#-1858

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT SEIU/DISTRICT 1199

AND

OHIO DEPARTMENT OF MR/DD

Before: Robert G. Stein

Case # 24-15-20041026-0864-02-11
Mark Poznar, Grievant

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio (herein "Employer", "MRDD" or "Department") and District 1199, SEIU (herein "Union"). The Agreement is effective from June 1, 2003 through May 31, 2006 and includes the conduct that is the subject of this grievance.

A hearing on this matter was held on November 8, 2005. The parties mutually agreed to the hearing date and location and were given a full opportunity to present both oral testimony and documentation supporting their respective positions. The parties each subsequently made closing arguments. The record was finally closed on November 8, 2005.

The parties have also agreed to the arbitration of this matter pursuant to Article 7 of the Grievance Procedure.

ISSUE

Was there a violation of the contract between the SEIU/District 1199 Union and the State of Ohio, Dept. of MR/DD at the Youngstown Developmental Center? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference. See Agreement for actual language)

ARTICLE 24.14

BACKGROUND

This is a straightforward case involving the Union's claim of a contract violation in shift scheduling. The Grievant is Mark Poznar, ("Grievant," "Poznar"), a psychiatric mr/nurse, employed at the Youngstown Developmental Center ("YDC"). Poznar is the second most senior nurse at YDC, having been hired July 2, 1990 (Joint Exh. 9). During the past thirteen (13) years Poznar has worked as a fulltime nurse with a flexible schedule. He was hired to work rotating variable shifts that were posted as follows: 1st shift, 6: 30 a.m. to 3:00 p.m. and 2nd shift, 2:30 p.m. to 11:00 p.m. including weekends and holidays. In 2001 the Grievant complained to Gary Jones ("Jones"), Operations Director of YDC, that constantly rotating between the aforementioned 1st and 2nd shifts has become burdensome, problematic, and was in violation of Article 24.15 of the Agreement, which requires in pertinent part the following: "Shifts shall not be rotated unless mutually agreed by the parties." In his communiqué to Jones he also requested being placed on steady 1st shift assignment (Joint Exh. 7). The Employer responded to Poznar by stating his request to work 1st did not fit into the YDC's scheduling practices, and that his rotating assignment was the assignment for which he was hired (Joint Exh. 8).

Approximately three (3) years later (October 26, 2004), the Grievant filed a grievance claiming a violation of Article 24.14 and a remedy that

calls for him to be reassigned to fulltime 1st shift assignment.

SUMMARY OF UNION'S POSITION

The Union's position in this matter is based upon what it considers to be a clear case of the Employer at YDC violating a clause of the Agreement that has existed and remained unchanged since the establishment of the first contract between the State of Ohio and the Union in 1986. The Union asserts that the only way for rotating shifts to exist is for the Union to mutually agree to such an arrangement. The Union contends that no definitive proof of such an accommodation was introduced into the record. The Union rejects the Employer's argument that the thirteen (13) year existence of rotating shifts worked by the Grievant constitutes a practice that supercedes the language of Article 24.14.

Based upon the above the Union urges the Arbitrator to sustain the grievance.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that the parties in this dispute are the Grievant and YDC. Furthermore, the Employer points out that there has been a "tacit agreement" between these parties for fifteen (15) years (See Management's opening statement, p.2). The Employer argues it does not

need a fulltime 1st shift psychiatric mr/nurse. Moreover, when the Grievant raised the issue with Jones as described above, the Union was put on notice almost three (3) years prior to filing the instant grievance. "Employees do not have the right to dictate the shift they work," asserts the Employer. Furthermore, the Employer points out that over a period of several years other 1199 members have rotated shifts at YDC.

Based upon the evidence and testimony, the Employer urges the arbitrator to deny the grievance.

DISCUSSION

The primary issue for resolution in the instant matter is whether the Employer is in violation of the Agreement by the assignment of the Grievant to a rotating schedule between 1st shift and 2nd shift at YDC. First, it should be made clear that the Agreement being analyzed is between two parties, the State of Ohio and SEIU District 1199. I find the Employer's argument that the parties in this dispute are "the Grievant and YDC" to be fundamentally flawed. Moreover, the "tacit agreement" that the Employer insists has existed between the Grievant and YDC for fifteen (15) years is not the primary source of authority in this dispute. Based on the arbitrator's review of the parties' arguments and all of the evidence submitted, the grievance stems from a disagreement regarding the

application of Article 24.14. Thus, the issue is one of contract interpretation.

> It is generally recognized that the primary function of an arbitrator in construing a contract is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties' intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result.

NSS Enters., Inc. and Int'l Union, United Auto, Aerospace & Agric. Implement Workers of Am., Local 12, 114 LA 1458 (2000). Article 24.14 reads as follows:

In the Department of Rehabilitation and Correction, the agency may schedule nursing personnel on a rotational shift basis for a temporary period during the opening of new facilities. The agency shall not schedule an employee to rotate more than two (2) different shifts in any four (4) week scheduling period. Exceptions may be mutually agreed to by the parties.

In other agencies, shifts shall not be rotated unless mutually agreed to by the parties.

When confronted with plain contract language, which conveys a straightforward course of conduct, arbitrators assume that the parties knew what they were doing when they drafted their agreement that incorporates the language they actually used and adopted. Arbitrators necessarily are reluctant to apply separate standards of interpretation in an attempt to give the language employed any meaning beyond the plain language used to express a distinct idea or thought. *Oak Grove School Dist.*, 85 LA 653, 655 (Concepcion 1985). An arbitrator cannot

ignore clear-cut contractual language, and he may not legislate new language or give credence to "tacit agreements" between individual bargaining unit members and the employer because to do so would usurp the role of the labor organization and the employer. *Rice Food Mkts. and United Food and Commercial Workers Union, Local 455*, 146 LA 726 (Marcus 1996).

The arbitrator's authority in this matter is limited by the language in Article 7, Step E 1— Arbitrator Limitations, which includes the following restrictions:

> The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

An arbitrator must apply contracts and collective bargaining agreements as they have been written and adopted by the parties' mutual consent. Ohio courts have consistently held that "[t]he overruling concern when constructing a contract is to ascertain and effectuate the intention of the parties." *Aultman Hosp. Ass'n and Cmty. Mut. Ins. Co.*, 40 Ohio St.3d 51, 544 N.E.2d 244 (1989). The clearest indication of the parties' intent is found in the written language used in their Agreement. *Volvo GM Heavy Truck Operations and UAW, Local 2227*, Summary of Labor Arbitration Awards, 365-3 (May 1989). The primary search is for a common meaning of the parties rather than to impose upon them obligations contrary to their own understanding. *Graphic Communications Union*

Dist. Council No. 2 (Local 388) and Weyerhauser Co., 04-1 Lab. Arb. Awards (CCH) P 3843 (Snow 2003).

The "plain meaning" principle of contract interpretation applies when there is specific language which speaks directly to and defines the outcome of a contested issue. *Beacon Journal Pub. Co. and Graphic Communications Int'l Union*, No. 42C, 00-2 Lab. Arb. Awards (CCH) P 3548 (Ruben 1999). An arbitrator seeks to determine what the language adopted by the parties meant to them when the Agreement was written and adopted. It is that meaning that governs, rather than what might later be read into the language. *Package Co. of Cal. Red Bluffs Molded Fibre Plant and United Paperworkers Int'l Union Local 1876*, 91-2 Lab. Arb. Awards (CCH) P 8457 (Pool 1991).

Among the well-established standards of contract interpretation adopted by labor arbitrators is the notion of using an objective approach, rather than a subjective one, to interpret disputed contract language. The objective test is based on what a reasonable person in similar circumstances would believe disputed contract language to mean. This objective approach is rooted in a common-sense policy that contract interpretation should be based on objectively verifiable information and not on a party's subjective intent, which cannot be objectively examined. Giving an objective approach to contract interpretation lends greater stability and predictability to labor-management contract disputes. *Int'l*

Bhd. of Teamsters, Gen Teamsters Local 999, AFL-CIO and South Peninsula Hosp., Inc., 00-2 Lab. Arb. Awards (CCH) P 3542 (Landau 2000).

Arbitrators also apply the principle that the parties to a contract are charged with full knowledge of its provisions and that they did actually intend the full application of the language they chose to include as representing their specific intentions. An arbitrator's decisions cannot be based on competing equities or sympathies, but rather on the basis of the contract that the parties themselves have written and adopted to govern their relationship. Arbitrators cannot search for inferences and intentions that are not apparent and not supported by contractual language documenting any purported intent.

The Agreement language in controversy here was submitted to arbitration, and the question to be determined is what should the parties mutually understand the contract provisions included in Article 24.14 of the Agreement to mean in the particular circumstances giving rise to the parties' dispute. I find the language of Article 24.14 to be clear and unequivocal. Moreover, it is apparent from the plain wording of the language of Article 24.14 that the parties carefully and specifically agreed to limited circumstances for the establishment of rotating shifts. Article 24.14 makes it plain that "mutuality" of agreement between the parties (i.e. the State of Ohio and the SEIU/District 1199) must take place for rotating shifts to be established in agencies such as MRDD. In as much

as the Agreement covers all agencies in the state of Ohio, and that the language of Article 24.14 calls for the parties to mutually agree upon conditions for the existence of rotating shifts, it is reasonable to expect that if specific exceptions to contract language are agreed upon in separate agencies, a formal expression of this mutual agreement by agents of authority for both parties would exist. No such evidence was submitted into the record.

The chief goal of contract interpretation is to give effect to what the parties to the Agreement intended when they went through the process of bargaining and writing language to express an idea that they have mutually considered. *Lull Engineering Co., Inc. and St. Paul Gen. Drivers, Helpers and Truck Terminal Employees, Local 120,* 85 LA 581 (Gallagher, 1985). Arbitrators are required to order or approve the utilization of negotiated language, even though the results are harsh or contrary to the expectations or in the instant matter a local need of one of the parties. *Del E. Webb Corp.,* 48 LA 164, 166 (Koven, 1967).

Arbitrators have long recognized that to constitute a binding past practice, several factors must be demonstrated. Factors such as mutuality, repetition, consistency, and longevity must be in place, even when no contract language speaks to the issue at hand (Zack & Block, *LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 43 (2ed. 1995).* In the instant matter, the Employer provides convincing evidence to support

some of these conditions, but what is lacking, particularly in light of the requirements contained in Article 24.14, is definitive evidence of mutuality on the part of SEIU. Conditions accepted by one employee or even a handful of employees in a single location, do not (in the context of a statewide contract, that contains specific language requiring mutual agreement of "the parties" of any change) represent mutual agreement.

This arbitrator has been involved with several disputes at YDC and has visited the facility on several occasions. Moreover, I am well aware of its reputation as a well-managed facility. However, the establishment of thirteen (13) plus years of rotating shifts with some employees, while it may be managerially sound, does not change the fact that without Union agreement such action is in violation of the express provisions of Article 24.14. If a labor agreement is to have stability and integrity, it must be applied to mean what it actually says. *United Grocers, Inc. and Teamsters Local 162*, 92 LA 566 (Gangle, 1989).

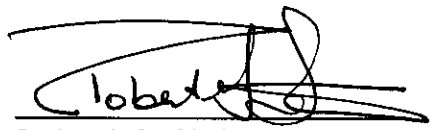
Also, it needs to be pointed out that under Ohio law, when a contract contains clear and unambiguous language, there is no issue of fact to be determined and a fact finder may properly construe and enforce it as a matter of law. *City of Brookville, Ohio and Ohio Patrolmen's Benevolent Ass'n*, 117 LA 2002 (Keenan, 2002), citing *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St. 241, 374 N.E.2d 146.

AWARD

The grievance is sustained.

No later than thirty (30) days from the date of this Award, the Employer is directed to cease and desist from utilizing rotating shifts that impact any bargaining unit members, without specifically obtaining the mutual agreement of the Union as provided for in Article 24.14. The Arbitrator does not have the authority to create a vacancy or place the Grievant in a non-existing vacancy; however, the Grievant retains his rights under the Agreement, including his considerable seniority, to bid on the newly configured shifts that may result from this ruling.

Respectfully submitted to the parties this 29th day of December 2005.



Robert G. Stein, Arbitrator