

#1976

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTIONS

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Patty Rich – Class Action

Case No. 02-10-20070626-0017-01-03

Date of Hearing: November 21, 2007

Place of Hearing: OCSEA – Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: John T. Porter, Associate General Counsel, OCSEA

2nd Chair: Patty Rich, Grievance Manager, OCSEA

Witnesses:

Robert Goheen, Operations Director, OCSEA

For the Employer:

Advocate: Kristen Rankin, General Counsel, OCB

2nd Chair: Mike Ducco, Labor Relations Manager, OCB

Witnesses:

Mike Ducco

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: January 16, 2008

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio ("Employer") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether Article 26 of the CBA was violated by the Employer regarding the payment of holiday pay for part-time employees. This matter in accord with Article 25.02 was taken to arbitration.

This matter was heard on November 21, 2007, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were agreed to be submitted by both parties on or about December 10, 2007. The matter is before the Arbitrator for resolution.

BACKGROUND

Prior to March 1, 2006, part-time employees receiving holiday pay were paid differently by various state agencies. Part-time employees were paid 1-1/2 times their regular rate of pay for actual hours worked on a holiday, but the computation of pay regarding the amount of additional holiday pay/straight hours they received was inconsistent. In other words, how much holiday/straight pay, were part-time employees entitled to receive on the holiday?

In an effort to standardize the holiday pay for part-time employees, the Employer submitted a proposal, subject to counter offers, which was agreed to between the parties and is currently contained in Article 26 of the CBA.

Since March 1, 2006, as an example, if a part-time employee has averaged six (6) hours of work per day, the employee has been paid as follows:

1. If the employee worked an eight hour shift on the holiday, the employee would receive 1-1/2 times his regular rate of pay for eight hours, plus six¹ hours of straight time pay.

2. If the employee did not work, the employee would receive six hours of straight time² only as holiday pay.

Prior to March 1, 2006, some part-time employees would receive eight hours of straight pay as holiday pay while others would receive less, based upon how each agency computed straight time pay for part-time employees. To specifically address this issue, the parties negotiated language within Article 26.02 to determine the amount of straight pay part-time employees are to receive for the holiday. As referenced above, the amount of holiday/straight pay is based upon "the daily average hours worked" in the previous quarter.

The Union contends, however, that in addition to the language in Article 26.02, the Employer is required to follow Section 26.03 in that part-time employees who actually work on holidays are to be compensated at "straight pay" for each hour worked. In other words, Section 26.02 applies only if a part-time employee does not work, and Section 26.03 applies and supersedes 26.02 if a part-time employee actually works the holiday.

During the most recent contract negotiations, Articles 26.02 and 26.03 were modified in an effort to standardize the amount of holiday pay received by part-time employees. The Employer contends that the negotiated language is clear and unambiguous and that the remedy

¹ Assume that six hours represents the daily average actual hours worked in the previous quarter. Article 26.02 provides (in part):

" . . . Part time employees shall receive holiday pay on a pro-rated basis based upon the daily average actual hours worked, excluding overtime, in the previous quarter. The quarters shall be January 1, April 1, July 1 and October 1."

² Hereafter, holiday pay and straight time is used interchangeably in referring to the pay a part-time employee is eligible to receive under Article 26.02.

sought by the Union is beyond the agreement. Whereas, the Union contends that, if any ambiguities exist in the language, they must be construed against the Employer.

As a remedy, the Union proposed that any part-time employee who worked on a holiday be paid hour for hour, for each holiday worked. The Union however, requests that the remedy be limited to holidays worked ten (10) days prior to the filing of this grievance, and thereafter. The Employer seeks that the grievance be denied in its entirety.

ISSUE

Under the 2006-2009 CBA between OCSEA and the State of Ohio, how should part-time employees be paid when they work on the holiday?

RELEVANT PROVISIONS OF THE CBA

ARTICLE 26 – HOLIDAYS

26.01 Observance

The following holidays will be observed:

New Year's Day – First day in January;
Martin Luther King, Jr.'s Birthday – Third Monday in January;
President's Day – Third Monday in February;
Memorial Day – Last Monday in May;
Independence Day – Fourth day of July
Labor Day – First Monday in September;
Columbus Day – Second Monday in October;
Veterans' Day – Eleventh day of November;
Thanksgiving Day – Fourth Thursday in November;
Christmas Day – Twenty fifth day of December.

Any other day proclaimed as a holiday by the Governor of the State of Ohio or the President of the United States. A holiday shall start at 12:01 A.M. or with the work shift that includes 12:01 A.M. Upon request, an employee may observe a religious holiday provided that the time off is charged to vacation, compensatory time, personal leave or leave without pay.

When a holiday falls on a Sunday, the holiday is observed on the following Monday. When a holiday falls on a Saturday, the holiday is observed on the preceding Friday. In facilities that operate on Saturday and/or Sunday, or where Work Area Agreements exist, and when the

employees' work week is other than Monday through Friday, the holiday will be observed on the day on which it falls.

Employees scheduled to work more than eight (8) hours in a day, may be required to change their schedule to include five (5) eight (8) hour shifts during the week including the holiday, any such schedule changes will be in accordance with Section 13.02. In such case, the employee will receive eight (8) hours of holiday pay for the day the holiday is observed. If an employee is on an alternative schedule and, as defined in Section 13.13 of the Agreement, whose day off falls on the recognized holiday may have the next scheduled day designated as the holiday for purposes of this Article.

26.02 Holiday Pay

Employees shall receive holiday pay for the number of hours they would normally be scheduled to work the day the holiday is observed. An employee whose scheduled work day off falls on a holiday will receive eight (8) hours holiday pay for that day.

Part-time employees shall receive holiday pay on a pro-rated basis, based upon the daily average of actual hours worked, excluding overtime, in the previous quarter. The quarters shall be: January 1, April 1, July 1 and October 1.

26.03 Work on Holidays

Employees required to work on a holiday will be compensated at their discretion either at the rate of one and one-half (1-1/2) times their regular rate of pay, or granted compensatory time at the rate of one and one-half (1-1/2) times, plus straight time pay for the holiday. The choice of compensatory time or wages will be made by the employee.

Holiday work beyond regularly scheduled work shall be distributed among employees by the provisions covered in Article 13. No employees' posted regular schedule or days off shall be changed to avoid holiday premium pay. Once posted, the employee's schedule shall not be changed, except that an employee who is scheduled to work on the holiday may be directed not to report to work on the holiday. The Agency reserves the right to determine the number of employees needed to work the holiday.

26.04 Eligibility for Holiday Pay

An employee on vacation or scheduled sick leave during a holiday will not be charged vacation or sick leave for the holiday. Employees who are scheduled to work and call off sick the day before the day of, or the day after a holiday shall forfeit their right to holiday pay for that day, unless there is documented, extenuating circumstances which prohibit the employee from reporting for duty.

POSITION OF THE PARTIES

THE UNION'S POSITION

Article 26 was modified in the current CBA as a result of a proposal submitted by the Employer. A variety of methods were utilized by different agencies in determining how part-time employees were paid for holidays, and the Union was in agreement to standardize the process for holiday pay for part-time employees.

The Union agreed to the language in Articles 26.02 and 26.03, with the understanding that no part-time employee would be negatively impacted by the changes. Bob Goheen ("Goheen"), lead negotiator on Article 26 for the Union, testified that it was the intent of both parties to standardize this practice, but he was also told by the Employer that no employee would lose pay due to the changes.

In the past, some agencies would pay part-time employees for actual hours worked on the holiday. Currently the same employee is now being paid based upon the daily average of hours worked in the previous quarter. Consequently, a part-time employee who worked greater hours on a holiday than his/her daily average in the prior quarter, lost money.

The Employer, according to the Union, failed to sufficiently convey the impact of this change during negotiations, and any ambiguity in the modified language must be construed against the drafter (Union Post-Hearing Statement, p.1).

Moreover, Article 26.02 titled "Holiday Pay" language applies to all employees, and this subsection addresses how employees are paid who do not work on a holiday, whereas Article 26.03 titled "Work on Holidays" applies to all employees who are required to work on a holiday – including part-time employees - the distinction being, the language in Article 26.03 does not

limit its application to full-time employees only. Therefore, if a part-time employee works eight (8) hours on a holiday, their straight time pay must also be eight (8) hours.

Finally, the application of the interpretation sought by the Employer is unreasonable. As an example, if a part-time employee failed to work in the previous quarter, but worked the holiday, they would receive only twelve (12) hours of pay, whereas a full-time employee performing similar duties would receive twenty (20) hours of pay. This result amounts to a forfeiture of holiday pay and makes no sense.

THE EMPLOYER'S POSITION

Article 26.02 controls the practice of paying part-time employees, whether they work on the holiday or not. The part-time employee in accord with Article 26.02 is paid as follows:

- “● A part-time employee works an average of six hours per day in the previous quarter.
- The part-time employee does not work on Labor Day. The part-time employee is paid six hours at straight time as holiday pay.
- The part-time employee works eight hours on Veterans' Day. The part-time employee is paid for the eight hours worked at 1-1/2 times his regular rate of pay, plus six hours of pay at straight time for the holiday.”
(Employer's Opening Statement, p. 1).

The Union seeks a benefit beyond Article 26.02 by an interpretation of Article 26.03 that confers this benefit that is not in the language of Article 26.02. A reading of Article 26.02 specifies the methodology for how “straight time pay” is determined for full-time and part-time employees.

Article 26.02 provides specific language on determining the number of hours a part-time employee is entitled to receive as opposed to Article 26.03 language which is general. Article 26.03 makes no differentiation between full-time and part-time employees and is a general provision detailing how employees are compensated who work the holiday, not the number of

hours. Determining the number of hours a part-time employee is paid is governed by the pro-rated formula contained in Article 26.02.

The Union, during contract negotiations, was informed that the intent of the Article's changes was to standardize holiday pay for calculation purposes. Additionally, in furtherance of the implementation of the Ohio Administrative Knowledge System ("OAKS"), the changes would result in an increase of holiday pay for some and a loss for others. Although the lead negotiators for the State on Article 26 did not testify, Mike Ducco ("Ducco"), confirmed at the hearing the Union was aware of the financial impact, good and bad, that Article 26.02 would have on its members.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, exhibits and the post hearing statements, the grievance is denied. My reasons are as follows.

During negotiations, the parties exchanged four proposals regarding Article 26 (Joint Exhibits (JX) 3, 4, 5 and 8). Embodied in the current CBA is the language agreed to by the parties in JX 8, dated January 26, 2006. The evidence is undisputed that Article 26.02 was the Employer's proposal and modified primarily how part-time employees were to be paid holiday pay. No dispute exists that non part-time employees are entitled to be paid the "normal" number of hours they would be scheduled to work as holiday/straight time pay.

The dispute centers upon what determines the amount of hours part-time employees are to be paid as holiday pay under Article 26.02 and/or straight time pay under Article 26.03. It is undisputed that a problem existed in the variations part-time employees were paid by State agencies as holiday/straight pay in the prior years. This practice was addressed during the most recent negotiations, and the testimony of Goheen and Ducco concurred that both parties

understood the need to correct this problem and the changes agreed to in Article 26 represents that effort. The evidence indicates that a meeting of the minds occurred regarding this provision, and this Arbitrator's role is to interpret the Agreement.

Article 26.02's language is very specific in determining part-time employees "holiday pay", whether they work or not. It states in part "... Part-time employees shall receive holiday pay on a pro-rated basis based upon the daily average hours worked, excluding overtime, in the previous quarter . . . " (Emphasis added). None of the bargaining proposals exchanged by the parties (Joint Exhibit (JX) 6, 7, and 8) during negotiations suggest that this section was limited or did not apply to determining holiday pay and/or straight pay for part-time employees. The evidence fails to support the Union's position that Article 26.02 only applies if the employee does not work. On the contrary, Article 26.02 provides the methodology in determining what amount of holiday and/or straight time pay part-time employees will receive based upon the average hours worked in the previous quarter.

The application of the language is straightforward and provides that, if an employee is normally scheduled for eight (8) hours, he/she shall be paid eight (8) hours of holiday/straight pay. Also, if a part-time employee's pro-rated hours are calculated to five (5) hours, he/she shall receive five hours of holiday/straight pay. Any other interpretation would be contrary to the plain meaning of Article 26.02. Therefore, the language to standardize the computation of holiday pay for part-time employees was accomplished, and the evidence offered by the Union fails to contradict the final written agreement.

Finally, the reading of Article 26.03 in conjunction with Article 26.02 does not modify the language to make it ambiguous or unclear. The Union contends that under Article 26.03 all employees, including part-time employees, are entitled to eight hours of holiday/straight time

pay in addition to the 1-1/2 rate for actual hours worked. In other words, it alleges that Article 26.03, and not Article 26.02, determines holiday/straight time pay for part-time employees who actually work the holiday. Unfortunately for the Union, Article 26.03 is silent on the interpretation sought. Also if a part-time employee worked less than the typical six (6) hours on a holiday, the Union's position would result in loss of pay. A review of all the evidence fails to convince this Arbitrator that the evidentiary burden of proof borne by the Union is sufficient to find a contractual violation.

Moreover, the parties could have made it abundantly clear in Section 26.02 that part-time employees who work holidays were entitled to holiday pay based upon the actual hours worked that day. They did not. The Union contends that the application of Article 26.02 in some instances could be nonsensical, i.e., employees with no work hours in the preceding quarter are not entitled to holiday pay. Although this result may seem harsh, the parties have agreed to this result and no evidence exists to find that a mutual mistake occurred which would require reformation. Elkouri & Elkouri, 6th Ed., pp. 436-440 (2003). For the rationale previously stated, the grievance is denied.

CONCLUSION

For the reasons cited above, the grievance is denied.

Respectfully submitted this 16th day of January, 2008.

Dwight A. Washington
Dwight A. Washington, Esq., Arbitrator