrase "Other employees" in the fifth paragraph, immediately after paragraphs two-four specifically focused on seven-day employees, Article 28.03 manifests an intent to distinguish "Other employees" from seven-day employees. And that distinction supports a reasonable inference that the remaining provisions in paragraph five are intended to apply to "Other employees," which, as the Agency correctly concludes, is synonymous with non-seven-day employees. Finally, Mr. Keeney did admit that "Other employees" indicated an intent to apply the provisions of the fifth paragraph to non-seven-day employees. Clearly, then, paragraphs two-four focus exclusively on seven-day

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[11] Observe, however, that Mr. Keeney did not testify that the fifth paragraph applied *only* to "Other employees." Instead he agreed that "Other employees" meant that the paragraph applied to non-seven-day employees.

employees, and just as clearly, the fifth paragraph intends to focus on non-seven-day employees.

The difficulty for the Agency, however, is that it is not at all clear that the fifth paragraph was intended to focus *exclusively* on non-seven-day employees, and the Arbitrator so holds. Several reasons support this holding. First, the fifth paragraph does not repeatedly reference "Other employees" as paragraphs two-four continually refer to seven-day employees or seven-day operations. Those continual, specific references leave no doubt about the Parties' intent to focus exclusively on seven-day employees. However, if the drafters had wanted to bring the same specificity to bear on the fifth paragraph, they certainly could have done so; they did not. And that decision supports a reasonable inference or conclusion that the Parties *did not* intend for the provisions of the fifth paragraph to apply *exclusively* to seven-day employees. Second, the Union argued that some procedural provisions in the fifth paragraph are fundamental to the ability of all employees to exercise and enjoy their contractual rights to leaves of absence. The Arbitrator agrees with this proposition, *especially* with respect to the "promptness requirement."

The Agency's reading of the fifth paragraph leaves Management absolutely free to be as prompt or as tardy as it wishes when responding to employees' legitimate contractual requests for leave. Yet, the viability of an employee's contractual right to take a leave turns in large part on the extent to which the employee can develop and reasonably rely on some type of plans for that leave. It is, however, difficult if not impossible either to intelligently or to reasonably plan for a leave while having to wait until the "eleventh hour" to learn whether the leave has even been granted. This point is vividly portrayed in the instant dispute. Under the ninety-minute rule, the Grievant lost half of the day she had planned to use for her leave because she had to wait until ninety minutes before the start of the second shift to learn whether her leave had been granted. That type of procedure unduly erodes an employee's contractual right to take a leave in the first instance. Stated differently, unless the Agency conforms to some standard or degree of promptness in responding to leave requests, an employee's contractual right to take a leave is rendered illusory rather than substantive. It is unlikely that the drafters would have intended such a result. This inequity highlights the thrust of the

Union's argument that some procedural provisions in the fifth paragraph are *fundamental* to the contractual right to take leaves. Consequently, the Arbitrator holds that the "promptness requirement" under Article 28.03 applies equally to seven-day employees and to non-seven-day employees.

E. Proper Implementation of the "Promptness Requirement"

There is more, however. One must balance employees' contractual right to take and enjoy leaves against Management's right to realize the Agency's mission. These two interests must be reasonably balanced if they are to coexist without either undue erosion or mutual destruction.[12]

The proper application of the "promptness requirement" presents practical difficulties for the Union's twenty-four-hour rule. In all likelihood, that rule would unduly hamper Management's ability to effectuate the Agency's mission to the same or similar extent that the ninety-minute rule eroded the Grievant's right to receive reasonably timely notification as to whether she could dedicate all of November 24, 2000 to Christmas shopping. Moreover, mandatory personal leave could very well exacerbate the threat to the Agency's interest in attaining its mission, especially in a dynamic operational environment fraught with risks and uncertainty. Therefore, even though the Arbitrator agrees with the Union that some degree of promptness is essential and fundamental to the preservation of contractual rights to leaves for both seven-day and non-seven-day employees,' the Arbitrator is unpersuaded that the twenty-four-hour rule is the most practical or desirable means of implementing the "promptness requirement."

Instead, for the reasons set forth below, the Arbitrator holds that the forty-eight-hour rule is a reasonable and workable interpretation of the "promptness requirement." First, evidence in the record suggests that the forty-eight-hour rule had attained the status of a past practice between the Parties, even though the Union never signed a document expressly adopting the forty-eight-hour rule. Nothing in the record establishes that

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[12] For example, in the Arbitrator's view, although it is now moot, the ninety-minute rule was far too corrosive to employees' contractual right to take and enjoy their leaves of absence. This much was evident from the fact that the Grievant would not know whether she had a legitimately requested day off until almost half of that day had passed.

the Union either formally or informally objected to the application of the forty-eight-hour rule. Second, Mr. Keeney, a former Union President, testified, during the arbitral hearing, that reinstatement of the forty-eight-hour rule satisfied the Union's concern's about the ninety-minute rule. Third, the record shows that after March 2001, no grievances were filed, regarding the forty-eight-hour rule. Under the circumstances of this case, the Arbitrator holds that the forty-eight-hour rule is a more practical and reasonable means to implementing the "promptness requirement" in the fifth paragraph of Article 28.03.

VI. The Award

For all of the foregoing reasons, the grievance is **denied**. That portion of the grievance challenging the ninety-minute rule is moot because the Agency unilaterally discontinued that rule. The Agency's imposition of the forty-eight-hour rule does not violate the Collective-Bargaining Agreement.

Robert Brookins

Robert Brookins, Labor Arbitrator, J.D. Ph.D.