PERMANENT ARBITRATION PANEL

In the Matter of the Arbitration --between-- Ohio Health Care Employees Union, District 1199 --and-- Ohio Department of Youth Services Community Services	OCB Grievance Number G87-0134

ARBITRATOR'S AWARD AND OPINION

John Patterson
For the State

Tom Woodruff
For District 1199

May 4, 1987

Calvin Wm. Sharpe
Arbitrator

On July 10, 1986, Philip D. Saunders filed a grievance on behalf of Youth Counselors Susan Davis and Maria Margevicius and others claiming that the Ohio Department of Youth Service (State) had "unjustly violated the contract by denying overtime when earned". The State denied the grievances at steps 1,2,3, and 4 of the grievance procedure. Being dissatisfied with the State's answer at earlier stages of the grievance procedure the Ohio Health Care Employees Union, District 1199 (Union), through President Tom Woodruff, submitted the grievance to arbitration. At a hearing held on April 28, 1987, at the Lausche Building in Cleveland, Ohio the parties stipulated to arbitrability and presented evidence and arguments on the merits of the grievance.

I.

STATEMENT OF THE CASE

A. ISSUES

Did the State breach the collective bargaining agreement by requiring employees to schedule time off at the straight time rate in lieu of receiving overtime pay or compensation time at the premium rate (time and one-half) for hours worked after 5:00 p.m.?

B. RELEVANT PROVISIONS OF THE JUNE 12, 1986 TO JUNE 11, 1989 AGREEMENT

ARTICLE 1 -- PURPOSE AND INTENT OF THE AGREEMENT

It is the purpose of this agreement to provide for the wages, hours and terms and conditions of employment of the

employees covered by this agreement; and to provide an orderly, prompt, peaceful and equitable procedure for the resolution of differences between employees and the empoyer. Upon ratification, the provisions of this agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and conditions of employment; and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein. All references to the Ohio Revised Code within this agreement are to those sections in effect at the time of the ratification of this agreement.

ARTICLE 5 -- MANAGEMENT RIGHTS

Except to the extent modified by this agreement, the employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1) - (9) of the Ohio Revised Code, . . .

* * *

ARTICLE 10--TRAVEL

Section 19.01 Time

Travel time as required by the agency is considered work time if the travel is between work sites or between the employee's place of residence and a worksite other than the assigned worksite before, during or after the regular work day. However, the time spent in traveling from an employee's place of residence to and from his/her headquarters shall not be considered work time. Overnight stay shall not be considered as travel time or hours worked. There shall be no standard travel time from place to place. Any employee who must begin work at some location other than his/her regular location shall be paid from the time he/she leaves his/her residence until the time he/she returns to his/her residence. Actual mileage shall be paid, and there shall be no standard mileage from place to place.

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ARTICLE 22 -- HOURS OF WORK AND OVERTIME

Section 22.02 Date of Overtime Pay

Employees shall receive compensatory time or overtime pay

for authorized work performed in excess of forty (40) hours per week, except for the following classifications:

65341 Physician
65343 Physician Specialist
65351 Psychiatric Physician
65371 Psychiatrist

Compensatory time and overtime pay for physicians shall be addressed in Article 41 Physicians.

Section 22.04 Overtime and Compensatory Time

Overtime work shall be compensated as follows:

A. Hours in an active pay status in excess of forty (40) hours in any calendar week shall be compensated at a rate of one and one-half (1 1/2) times the regular rate of pay for each hour of such time. Regular rate of pay is defined as the base rate of pay plus longevity and supplements excluding shift differential.

B. An employee may elect to take compensatory time off in lieu of cash overtime payment for hours in an active pay status more than forty (40) hours in any calendar week. Such compensatory time shall be granted on a time and one-half (1 1/2) basis.

* * *

Section 22.11 Flexible Work Schedules

The present practice of flex time shall be continued. Extending the use of flexible work schedules shall be a subject for discussion in the Agency 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.

Section 22.13 Posting of Work Schedules

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In non-institutional settings where the work schedule is fixed, the agency shall not change an employee's schedule to avoid the payment of overtime.

Section 29.03 Facility Professional Committees

For each institution within the Departments of Mental Health, Mental Retardation and Developmental Disabilities, Rehabilitation and Correction and Youth Services, there shall be a Facility Professional Committee.

During the first year of the agreement the Committee shall discuss the feasibility of extending the use of flexible work

schedules within the facility and the feasibility of a job sharing program.

C. THE FACTS

Employees within the classification of Social Services Worker--3 (Youth Counselors) are professional employees who perform a variety of counseling services for youths who have been committed to institutions for a variety of criminal offense. These services are provided before the youths are released from the institutions and after they have started the process of re-entering the community. Effective conseling requires Youth Counselors to maintain contact not only with the youth but also with other agents such as parents (foster or natural), school, employment, or community programs that might affect the youth's successful re-entry into the community.

Youth Counselors work a normal work week from 8:00 a.m. to 5:00 p.m., Monday through Friday. Youths who receive counseling services are located either in institutions or communities in various parts of the state, and the scheduling of counseling sessions is within the discretion of the Youth Counselor. Because of the schedules of clients (youths or parents), Youth Counselors occasionally must schedule sessions with their clients after their normal work day.

Because Youth Counselors were exempt from the provisions of the Fair Labor Standards Act (FLSA), they were not paid at time and one-half for hours worked in excess of 40 per week before the Agreement was reached. Rather, Youth Counselors working

overtime were permitted to schedule an equal amount of time off with supervisory approval, called approved time off (ATO).

At the negotiations leading to the current Agreement the State proposed that employees exempted form the FLSA not receive compensatory time or overtime pay. The Union rejected the proposal, and Section 22.02, the current overtime provision of the Agreement, covers all employees. However, since the effective date of the contract the State has continued to implement the ATO policy instead of paying compensatory time or overtime when Youth Counselors schedule client contacts after the normal work day. The state has paid the premium overtime rate only in those cases where the Youth Counselor does not have the option of scheduling work pursuant to her professional discretion. Typically, these cases involve bus schedules, conferences, workshops, and other assignments where the Youth Counselor cannot adjust the schedule to avoid overtime. Since Youth Counselors do have the discretion to schedule client contacts, the State compensates any contacts requiring visits after 5:00 p.m. under the ATO policy rather than the compensatory time and overtime provisions of the Agreement. As a result of the State's interpretation of the Hours Of Work And Overtime provisions of the Agreement, Youth Counselors Susan Davis, Brenda Weems and Maria Margevicius have accumulated overtime for which they have not been compensated at the premium rate.

On January 15, 1987, the parties settled several grievances involving the claims of Youth Counselors for compensatory time and overtime payments instead of compensation under the ATO policy. Under the Settlement Agreement the grievants received the

difference between compensation at straight time pay under the ATO policy and compensation at the premium overtime/compensatory time rate for hours worked beyond the normal work day. The parties agreed that the settlement would set a precedent for resolving similar overtime grievances.

II.

CONTENTIONS OF THE PARTIES

A. THE UNION'S POSITION

The Union contends that the requiring Youth Counselors to take time off rather than compensating them with compensatory time or overtime pay violates Section 22.04 and 22.13 of the Agreement. It argues that Sections 22.04 requires either form of compensation at premium rates for hours worked in excess of 40 per week and that Section 22.13 specifically forbids the State from changing an employee's schedule to avoid the payment of overtime. Compensating Youth Counselors at straight time under the ATO for client counselings after 5:00 p.m. violates the Agreement under the Union's interpretation of the overtime provisions. The Union also argues that the settlement agreement is dispositive of this case.

B. THE STATE'S POSITION

The State contends, on the other hand, that its use of the ATO policy to compensate Youth Counselors for client couselings outside the normal work day is consistent with its authority under the contract. Citing the pre-Agreement orgin of the ATO policy (1980) and the practice under it of scheduling time off

at straight time pay to compensate Youth Counselors for overtime work, the State argues that it is continuing "the present practice of flex time". Thus, the Agreement authorizes the use of approved time off in lieu of compensatory time or overtime payments for client counseling scheduled outside the normal work day under the State's interpretation of Section 22.11. The State adds that the management rights clause of the contract, which incorporates the Ohio Revised Code Section 4117.08(C)(1) - (9), gives the State the right to schedule work unless the right is modified by the Agreement. It urges that Section 22.13 does not modify the scheduling right in view of Section 22.11 and agency practice under the ATO policy. Finally, the State argues that the limited precedential effect of the settlement agreement has no application in this case.

III.

DISCUSSION AND OPINION

Both the State and the Union agree that the settlement agreement of January 15, 1987, has precedential effect. They disagree, however, on the scope of this effect. The Union claims that the settlement establishes a rule that straight time compensation under the ATO in lieu of compensatory time/overtime pay is never appropriate. The State, on the other hand, claims that the settlement merely establishes that Counselors who are required to attend workshops, such as the grievants in that case, are entitled to compensatory time/overtime pay under Section 22.04. The Union resists the State's limited interpretation of the settlement by citing an earlier proposed settlement that

contained limiting language not contained in the final settlement.

The State has admitted that it must pay compensatory time or overtime in cases where Youth Counselors have no scheduling discretion such as emergencies, bus schedules, conferences and workshops. The instant dispute concerns the applicability of this obligation where Youth Counselors do have scheduling discretion as in arranging client conferences. Moreover, the Union's refusal to agree that the grievant's were only entitled to compensatory time or overtime pay because they were in travel status, is no evidence that it did not agree with the limitation urged by the State--compensatory time or overtime payments are only appropriate for overtime emergencies, conferences, etc., where Youth Counselors do not have a scheduling option. Since the parties can only agree on this limited scope of the settlement as precedent, the settlement of January 15, 1987 canot be dispositive of this case.

The key issue in this case is how Sections 22.04 (granting compensatory time and overtime for work in excess of 40 hours), 22.11 (continuing the practice of flex time) and 22.13 (prohibiting the state from changing an employee's schedule to avoid overtime) affect a Youth Counelor's right to overtime/compensatory time pay, when overtime is scheduled by the Counselor. If flex time under Section 22.11 includes the practices of scheduling client conferences after normal working hours and scheduling time off under the ATO policy to compensate for the overtime, the Youth Counselors are arguably only entitled to ATO, notwithstanding Section 22.13. On the other

hand, if these practices are not flex time, there is not even an arguable contractual basis for denying compensatory time or overtime pay to Youth Counselors in light of Section 22.13.

The Arbitrator finds Section 22.13 to be controlling on this issue. Roberts' Dictionary of Industrial Relations defines flextime as follows:

> A work scheduling method that allows employees to vary their arrival and departure time around a required number of work hours. Such plans may require all employees to be on the job during certin operating hours.

Before the Agreement became effective the State had no formal flex time policy for Youth Conselors under this definition. There had been some discussions about instituting a flex time system, and after the effective date of the Agreement the Union and the State considered the issue pursuant to their charge under Section 29.03, the Facility Professional Committees provision of the Agreement. A draft of the State's flexible hours proposal growing out of these Committee discussions and the definition of flexible work schedules under Section 22.11 of the Agreement show that this conventional definition was contemplated by the parties in Section 22.11. In addition, flextime policies already promulgated in the Department of Human Services and the Department of Health show that the terms "flextime" and "flexible hours" are used interchangeably.

Since nine state agencies are signatories to the agreement, the parties obviously intended to preserve any existing agency flextime practices and extend such practices where previously non-existent. The State might argue, however, that "flextime" in

the case of Youth Counselors meant the scheduling of after 5:00 p.m. client contacts along with the ATO practice, since that was the only pre-Agreement practice involving flexibility in scheduling hours. This argument creates an ambiguity, however, since it urges that a term of art be given something other than its conventional meaning.[1]

And even if the "flextime" term in Section 22.11 were deemed ambigous as applied to Youth Counselors, who were previously governed only by the ATO policy and never under a conventional flextime policy, that Section could not be interpreted to permit the avoidance of overtime in this case. Giving effect to clear contractual provisions over more general or ambiguous provision is a well-settled principle of contract interpretation. See Elkouri and Elkouri, How Arbitration Works, pp. 356, 348 - 350 (3d ed. 1985). Section 22.13 clearly directs the agency "not [to] change an employee's schedule to avoid the payment of overtime". The State's requirement that Youth Counselors take time off at straight time pay rather than take overtime pay or compensatory time to compensate for overtime work is a change of work schedule to avoid overtime. A clearer application of a contractual provision to an employer practice can hardly be imagined.[2]

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[1] The evidence, particularly Regional Administrator William Avery's memorandum dated April 4, 1980, clearly indicates that the ATO policy was promulgated to compensate FLSA-exempt Youth Counselors for overtime work.

[2] The application of this principle of contract interpretation makes it unnecessary for the Arbitrator to consider the distinction that the State seeks to draw between overtime where

V.

AWARD

The grievance is upheld. The State shall pay all Youth Counselors who have accumlated overtime since the effective date of the contract the difference between the straight time rate for such hours worked and the premium rate to which they were entitled under Section 22.04 of the contract. Each counselor may elect compensatory time off in lieu of cash overtime payment under Section 22.04(B).

May 4, 1987

Calvin William Sharpe
Arbitrator

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the Counselor has no scheduling option and overtime where she does have a scheduling option. The Arbitrator sees no reason for the distinction where there is no evidence of abuse of overtime by Counselors scheduling client contacts--the most accumulated by a counselor during the 10 months between the effective date of the contract and the date of the hearing was 21 hours--and when the state seems to acknowledge that client contact is both an important part of youth counseling and may not be possible in some cases during the normal work day. Of course, a totally different problem of interpretation would be presented, if Youth Counselors used their scheduling discretion to create unnecessary overtime, rather than (as the evidence shows) to schedule client conferences at the only reasonably available times.

The authorities cited by the State in support of management's right to schedule work are inapposite to this case. Those cases involve this rarely disputed management right, when the contract contains no limitation. See e.g. CAlumet & Hecla, Inc., 42 LA 25, 28 (Howlett, 1963) As noted above, the contract specially limit management's scheduling right in this case.