IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO/DEPT OF YOUTH SERVICES (DYS)

AND

SERVICE EMPLOYEES INTERNATIONAL UNION/DISTRICT 1199

GRIEVANCE: Catherine DeSantis

Issues: Reduction of Hours, Change of Days, OT opportunities

BEFORE: ROBERT G. STEIN, NAA ARBITRATOR

FOR THE UNION:

Pete Hanlon
Union Advocate
SEIU 1199
phanlon@seiu1199.org

FOR THE EMPLOYER:

Larry L. Blake, LRO 3
Advocate for the Employer
DYS
larry.blake@dys.ohio.gov
Alicyn.Carrel@das.ohio.gov

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the terms of the collective bargaining agreement ("Agreement") (Joint Exh. 1) between The State of Ohio, Department of Youth Services ("Department," "DYS" or "Employer") and the Service Employees International Union/District 1199 ("Union"). That Agreement was effective from 2012 through 2015 and included the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, DYS-2015-01344-11, pursuant to the terms of Article 7.07(A) of the Agreement as a member of a panel of arbitrators selected by the parties. A hearing on this matter was conducted on September 27, 2017 at the Union's administrative office. The parties mutually agreed to that hearing date and that location, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not fully recorded via a written transcript, was subsequently declared closed upon the parties' individual submissions of post-hearing briefs on October 30, 2017.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have agreed that the matter is properly before the arbitrator for a determination on the merits. (Union brief p. 2) The parties have agreed to the submission of eight (8) joint exhibits.

ISSUES

(1) Did management violate the Agreement by reducing the hours of grievant without agreement between the appropriate parties? If so, what shall the remedy be?

(2) Did management violate the Agreement by changing grievant's agreed-upon flexible schedule in an arbitrary or capricious manner and without a rational management purpose? If so, what shall the remedy be?

(3) Did management violate the Agreement by taking the grievant out of the pool in medical for voluntary overtime? If so, what shall the remedy be?

RELEVANT AGREEMENT PROVISIONS

ARTICLE 5—MANAGEMENT RIGHTS
ARTICLE 6—NON-DISCRIMINATION
ARTICLE 7—GRIEVANCE PROCEDURE
ARTICLE 24—HOURS OF WORK AND OVERTIME
ARTICLE 27—EMPLOYEE STATUS
ARTICLE 29—LAYOFF AND RECALL

BACKGROUND

The Cuyahoga Hills Juvenile Correctional Facility ("CHJCF"), a DYS location, posted a vacancy for the Psych/MR Nurse Coordinator position beginning on January 22, 2013. Grievant testified that her position could also be designated as a psychiatric disability nurse coordinator, and that her position differs from that of a Nurse 1 because her job

responsibilities include ordering and dispensing of controlled substances. The job posting (Employer Exh. 2) described the job type as "part-time, permanent, bargaining unit" and "part-time position up to 32 hours per week." (Employer Exh. 2) Catherine DiSantis ("DiSantis" or "Grievant"} submitted an application for that position and was ultimately hired with an effective date of March 11, 2013.

After both her pre-service and on-the-job training were completed in late March 2013, Grievant worked 39.5 hours per week with a flexible schedule of four (4) or (5) varying workdays until fall 2013 when psychology supervisor Dr. Jennifer Franklin resigned on November 5, 2013. A resulting reduction in Grievant's work hours continued through April 2014 when psychologist Dr. Edmund Burke was added to the CJHCF staff on April 6, 2014. (Employer Exh. 1) No grievance was previously filed in response to that reduction in DiSantis' work hours.

A second notice of work hours' reduction was communicated to DiSantis via an e-mail on April 6, 2015 by Health Services Administrator Dale LaChance (LaChance"), which stated:

> On the days Dr. Burke is scheduled to be here, your schedule will be 9:00 a.m. 5:00 p.m. On Tuesday and Thursday, your schedule will be 9:00 a.m.-5:00 p.m. so that you can attend treatment teams. You will not work weekends or holidays. Total hours cannot exceed 32 hours. You must obtain permission from me prior to working past your scheduled time each day.

(Joint Exh. 6) Because the Grievant did not agree to the change in her regularly-scheduled hours, nor to the changes in her days of work, the instant grievance was filed on April 22, 2015. (Joint Exh. 8) Subsequent to that filing, Grievant's hours were reduced to thirty (30) per week on April 1, 2016. (Joint Exh. 7) Because the matter remained unresolved after

processing initially through the grievance procedure identified in Article 7, Section 7.06, it has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE UNION'S POSITION

(1) The Union asserts that the Employer violated Section 29.05 of the Agreement because there was never any conversation or consent from Grievant or the Union to any of the reductions in DiSantis' work hours from what was indicated in the original job posting pursuant to which she was originally hired. (Employer Exh. 2) The following language is included in Section 29.05 of the Agreement and has been identical in its inclusion for over twenty-two (22) years and seven (7) collective bargaining agreements between these same parties:

> If the work force is to be reduced, it shall be accomplished by layoff and not by any hours reduction. Only by agreement between the appropriate parties can the regular hours of employees be reduced.

The Union emphasizes that the reduction of the Grievant's hours was not agreed to by the Union or the Grievant.

In its post-hearing brief, the Union makes multiple references to a decision rendered by arbitrator Harry Graham in 1995 regarding two (2) Union members who worked for the Ohio Department of Developmental Disabilities whose hours were unilaterally reduced under a collective bargaining agreement including the same contractual language as Section 29.05. *Dist. 1199/SEIU and The State of Ohio, Dept. of Mental Retardation and Developmental Disabilities*, 96-1 Lab. Arb. Awards (CCH) P 6057 (Graham 1995). The Union specifically summarizes arbitrator Graham's decision as indicating that "the employer

violated the [Agreement] because it did not enact a layoff when a reduction in the workforce was indicated but instead unilaterally reduced the number of hours without mutual agreement by the appropriate parties . . . The broad authority to manage granted in Article 5—Management Rights—is specifically abridged by the terminology of Section 29.05. The employer has agreed to reduce the 'regular hours of employees' by 'agreement.' That did not occur in this case." (Union brief p. 4)

The Union also emphasizes the inclusion of the word "shall" in Section 29.05 as denoting compulsion. (*Id.)* The Union insists: "[I]f the workforce is to be reduced, it SHALL be accomplished by layoff. This was not done in this case. If it was, the Grievant would have had the opportunity to bump into a same and similar position of Nurse 1 based on her seniority and that of her peers." (Union brief p. 4)

(2) Regarding the second recognized issue focusing on the use of flexible scheduling, the Union refers to the following language included in Section 24.10 of the 2012-2015 Agreement, which was in effect at the time Grievant filed the instant grievance:

> The current practice of flex time shall be continued. Management reserves the right to change schedules, including flexible schedules, [sic] however, **employees will not have their flex time schedules terminated in an arbitrary or capricious manner** and such changes shall be made for a rational management purpose. The use of flexible work schedules shall be a subject for discussion in the Agency/Facility Professional Committees. Flexible work schedules can include adjusting the starting and quitting times of the work days and/or the number of hours worked per day and the number of days worked per week.
>
> The Employer agrees to consider 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. Subject to the Employer's right to schedule employees to satisfy its operational needs, such a schedule will be implemented upon the request of the Union and affected employees . . . (emphasis added)

The Union asserts that the Grievant's KRONOS time-keeping records clearly establish that she was working a flexible schedule, typically on Monday, Wednesday, Thursday and Friday with varying start and quit times. The Union also notes that LaChance testified at the hearing on this matter that Grievant was able to change her flexible schedule to meet her personal obligations regarding her son with special needs. (Union brief p. 7) By doing so, she was able to pick up her son from the bus or attend to issues at school with him. Grievant's own hearing testimony indicated that she was permitted to work on Sunday and take a different day off during the week to attend to some of those same issues. The Union insists that the flexible schedule Grievant worked was not recognized in any written format and was not required to be so documented. Additionally the Union claims that, while Section 24.10 does give management the right to change work schedules, including flexible schedules, it also prohibits management from terminating flexible schedules in an arbitrary and capricious manner and requires that flexible schedules be made for a rational management purpose.

The Union also notes that in October 2013 Grievant's hours were reduced and her schedule was changed in a unilateral fashion by the Employer, including termination of her flex schedule. (Joint Exh. 2; Union Exhs. 4, 5, 6, 8) The Union further notes that approximately six (6) months later, DiSantis was again permitted to work a flexible schedule beginning in April 2014. The flexible work schedule continued until April 2015, when DiSantis received a settlement agreement in response to her previously filed grievance regarding shift differential. (Union Exh. 11)

> Within days of this settlement, Mr. LaChance issue[d] two emails (Joint Exhs. 5, 6) reducing the Grievant's hours to 36 per week and subsequently to 32 hours per week and additionally cancelling her flexible schedule and changing her days of work . . . and changing her hours to end before or at 5 p.m. to avoid triggering the

> shift differential . . . Clearly, this termination of her flexible schedule is arbitrary and capricious in nature. Additionally, at no time did the Employer bargain with the [a]ffected employee or the Union over what would be a mandatory subject.

(Union brief p. 8) The Union argues that the contemporaneous Employer effort to limit Grievant's hours to those identified in the original job posting had no connection or bearing on the elimination of DiSantis' flexible schedule.

(3) The Union emphasizes that both the current and prior Agreement include the following language in Section 24.03(A), entitled "Overtime Assignment:"

> In institutional settings when the Agency determines that overtime is necessary, overtime shall be offered on a rotating basis, to the qualified employees who usually work the shift where the opportunity occurs. If no qualified employees on the shift desire to work the overtime, it will be offered on a rotating basis first to the qualified employee with the most state seniority at the work site. When there are no volunteers to work the overtime as outlined above, and/or where an emergency exists, reasonable overtime hours may be required by the Agency. Such overtime shall be assigned, on a rotating basis, first to the qualified employee with the least state seniority at the work site. This policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Union avers that DiSantis was improperly denied the opportunity to work overtime despite the fact that she is qualified in the same or similar classification as a Nurse 1 at the CHJCF. "She was again denied this opportunity due to asserting her Union rights to file and win grievances in the past." (Union brief p. 10) The Union also avers that "there [were] approximately 1500 hours of overtime attributed to the medical department between October 2015 and March 2016, yet the Grievant was not allowed to volunteer for any of it." (Union brief p. 9) It is emphasized by the Union that, once management has determined that overtime is necessary, the Agreement states that the overtime shall be offered to any qualified employee who desires to work those overtime hours on a rotating

basis by seniority. Based on her recognized status as a Nurse 1, the Union insists that DiSantis should have been permitted to volunteer for overtime work for the medical staff.

The Union requests that its grievance be sustained and DiSantis should be made whole in the following ways:

- Restore the Grievant's ability to work 39.9 hours per week. Additionally, DiSantis should receive the difference between what she would have received if she worked 39.9 hours per week and what she did receive based on the hours of work performed since her hiring date. Grievant's seniority credits and leave accrual banks should also be adjusted accordingly.

- Restoring the Grievant's previous flexible schedule to have her work on Monday, Wednesday, Thursday and Friday, including that she have the ability to work after 5:00 p.m. Additionally, Grievant is asking for the opportunity to work on recognized holidays.

- Permitting the Grievant's inclusion in the overtime pool in medical consistent with the current Agreement. The Union requests that Grievant be made whole for past overtime opportunities by either equalizing the rotations in the overtime pool or compensating her for missed overtime opportunities. Additionally, the Grievant is asking to be scheduled for holidays on a rotating basis as are other Nurse 1's in the medical center.

(Union brief pp. 9-10)

SUMMARY OF THE EMPLOYER'S POSITION

(1) DYS insists that the job posting for the position of Psych/MR Nurse Coordinator for which DiSantis did respond was originally posted as a "Part-time, Permanent, Bargaining Unit" position with a specific notation in the Supplemental Information section, which provides for "Part-Time Position up to 32 hours per week." (Employer Exh. 2; Employer brief p. 3) The Employer also asserts that "[a]s a permanent part-time employee, hours worked does not matter in gaining health care benefits." (Employer brief p. 5) The

Employer also notes that the Grievant testified at the hearing on this matter that she has declined any opportunity to receive health care benefits since she was originally hired.

The Employer claims that DiSantis, at the time of her hiring, was well-aware that the position to which she was being hired was a permanent part-time position with regular hours established so as "not to exceed 32 hours per week." (Employer Exh. 2) The Employer maintains that the 1995 decision by arbitrator Harry Graham is not relevant to the instant matter, purportedly based on a different fact pattern and also because "DiSantis was not guaranteed a certain number of hours per week. Since she might work anywhere from 0 hours up to 32 hours in any given week, her hours are indeterminate and not 'regular hours' of work as contemplated in [Agreement] Article 29.05. Therefore, they cannot be reduced as contemplated in that specific {Agreement] Article." (Employer brief p. 6)

(2) In response to the Union's claim that DYS violated the Agreement by arbitrarily or capriciously changing Grievant's "previously agreed-upon flexible schedule . . . without a rational management purpose," the Department notes that Grievant's original work schedule, starting May 27, 2013, consisted of her working Monday, Tuesday, Wednesday and Thursday. (Joint Exh. 2) DiSantis maintained that schedule until the week beginning on November 4, 2013, just before Dr. Franklin's resignation. "The Grievant maintained a workweek schedule of Monday/Tuesday/Friday until 2/24/14, when the schedule was changed to Monday/Tuesday/Thursday/Friday. It is important to note, the Grievant has maintained this schedule to date." (Employer brief p. 8) Those same workdays from 9:00 a.m. to 5:00 p.m. have been maintained since February 24, 2014. (Joint Exh. 2)

(3) The Employer contends that both Joint Exh. 2 and Employer Exh. 1 indicate that Grievant only worked two (2) Saturdays in September and October 2014 prior to the filing of the instant grievance in April 2015. DYS also notes that ". . . LaChance . . . testified that the Psych/MR Nurse Coordinator does not work either voluntary or mandatory overtime in the medical nursing position. Further, the Grievant did not fill a void in the Saturday schedule, but simply shadowed Ms. Krupp as an orientation to the nursing side to gain knowledge of the position [for which] she had applied." (Union brief p. 9) The Employer further asserts:

> Article 24.03—Overtime Assignment—provides in part: "In institutional settings when the Agency determines that overtime is necessary, overtime shall be offered . . ." The Union has failed to provide any documentation, evidence or testimony to support a violation of any contractual article(s) as it relates to the offering of overtime. When did the missed overtime opportunities occur? The Grievant requests compensation for denied overtime opportunities, however, she has failed to provide any dates in which she alleges that an overtime opportunity existed.

(*Id*.)

In summary, the DYS insists that the evidence does not demonstrate that Grievant has been harmed by any of the Employer's actions leading to the filing of the instant grievance and that it should be denied in its entirety.

DISCUSSION

In this arbitral proceeding involving the interpretation and application of the Agreement, as asserted by the parties' advocates, the arbitrator is a creature of the contract from which he derives his authority, and he must confine his decisions. An arbitrator's decision must be based on the terms of the contract which the parties themselves have

created and adopted to govern their relationship. It is the contract and its precise terms which must be examined to determine the merits of the case.

The law presumes that the parties each understood the terms and import of the contractual provisions they have drafted and subsequently ratified and that they had the intentions which the contractual terms manifest. The arbitrator's sole duty is to find out what was intended by the language actually incorporated into the Agreement.

> 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).

The arbitrator must apply contracts and collective bargaining agreements as they have been written and adopted by the parties' mutual consent to provide the groundwork for their relationship. 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). Arbitrators cannot search for inferences and intentions which are not apparent and not supported by contractual language documenting any purported intention.

> Because the words in a contract are chosen by the parties to express their intended meaning, the words are the most important single factor in ascertaining the parties' intent. When experienced negotiators have drafted a collective bargaining agreement, the presumption is that they understood what they were doing.

Goodman Co., L.P., Fayetteville, Tenn. and the Int'l Assoc. of Machinists and Aerospace Workers and Affiliated Dist. Lodge 711 and Stonebridge Local 2383, AFL-CIO, 06-1 Lab. Arb. Awards (CCH) P 3599 (Holley 2006).

It is generally-recognized that neither party to an agreement should be able to gain through arbitration what it was unable to successfully assert in prior negotiations or bargaining. The law presumes that the parties understood the import of their contract and that they had the intention(s) which its terms manifest. Ultimately, "[i]t is not for the arbitrator to question whether the parties made a good bargain." *Int'l Union of Operating Eng'rs, Local 3 and Premier Chems*. 00-1 Lab. Arb. Awards (CCH) P 3245 (Calhoun 1999). What is recognized by this arbitrator and his colleagues is that the bargain struck in negotiations must be recognized and enforced and that the parties are precluded from gaining through arbitration what was not successfully asserted or gained in their prior negotiations. "It is axiomatic that a party may not achieve in arbitration what it was not successful in achieving at the bargaining table." *Sanderson Plumbing Prods., Inc*., 106 LA 535 (Howell 1966); *Int'l Paper Co*., 106 LA 645 (Felice 1996).

It must be recognized that the Union, as the grieving party in this matter, has the burden of proving by at least a preponderance of the evidence that the Employer has violated the Agreement if it is to prevail.

> An established principle in labor relations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a contract violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining unit.

Am. Std., Paintsville, Ky. and United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH.) P 3213 (Allen 2005). After a thorough review of the facts surrounding this grievance, the evidence submitted, and the arguments presented by the parties, the arbitrator finds that the Union has only partially met its burden of demonstrating that the Employer has violated the Agreement by denying overtime opportunities to the Grievant.

An arbitrator's decision may not be based on competing equities or sympathies, but rather on the basis of the language which the parties themselves have adopted to govern their on-going relationship. The arbitrator is a creature of the contract from which he derives his authority. He is limited thereby and must, therefore, confine his decision as directed or prescribed. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator cannot substitute his own sense of equity and justice because his award must be grounded in the negotiated terms.

"A collective bargaining agreement is a contract, and the overriding concern of any court [or arbitrator} when construing a contract is to ascertain and effectuate the intention of the parties." *The Portage County Ass'n for the Mentally Retarded and Developmentally Disabled and The Portage County Bd.*, 06-2 Lab. Arb. Awards CCH P 3620 (Brundage 2006). 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 3483 (Snow 2003). The underlying question to be resolved is "What should the parties mutually understand the relevant contract provisions to mean in the specific circumstances giving rise to the parties' dispute?" The starting point is to review the actual language adopted by the parties to express their intent and to determine what that language meant to them

when the Agreement was drafted and mutually-adopted. *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).

(1) In interpreting contracts, the first place to look to determine the intent of the parties is the language itself, and where the language is clear and unambiguous, arbitrators must give effect to that plain language. *Communications Workers of Am., AFL-CIO, Local 621 and YP Tex. Yellow Pages L.L.C.,* 13-2 Lab. Arb. Awards (CCH) P 5932 (Holley 2013). The "plain meaning" principle of contract interpretation applies when, as in the present matter, there is specific language in a contract which speaks directly to, and addresses 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 4548 (Ruben 1999). According to this rule, if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the four (4) corners of the instrument itself, without recourse to extrinsic evidence of any nature. *Colonial Baking Co. (Chattanooga, Tenn.) and Bakery, Confectionery and Tobacco Workers, Local 25*, 110 LA (Holley 1993). If the words are plain and clear, conveying a distinct idea, then there is no occasion to resort to technical rules of interpretation, and the clear meaning will ordinarily be applied by arbitrators. *Colonial Baking Co*. If the language of a contract is free from ambiguity, an arbitrator should effectuate the clearly-expressed intent of the parties. *Duluth (Minn.) City and County Employees Credit Union and AFSCME Council 96, Local 3558*, 117 LA 28 (Befort 2002). In those circumstances, there is no need for an arbitrator to go beyond the face of the original job posting (Employer Exh. 2) to settle this specific issue.. *QUADCOM 9-1-1 Pub. Safety Communications Sys. (Carpentersville, Ill.) and Local 73, Serv. Employees Int'l Union*, 113 LA 987 (Goldstein 2000). Even though

the parties to an agreement may disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce its clear meaning. *S. Council of Indus. Workers and Johnstone-Tombigbee Mfg. Co., Inc*., 00-1 Lab. Arb. Awards (CCH) P 3378 (Hovell 2000).

Regarding the first issue in this matter, both the job posting (Employer Exh. 2) and the two (2) e-mails generated by LaChance and sent to Grievant (Jt. Exhs. 5, 6) clearly demonstrate that DiSantis accepted the DYS position based on its clearly-documented description as offering a maximum of thirty-two (32) paid hours per work week. Although Grievant had multiple opportunities early during her employment to work additional hours, DYS had no identified obligation to offer her additional hours or days of employment. Although DiSantis occupies a permanent employment status with the Employer, there is no plain language or recognized mandate that she should have previously been required to work more than the recognized thirty-two hours (32) weekly maximum or that prospectively in her current position as a part-time employee that she must be granted the opportunity to work additional hours over the identified thirty-two (32) regularly-assigned hours on a weekly basis.

(2) In addition to the above-cited language included in Section 24.10 of the Agreement, which indicates that "[m]anagement reserves the right to change schedules, including flexible schedules," Article 5(4), entitled "Management Rights," also recognizes the Employer's right to "determine the starting and quitting time and the number of hours to be worked by its employees." The April 16, 2015 e-mail from LaChance (Joint Exh. 6) provided Grievant advance notice of the change in her weekly day off from Thursday to Wednesday. LaChance's message indicated that "[o]n the days Dr. Burke is scheduled to be here, your schedule will be 9:00 a.m.-5:00 p.m. On Tuesday and Thursday, your schedule

will be 9:00-5:00 so that you can attend treatment teams." There is an absence of evidence from the Union regarding how the one-time change in DiSantis' day off can be viewed as arbitrary and capricious considering the identified dynamics desired to be implemented and accomplished based on the nature of Grievant's qualifications and the Employer's desire to have her be part of specifically-recognized duties on each of her four (4) workdays each week on a routine basis.

Arbitrators generally have recognized that management has broad authority to control its methods of operations, provided that, by exercising its authority, it does not violate the collective or individual rights of the employees under a collective bargaining agreement. *PACE Locals 7-0087/96 and Kimberly Clark Corp*., 01-1 Lab. Arb. Awards (CCH) P 3725 (Knott 2001). "If a management decision is taken in good faith, represents a reasonable business judgment, and does not result in subversion of the labor agreement, there is not a contract violation." *Teamsters, Local 117 and Bergen Brunswig Drug Co*., 00-1 Lab. Arb. Awards (CCH) P 3385 (Axon 2000), citing to *Shenango Water Co*., 53 LA 741, 744 (1969).

> Management has the right to operate its business in an efficient and economical manner. An arbitrator cannot substitute his judgment for that of management unless the record evidences an abuse of management discretion. An arbitrator will not lightly upset a decision reached by competent, careful management acting in the full light of the facts and without any evidence of bias, haste, or lack of emotional balance.

Norco Chem. Workers Union and Shell Chem. Co., 01-2 Lab. Arb. Awards (CCH) p 3996 (Massey 2001). In this matter, the evidence indicates that the Employer's actions in establishing an amended schedule, based on Wednesday identified as Grievant's day off, were based on its legitimate and reasonable intention to benefit most from the hours and

efforts expended by DiSantis for the DYS and its residents. That new flexible schedule had a "rational management purpose" and has remained in effect since February 24, 2014. (Employer brief p. 8; Joint Exh. 9) The Union has failed to prove that her work days were changed due to some discriminatory motive because she was **not guaranteed** any work hours beyond the thirty-two (32) hours identified in the original job description nor guaranteed any specific day off.

(3) The last identified issue involves the purported absence of overtime opportunities provided for the Grievant at DYS in alleged violation of Section 24.03 of the Agreement, as cited above. The Employer's response to this claim states:

> The Union has failed to provide any documentation, evidence or testimony to support a violation of any contractual article(s) as it relates to the offering of overtime. When did the missed overtime opportunities occur? The Grievant requests compensation for denied overtime opportunities. [H]owever, she has failed to provide any dates on which she alleges that an overtime opportunity existed.

(Employer brief p. 9) Instead of providing more probative and direct evidence to support the claim of overtime denial, the parties instead relied on circumstantial evidence to support their respective positions. "Circumstantial evidence must do more than give rise to mere suspicion." *City of Flint and Flint Police Officers Ass'n (FPOA)*, 14-2 Lab. Arb. Awards (CCH) P 6190 (McDonald 2013). "Circumstantial evidence, by its very nature, is less persuasive than direct evidence . . ." *Sanyo Mfg. Corp. and Int'l Union of Electronic, Elec., Technical, Salaried Machine Workers and Furniture Workers, AFL-CIO-CLC, Local Union 1106, 91-1 Lab. Arb. Awards* (CCH) P 8059 (Taylor 1990). "Circumstantial evidence is all evidence which raises an inference with respect to some other fact other than testimony offered to evidence the truth of the matter asserted." *Carmeuse Lime and Stone (formerly O N Minerals Mich. Co. and United Steelworkers*, *Local 182*, 09-1 Lab. Arb. Awards (CCH) P 4572 (Allen

2008). "Circumstantial evidence is merely the taking of known facts, determining if they are relevant and at the same time determining if they raise reasonable inferences or concepts concerning the occurrence[s] under investigation." *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union160 and Marigold Foods, Inc.,* 97-1 Lab. Arb. Awards (CCH) P 3127 (Berquist 1996). "The arbitrator must be sensitive to the particular problems involved in proving a [claim] solely based on circumstantial evidence. The key question then becomes whether the circumstantial proof is sufficient to sustain the accusation." (*Id*.) Based on the absence of more probative evidence regarding this issue, the Grievant's claim to any compensation for lost overtime income is not sustained.

Yet, there is sufficient evidence that the Employer acted in an arbitrary and capricious manner in denying the DiSantis overtime opportunities on the alleged premise it would put her over 32 hours, when previously, and for long periods of time, her hours well exceeded 32 hours at management's directive. According to the Grievant, Dr. Franklin told her she could work on Memorial Day in 2013, but then LaChance told her that her position was different than a Nurse 1 and she could not work on holidays. On cross examination LaChance stated that the practice was that the position held by the Grievant did not involve weekend or holiday work and that is what he told DiSantis. But, the record did not contain any other evidence of an established practice. Peter Renner, Deputy Director of DYS, stated he did not think 32 hours a week was the standard for part-time employees, but that working a part-time employee more than 32 hours a week is "up to the facilities discretion." The Position Posting does not contain limitations regarding holidays, but does contain a definitive statement regarding regular weekly hours "…up to 32 HOURS OF PER WEEK." (Management Ex. 2) Prospectively DiSantis shall be entitled to be considered and

enabled to work both overtime hours and holiday hours for which she is qualified as a Nurse 1 based on the criteria identified in Section 24.03 of the Agreement.

AWARD

The Union's grievance is sustained in part and denied in part.

The Union has failed to meet its burden of proof regarding issues 1 and 2, resulting in a denial of those specific claims.

Regarding the third issue, Grievant is denied recovery for any and all past instances of alleged overtime denial. However, prospectively DiSantis shall be given the opportunity to volunteer to work any and all overtime hours in the Medical Department for which she is qualified, including as a Nurse 1, and shall be permitted to volunteer to work holidays. Pursuant to Article 7, Section 7.07(C), the arbitrator's fees and expenses shall be equally shared by the parties.

Respectfully submitted to the parties on December 11, 2017,

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Robert G. Stein

Robert G. Stein, Arbitrator