Thomas J. Nowel, NAA
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In the Matter of a Controversy Between:	)	Grievance Nos.
	)	MCD-2016-00145-
Service Employees International Union	)	12 and MCD-2016-
District 1199	)	00354-12
	)	
and	)	ARBITRATION
	)	OPINION AND
Ohio Department of Medicaid	)	AWARD
	)	
Re: Alternative and Flexible Work Schedules	)	DATE: November
	)	7, 2017

APPEARANCES:
Catherine J. Harshman, Esq., Hunter, Carnahan, Shoub & Byard, and Josh Norris, Public Sector Director, SEIU District 1199, for the Union; and Daniel J. Guttman, Esq., Baker & Hostetler LLP and Amanda Godzinski, Esq., Baker & Hostetler LLP for the Employer.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Service Employees international Union, District 1199. In January 2016, the Employer required office workers in the Ohio Department of Medicaid to abandon a number of flexible or alternative work schedules which did not conform to directives from the Agency Director and administrators. A number of bargaining unit members grieved the changes believing that Section 24.10 of the collective bargaining agreement prohibited the Employer from changing the schedules. The grievances proceeded through the grievance procedure and were appealed to arbitration as the parties failed to resolve the dispute. The arbitrator in this matter was scheduled to hear a class action grievance filed by agency employee Frye. On the first day of hearing, the Employer challenged the arbitrability of the grievance based on timeliness and appropriateness of Frye's grievance representing a class of employees. The case on arbitrability proceeded during the entire first day of hearing. At the end of the hearing, the advocates agreed to meet prior to the next scheduled day of hearing to discuss possible resolution to the question of arbitrability. Prior to the second day of hearing, which was scheduled on July 17, 2017, the parties resolved the question of arbitrability and entered into a Settlement Agreement. Portions of the Settlement Agreement are as follows.

> 1 (A) District 1199 hereby withdraws the class action grievance filed by Frye, MCD-2016-00024-12 ("the Frye grievance"), with prejudice, but without setting any precedent to be used in any future arbitration. The withdrawal shall not be construed as an admission by either party on the timeliness or merits of the Frye grievance.
>
> (C) The parties agree to consolidate the grievances filed by Marbury and Fischer, MCD-2016-00145-12 and MCD-2016-00354-12 (collectively, "the Office grievances"), in an arbitration to be conducted by Arbitrator Thomas J. Nowel. The arbitration will address

ODM's decision to change the schedules of certain ODM office employees represented by District 1199 effective January 10, 2016.

(D) The parties agree that District 1199 will begin its case-in-chief on the Office grievances on July 17, 2017, and the ODM will begin its defense on July 24, 2017. The parties agree that there are no procedural objections to the Office grievances and that they are properly before the arbitrator.

(F) The parties agree that the presentations by the parties at arbitration of the Office grievances will not address any alleged issues with regard to ODM's decision to change the schedules of field employees represented by District 1199.

The arbitrator was selected to hear this case pursuant to Article 7 of the collective bargaining agreement. Two days of hearing were held regarding the merits of the referenced grievances at the offices of SEIU District 1199. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. The parties stipulated to a series of joint exhibits. At the close of the hearing, the parties agreed to submit post hearing briefs no later than September 25, 2017, and the arbitrator indicated that the Award would be completed no later than November 9, 2017.

ISSUE

The parties agreed that the issue to be presented to the Arbitrator is the following. "Whether the Union established that the Employer violated the following provision of Article 24.10 of the CBA when it changed the schedules of certain office employees in the 1199 bargaining unit:

> "Any employee currently working an alternative or flexible work schedule may continue to work the alternative or flexible work schedule, subject to the Employer's right to change schedules; however, employees will not have their alternative or flexible work

schedules terminated in an arbitrary or capricious manner and such changes shall be made for a rational management purpose."

WITNESSES

TESTIFYING FOR THE UNION:
Amanda Schulte, District 1199 Administrative Organizer
Crystal Ufferman, Medicaid Health Systems Specialist 2
Jeff Canter, Medicaid Health Systems Specialist 2
Chana Trimble, Medicaid Health Systems Specialist 2
Starlett Hylton, Medicaid Health Systems Specialist 2
Josh Norris, District 1199 Public Division Director

TESTIFYING FOR THE EMPLOYER:
James G. Tassie, ODM Assistant Director and Chief of Policy
Roberta Schwamberger, Medicaid Health Systems Administrator 2
Jennifer Demory, Former ODM Chief of Staff

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 5 – MANAGEMENT RIGHTS
The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of the workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.
Accordingly, the Employer retains the right to: 4) determine the starting and quitting time and the number of hours to be worked by its employees;

ARTICLE 24 – HOURS OF WORK AND OVERTIME
Relevant provisions of Article 24
Employees may request to work alternative or flexible schedules. The Employer agrees to consider alternative or flexible work schedules for particular employees or classifications. The Employer agrees to consider such options as four (4) ten (10) hour days, twelve (12) hour shifts, and/or other creative scheduling patterns that may assist in the recruitment and/or retention of nurses and other employees. Alternative work schedules may include a set schedule where the number of hours worked per day is

other than eight (8) and/or the number of days worked per week may be other than five (5). Flexible work schedules may include an established schedule that allows for variable starting and ending times of work days (i.e. beginning the work day before or after the established start time and ending before or after the established end time). The use of alternative and flexible work schedules shall be a subject for discussion in the Agency/Facility Professional Committees.

The Employer retains the right to grant or deny a request for an alternative or flexible work schedule. Such decision to grant or deny the request shall not be made in an arbitrary or capricious manner. The Employer will provide (upon request) the reason(s) for any denial in writing.

Any employee currently working an alternative or flexible work schedule may continue to work the alternative or flexible work schedule, subject to the Employer's right to change schedules; however, employees will not have their alternative or flexible work schedules terminated in an arbitrary or capricious manner and such changes shall be made for a rational management purpose.

Employees may request to use flex time. The Employer may grant or deny such requests. Requests shall not be denied in an arbitrary of capricious manner. Flex time may include adjusting starting and ending times of the established, set work day, so long as the employee works an established, set number of hours in a week. Flextime may, by mutual agreement, be used for various reasons, including but not limited to pre-scheduled medical appointments. In addition, the trading of shifts may also be granted, by mutual agreement, for pre-scheduled medical appointments.

Alternative work schedules, flexible work schedules, and the use of flex time are not mutually exclusive of one another. If approved by the Employer, an employee may work an alternative schedule as well as a flexible schedule and be able to use flex time in accordance with the terms of this Article.

GRIEVANCES

In that the parties have stipulated regarding the two grievances to be considered in this matter and both grievances are generally the same or similar, the statement of the Judy Marbury grievance, MCD-2016-00145-12, is as follows.

> Statement of Grievance: I was told by management that I could no longer work my 7:00 am to 3:30 pm schedule that I have been working for over 2 years effective 1-11-2016. This has effected my transportation on catching the express bus which pickup in 3:40 on Front St. This mandated change decreases the hours the unit is available to serve the public. There is no operational need for this change. There is a large delay in entering and leaving the building with this new mandated schedule. There is also a delay with catching the elevators. This change is overly restrictive and violates the 1199 contract. Resolution Requested: I request to be made whole in every way including returning to my previous schedule.

BACKGROUND

The State of Ohio and the Service Employees International Union, District 1199 are parties to a collective bargaining agreement representing some 4000 employees in a number of departments. The Union represents approximately ninety employees in the office of the Ohio Department of Medicaid (ODM). In the past, the Ohio Department of Job and Family Services administered the Medicaid program. As the Medicaid program was being expanded, the Ohio Governor, John Kasich, created the Office of Health Transformation in January 2011 to oversee the move to a stand alone Medicaid agency. Then in July 2013 ODM officially transitioned from ODJFS and became a stand alone agency. John McCarthy was appointed by the Governor to lead and oversee the new agency. Most employees, who administered the Medicaid program and who were assigned to ODJFS, became staff members of ODM.

The Union represents both office staff and field workers at ODM. Prior to January 2016, approximately 77 office staff, who are represented by District 1199, had approved schedules that were other than a standard five day work week of eight hours each day. Flexible work schedules included four ten hour days per week; four nine hour days with a four hour schedule on one day, usually on Friday. Approved schedules included starting and quitting times which did not correspond to a standard eight to five work day. These schedules allowed for a starting time between 7:00 and 9:00 am with an end time of no later than 5:30 pm. There were a few employee schedules which varied from this model. A majority of employees with flexible schedules worked a five day work week with flexible starting and quitting times. Approximately seventeen employees worked a variation on four tens or four nines plus four on Friday. All flexible work schedules had been approved by management.

Medicaid benefits and coverage expanded significantly following the establishment of ODM. Many Ohio residents, who had not qualified for Medicaid benefits in the past, were now added to the rolls of recipients. The Affordable Care Act played a role in the expansion of Medicaid coverage in Ohio. The Governor circumvented the legislature in order to allow for the expansion of Medicaid in Ohio. ODM provides healthcare coverage for more than three million people in Ohio.

In late 2015, ODM circulated the draft of a new attendance policy, the first since moving away from ODJFS. Although a draft, the document stated that a standard work day commenced at 8:00 am and ended at 5:00 pm. The draft policy indicated that employees were not permitted to begin a work day prior to 7:30 am or after 9:00 am. It also mandated a five day work week. The draft policy provided for two fifteen minute breaks during the work day

and a one-half hour lunch period. Paragraph C of the policy provided for flexible work schedules but not outside the new parameters. During late 2015, supervisors began asking employees, with flexible work schedules, to submit new schedules consistent with the policy. As schedules were being submitted, there was confusion among affected employees and a number of supervisors. A number of schedules, which were submitted during this time, were denied by supervisors as not in conformance with the five day work week and amended starting times. Some supervisors believed the schedule change was a result of the new Attendance Policy, ODM IPP-5203. Senior management directed supervisors to indicate that the changes were not primarily due to the new Attendance Policy but instead were a result of efficiency and service delivery. Confusion continued.

The new Attendance Policy was implemented on January 10, 2016. It was amended on April 3, 2016. Employees were required to submit new schedules, and approximately fifty flexible schedules changed.

Many of the flexible schedules, prior to the mandated changes, had been approved by supervision and were in place for years. Several grievances were filed by Union members, and Step 2 grievance meetings were conducted in February and March 2016. The Employer denied the grievances which were then appealed to arbitration. Although there was a dispute between the parties regarding the timeliness of one of the grievances which had been appealed to arbitration, the Union and Employer entered into a Settlement Agreement on July 14, 2017 which consolidated grievances filed by employees Marbury and Fischer for purpose of arbitration. These are the grievances before the arbitrator. The parties stipulated to the issue

before the arbitrator, and hearing at arbitration on the merits was held over two days, July 17 and July 24, 2017.

POSITION OF THE UNION

The Union argues that the termination of existing flexible work schedules effective in January 2016 is a violation of Section 24.10 of the collective bargaining agreement. The Union states that the parties bargained for flexible work schedules, and many of the approved schedules at ODM had been in existence for a number of years. Due to this, the impact of the Employer's decision effected both the work life and personal arrangements of the affected employees. The Union states further that contract language regarding existing flexible work schedules is unchanged through several collective bargaining agreements. The Union agrees that language changed during the most recent negotiations for new requests for flexible work schedules, but there has been no change regarding existing work arrangements. The Union states that, at the bargaining table, the Employer gave assurances that language modifications would have no impact on existing flexible work schedules.

The Union states that Section 24.10 prohibits an arbitrary or capricious change in flexible work schedules. The Union argues that the Employer acted in an arbitrary manner when 1199 bargaining unit members were treated the same as other employees in the ODM office operation. The District 1199 Agreement provides for flexible work schedules while the OCSEA collective bargaining agreement is silent in this regard and exempt employees are subject only to department policy. The Union argues emphatically that the Employer was required to treat District 1199 members differently based on existing contract language. The Union makes reference to a memo generated from the then Interim Deputy Director of the

Office of Collective Bargaining, Michael Duco, who, in 2008, stated that District 1199 flexible schedules, pursuant to Section 24.10 of the Agreement, could only be changed for a "rational management purpose." In terminating all existing flexible work schedules, the Employer ignored how the changes would impact work and personal considerations. And, the Union states, ODM never provided a reason for individual workers so affected. The Employer gave no consideration for the diverse roles played by District 1199 members in the office. The Union cites a number of specific employees whose schedules were terminated in an arbitrary manner. Jeff Canter, for example does not engage with recipients, and he is never faced with emergency situations. He successfully worked a flexible work schedule for 11 years until it was arbitrarily terminated.

The Union argues that the Employer's claim that its actions were designed to cover core business hours is false. The original flexible work schedules adequately covered the core work hours of the agency, and, in fact, the office operation was more adequately staffed prior to the wholesale termination of the original schedules. The Union states that the operational needs of the agency had not changed from the time ODM was created until the Employer terminated the original schedules making the action arbitrary and not necessary. The Union argues that it never was provided a reason for the change including the Step 2 response to its grievances.

The Union states that the Employer, during the most recent collective bargaining negotiations, attempted to modify language which requires a "rational management purpose" to a lower standard. Ultimately there was no change in this provision of the Agreement. The Union argues that the Employer failed in its burden to provide the purpose and rationale for the termination of the flexible work schedules. And the Union argues that any reasons for the

changes, which may have been provided at the arbitration hearing, must be ignored as the Union received no such rationale at the time of occurrence or during the early steps of the Grievance Procedure. The Union emphasizes that "the State does not define what this operational need is" (Union post hearing brief, pg. 20). The Union states further that a change in policy, Attendance Policy, is not a legitimate reason for wholesale termination of flexible work schedules.

The Union argues that the Employer never provided a rational management purpose for the termination of the schedules. Medicaid expansion was never stated as a reason. And supervisors were generally unclear of the reasons when asking employees to make changes to their previously approved schedules. The Union states that the work did not change due to the expansion of Medicaid. Additionally, testimony regarding employees who engaged in non-work activity, in the absence of supervision, clearly cannot be used as a rational management purpose. The witness of such activity failed to report this to managers who could have easily rectified the problem. The Union states that the example of insufficient staff to call recipients regarding medical needles cannot be used as a reason to terminate flexible schedules. The supervisor could have authorized overtime, but the alleged emergency was resolved in a short period of time.

The Union states that there is no evidence of complaints from the public regarding any impact of the original flexible schedules. There is no evidence of failure to complete work timely or discipline due to non-performance. The Union states that absent a reasonable, non-arbitrary, non-capricious, rational management purpose, the Employer violated Section 24.10 of the Agreement when it terminated, wholesale, flexible work schedules in January 2016. The

Union states that the Employer violated the "plain clear language of the contract." The Union requests that the grievances be sustained and affected class of employees have their former flexible work schedules reinstated.

POSITION OF THE EMPLOYER

The Employer states that the Union has the burden to prove that ODM did not have a rational management purpose for amending office staff work schedules. The Employer argues that the Union failed to meet this burden of proof. The Employer argued at hearing and in its post hearing brief that rational purpose is a low level of scrutiny, and this is what the parties bargained. Rational purpose does not require evidence that the actions of the Employer were necessary or correct based on data or evidence. The Employer goes on to state that it had a right to make the schedule changes as permitted by this contract language. Its right, based on the language, does not require a determination that the Employer's actions were correct in managing the work force. The Employer goes on to argue that, based on the language of Section 24.10, it has the "management right" to enact changes in flexible schedules as, in the instant case, it has provided a rational management purpose. The Union has failed to establish that ODM lacked a rational management purpose. The Employer states that it did not selectively change the schedules of bargaining unit employees but instead made modifications to align with its business hours. The Employer states that its goal was to improve staff availability during core business hours, ensure that supervisors were present with their assigned staff and improve the ability to schedule meetings during a five day work week. The Employer states that Director McCarthy worked with his senior staff to design a more efficient

work schedule. So, the Employer argues, the Director's purpose clearly was rational. The Employer states that Ohio spent over $25 billion in 2016 to provide health care to three million people including children, adults, senior citizens, disabled individuals, and those with limited income. As the agency split from ODJFS, it was critical to develop an efficient work force which has advanced skills and a greater level of responsibility. The Employer states that there was a historic expansion of Medicaid in the state which required a stand alone agency, and this occurred in 2013.

The Employer states that it had been difficult to manage the flexible work schedule. A number of employees were not scheduled to work on Fridays and some left during the middle of the day on the last day of the week. The Employer states that it was difficult to schedule meetings with employees on Friday. Additionally, start times ranged from 6:00 am to 9:30 am. Supervisors' work schedules did not match that of their subordinate employees in many cases. The Employer refers to the quitting time of one employee as 5:42 pm on Mondays, 5:18 on Tuesdays, 4:18 on Wednesdays, 1:42 on Thursdays and 12:18 on Fridays. The Employer argues that managing the ODM office was complicated with the various work schedules including four tens and four nines plus four. The Employer states further that the Ohio Inspector General was critical of employee scheduling at ODM. The Employer states in its post hearing brief that "Director McCarthy decided that ODM needed to change employee work schedules to a more consistent 'normalized' approach" (pg. 11). The Employer states further that a decision was made to schedule all employees five days per week, but still allowing for flexibility. Employees are able to select a start time between 7:30 am and 9:00 am in fifteen minute increments with

the option of 30 minute, 45 minute or one hour lunch breaks. The Employer states that management continues to be flexible and has not acted in an arbitrary manner.

The Employer states that it strengthened its ability to manage work schedules during the last negotiations. A portion of Section 24.10 was modified by removing the words "operational need" when the Employer considers a request for a flexible work schedule. The Employer argues, therefore, that it has the management right to change work schedules regardless of operational need. And Article 5 of the collective bargaining agreement provides that the Employer retains the right to determine starting and quitting times and the number of hours to be worked. The Employer states further that, during the last collective bargaining negotiations, the word "may" was substituted for the word "shall" regarding the right of an employee to continue to work a flexible schedule which is subject to management's right to change schedules based on a rational management purpose. The Employer states that the Union was made aware, and acknowledged at the bargaining table and at the arbitration hearing, that one of its three major goals during the last negotiations was to gain more control of employee work schedules. In addition, the parties added no new provisions in the collective bargaining agreement when agency specific negotiations were commenced. The Employer states that Director McCarthy's goal in realigning certain flexible schedules was to make the agency more accessible to the entities, providers and consumers it serves.

The Employer argues further that flexible work schedules were modified to ensure that supervisors were available to their subordinate staff on a daily basis. Accountability of staff was critical in an agency with a $25 billion budget. The senior staff was concerned about public perception, legislative oversight and concerns from the Governor.

The Employer states that its actions were not arbitrary or capricious. An arbitrary decision is based on whim or prejudice. The Employer argues that the decision to modify flexible work schedules was based on well evaluated concerns, and the action followed months of discussion between the Director and his senior staff. The Employer's directives were applied consistently. Employees were not targeted based on Union activity, poor performance, sick leave or disciplinary issues. The Employer states that the Union has the burden to prove arbitrary or capricious, and it has failed to do so.

The Employer argues that a 2008 memorandum authored by Mike Duco, the Interim Executive Director of the Office of Collective Bargaining at that time, is irrelevant. While the memo suggested the continuation of flexible work schedules consistent with language in the District 1199 collective bargaining agreement, contract language referenced by the memo has since been deleted.

The Employer states that witnesses at hearing testified and evidence is conclusive that the modification of flexible work schedules has improved the operations of the agency. The Union failed to show that the changes were not for a rational management purpose. The Employer requests the arbitrator to deny the grievances of the Union.

ANALYSIS AND OPINION

The Union has presented strong arguments regarding the general performance of the Medicaid agency employees which it represents. The agency's "2015 Year-in-Review" report clearly depicts a high level of performance in an evolving and expanding organization. In January 2016, the Ohio Department of Medicaid was providing health care benefits to 3 million

Ohioans. The annual budget was over $25.3 billion. While the Ohio legislature opposed an expansion of Medicare benefits, the Governor was able to expand the program and provide the funding to do so without legislative approval. The political spotlight was on the agency. Throughout all of this, employees provided excellent service and performed at a high level. Both management and Union would agree with this assessment. During 2015, and for many years prior to that time, approximately 75 of 90 office staff in the bargaining unit worked flexible or alternative work schedules which included five eight hour days with variable starting and quitting times; four ten hour days during the work week; and four nine hour work days with an additional four hours on the fifth day, usually Friday. Some supervisors likewise worked flexible schedules. All schedules were approved by management. The core business hours were five days per week from 8:00 am to 5:00 pm. As the Union argues, there is no evidence or record of complaints from recipients, providers or the public regarding availability and performance of office staff. Clearly the operational needs of the Ohio Department of Medicaid were being met.

The Medicaid agency had been an organization under the umbrella of the Ohio Department of Job and Family Services until 2013 when it became its own organization. The Union continued to represent various classifications in the agency including 90 or more staff assigned to the office operation. Many bargaining unit employees are classified as Medicaid Health Systems Specialist 2 although, within this job title, they perform a variety of diverse tasks. Most have little or no contact with recipients. As employees moved from ODJFS to ODM, they carried their flexible work schedules with them. Evidence indicates that the new ODM Director, John McCarthy, indicated to his senior staff that he was not comfortable with

the flexible work schedules of the ODM office staff. Testimony at hearing indicates that he and other management staff felt that it was necessary for all staff to work five day schedules in order that they be available for meetings or other work related activity on the fifth day of the week. The Director believed that core business hours of 8 to 5 were better maintained with a five day schedule and a modification of the flexible starting time. In addition, senior management felt it necessary that schedules of supervisors and their staff match. Employees would be required to start their work day no earlier than 7:30 am and no later than 9:00 am in fifteen minute increments.

As management discussed modifying work schedules, the draft of a new attendance policy, separate from the former ODJFS policy, was being circulated among office staff in the fall of 2015. Paragraph F of the draft included a modification of flexible work schedules as it stated that ". . . . staff may not start their work day before 7:30 am or any later than 9:00 am." Evidence at hearing is clear that supervisors struggled to explain to their subordinate employees the reason for the changes. Employees asked for an explanation and were generally told that work hours should be in compliance with the new attendance policy. Senior staff, including Chief of Staff, Jennifer Demory, urged supervisors to downplay the attendance policy explanation and indicate that operational need was the driving force behind the changes. Evidence indicates that supervisors and staff continued to struggle to understand the reasoning for the changes as employees submitted a number of schedule changes, some in compliance with the policy and some not. Evidence indicates that individual employees specifically asked for the reason behind the changes. Clear explanations were few and far between.

The Union argues that it was not provided with the reasoning for the changes, and evidence indicates that management failed to provide clear and concise responses. Chief of Staff Demory testified that the Union was provided with an explanation and reasoning for the schedule modifications at an APC meeting (labor management meeting). The Union disagrees, and there is no evidence that a comprehensive meeting regarding the schedule modifications between the parties took place. This is problematic. While the collective bargaining agreement does not mandate bargaining or discussions with the Union over issues or changes of this nature, good labor relations would have dictated a timely meeting over the schedule changes and reasoning behind the modifications. Evidence indicates that Director McCarthy failed to take the bargaining agent into consideration. The schedule changes impacted a significant number of staff who had worked flexible schedules for many years and who planned their work and personal lives around their long held approved work days and week. As the Union argues, a clear and comprehensive discussion between the parties would have been desirable. It is noted that the Employer must provide a reason for denying a new request in writing if asked by the affected employee. Same or similar language does not exist in the paragraph which outlines the Employer's right to change existing flexible schedules, and, at hearing, a Union witness agreed that this was an accurate rendition of the language although it was stated that there was a verbal agreement to provide management's reasoning during the grievance process. Said agreement is not codified in the Agreement.

The Employer argues that the collective bargaining agreement is clear and unambiguous, that it possessed the "management right" to modify the flexible work schedules of office employees. At hearing, the parties focused on the most recent collective bargaining

negotiations and language changes which occurred in Section 24.10 of the Agreement. The title of the Section changed from "Flexible Work Schedules" to "Non-Traditional Work Schedules." The order of the paragraphs was modified. Two separate circumstances are outlined in Section 24.10. This provision addresses a request for a flexible work schedule. The previous collective bargaining agreement, in Section 24.10, stated that the Employer would consider requests for flexible work schedules which would be implemented "to satisfy its operational needs. . . ." Language in 24.10 has been altered in the current Agreement regarding requests for flexible work schedules. Although the Employer may not deny such requests in an arbitrary or capricious manner, it retains the right to grant or deny. The term "operational need" was deleted in the current Agreement. Additionally, this section of the Agreement addresses employees currently working an alternative or flexible schedule. Although a few wording changes occurred at the bargaining table, the language is essentially the same, and evidence suggests that this language has remained intact for a number of past collective bargaining agreements. The Employer argues that gaining control and asserting management rights regarding employee schedules was one of a number of critical issues placed on the table during the previous negotiations. The parties agreed to delete "operational need" from the provision governing requests for flexible schedules. The issue before the arbitrator is different. Did the Employer violate Section 24.10 when it modified existing and, at the time, current flexible work schedules? Section 24.10 says the following.

> Any employee currently working an alternative or flexible work schedule may continue to work the alternative or flexible work schedule, subject to the Employer's right to change schedules; however, employees will not have their alternative or flexible work schedules terminated in an arbitrary or capricious manner and such changes shall be made for a rational management purpose.

It is noted that the previous collective bargaining agreement in Section 24.10 stated that flex schedules "shall be continued." The current provision states that an employee "may" continue to work the alternative or flexible schedule. This change in wording is important, but the key words are "rational management purpose." The Union suggests that "rational management purpose" is equivalent to operational needs, that the standard for modifying a schedule has not changed from one collective bargaining agreement to another. The Union states that existing schedules are contractually protected, and the Employer agreed to this at the bargaining table, that flexible schedules would not change based on modified contract language. The Employer argues that it possessed the "management right" to modify the flexible work schedules as rational reasons or purposes existed. The Employer argues that the term rational purpose is a low level standard, and this is what the parties have bargained. This argument is compelling. Rational management purpose is not operational need. If the standard in the instant matter was operational need, the Employer would have a heavier burden to justify the schedule changes. The 2015 performance review of the agency made it clear that most operational needs were met with the diverse flexible work schedules enjoyed by many bargaining unit office staff. But the standard here is rational management purpose. The standard is a "management purpose" which must be rational. It is not based on operational need. It is not based on the convenience of the employee. The phrase does not connote collaboration with the bargaining agent. Concerns regarding the legislative oversight committee may be a rational reason to modify the schedules as is the desire to have employees scheduled on Friday in order that staff meetings may take place as argued by the Employer. Establishing overlapping schedules between bargaining unit employees and their supervisors

may not equate to improved efficiency or production, but doing so is rational. The basis is a management purpose. It may not be the best solution operationally, but the decision to implement is rational. An employee or the Union may not agree that changes are necessary or correct, and operational need may be questionable, but the standard in the instant matter is rational, and reasons elicited at the hearing at arbitration were "rational." The Union argues that the language in Section 24.10 has essentially been unchanged over numerous collective bargaining agreements in respect to existing flexible work schedules, and the changes enacted are therefore in violation of this provision. But the Employer argues that the language is clear and unambiguous, and the Arbitrator is therefore bound to deny the grievances. This argument has merit. Dictionary definitions of rational are "sensible," "good sense," "derived from reason," "judicious." Antonyms are "irrational", "stupid", "insane." The modified flexible work schedules may or may not improve or maintain the level of service which existed prior to January 2016, but the reasons for the changes were rational. Additionally, there is no evidence of past practice which would challenge the Employer's interpretation of the contract language in the instant matter.

The Union argues that the decision to modify the flexible work schedules was arbitrary and capricious, but it has the burden to prove this assertion. Under certain circumstances, proving arbitrary and capricious is often a tall task. The Union states that the Employer modified schedules for all office employees including those who are members of the Ohio Civil Service Employees Association (OCSEA) and exempt staff. The District 1199 collective bargaining agreement contains protections regarding the continuation of flexible work schedules, Section 24.10, while the OCSEA Agreement is silent in this respect and exempt

employees have no such guarantees. The Union argues that its members were therefore arbitrarily singled out as they were treated the same as all other members of the office staff who had no protective contract language regarding changes to flexible work schedules. Nevertheless, the opposite may be true. If District 1199 members were required to modify their flexible work schedules while other employees were permitted to maintain them, an argument could be made that an arbitrary and capricious decision had been made. This is not the case as all office staff were required, regardless of status, to modify their daily and weekly work schedules to meet the new requirements required by the Employer. The Employer argues that its reason to modify schedules was not based on a whim or prejudice. And the Employer did not eliminate flexible work schedules entirely. Although employees must work five eight hour days, they may begin their work day between 7:30 am and 9:00 am. In its post hearing brief, the Employer cites the decision of Arbitrator Jonas B. Katz in an arbitration case between the Ohio Bureau of Child Support and SEIU District 1199. Although the decision is dated 1992, it provides some guidance in the instant matter. It upheld the right of management to modify flexible work schedules of bargaining unit employees at the Child Support agency while the collective bargaining agreement stated that "the present practice of flex time shall be continued." The Union, in the Katz case, argued that management acted in an arbitrary and capricious manner. Arbitrator Katz' conclusion and denial of class action grievances is as follows.

> In the arbitrator's opinion, his authority is limited to the determination of whether or not the Bureau of Child Support in terminating the flex schedule exercised its management rights in an arbitrary or capricious manner. The evidence in the record demonstrates it did not. It made a decision based on what it perceived to be shortcomings of the Bureau's operation and its need to improve. It (sp) decisions in this

> respect were therefore not unreasonable, arbitrary or capricious. Although the Union and its members believe that nothing beneficial was accomplished by the change in the flex schedule, as previously noted, that determination rests in the hands of the employer so long as it does not act in an arbitrary or capricious manner.
> *State of Ohio, Department of Human Services, Bureau of Child Support and The Ohio Health Care Employees Union, District 1199, WV/KY/OH. Case No. 16-00-910612-0035-02-12. Jonas B. Katz, Arbitrator*

There is no evidence, in the instant matter, that the Employer's decision to modify the flexible work schedules of office staff represented by the Union reached the level of arbitrary or capricious.

In summary, the "2015 Year in Review" is an indication that, while enjoying alternative and flexible work schedules, the office staff of the Ohio Department of Medicaid performed at a high level. And for many years a majority of the bargaining unit in the office worked approved flexible schedules with no interruption of services. A new Attendance Policy was issued and then promulgated by the ODM in early 2016. It outlined the changes in flexible work schedules. Although evidence makes it clear that management, from senior staff to supervisors, failed to appropriately explain the changes to work schedules, the new Attendance Policy itself was not the driving force behind the modification to the alternative and flexible work schedules in the ODM office. As referenced earlier, evidence indicates that neither employees nor the Union were provided with clear response to their inquiries regarding the changes. Further, the Union was not engaged by Director McCarthy or members of the senior staff for a decision which disrupted long held work schedules; which impacted the work, personal and family lives of

impacted employees; and which effected the morale of office staff. Although not a model of constructive labor relations, this approach, nevertheless, was not a violation of the collective bargaining agreement. The removal of "operational need" from the provision regarding requests for flexible work schedules does not have a direct impact on the portion of Section 24.10 relating to current schedules, but it illustrates a trend in the most recent negotiations between the parties. The "rational management purpose" language has appeared in a number of collective bargaining agreements. It provides the Employer greater latitude in initiating work schedule changes. There is no past practice to suggest otherwise. Changes may not be related to operational need. The Union may express opposition to the changes, and such modifications may or may not improve efficiency and services, but said language allows the Employer to initiate changes to work schedules based on reasons which are rational or not irrational. Finally, the Union did not prove that the decision to modify flexible work schedules was arbitrary or capricious. The Union did not establish that the Employer violated Section 24.10 of the collective bargaining agreement when it changed the schedules of certain ODM office employees in the 1199 bargaining unit. Grievance Nos. MCD-2016-00354-12 and MCD-2016-00145-12 are therefore denied.

AWARD

Grievance Nos. MCD-2016-00354-12 and MCD-2016-00145-12 are denied.

Signed and dated this 7th Day of November 2017 at Cleveland, Ohio.

_____

Thomas J Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th Day of November 2017, a copy of the foregoing Award was served, by electronic mail, upon Catherine J. Harshman, Esq., Hunter, Carnahan, Shoub & Byard and Josh Norris for SEIU District 1199; and Daniel J. Guttman, Esq., Baker & Hostetler LLP, and Alicyn Carrel, Ohio Office of Collective Bargaining, for the State of Ohio.

_____

Thomas J Nowel, NAA
Arbitrator