

OPINION AND AWARD

**Ohio Department of Youth Services
-AND-
Ohio Civil Service Employees Association, Local 11, AFSCME**

APPEARANCES

For DYS

Victor Dandridge, OCB, State of Ohio Labor Relations Administrator
Cullen Jackson, Human Resource Analyst
Daniel Batts, Operations Facilitator

For OCSEA

Jessica Chester, Classification & Arbitration Coordinator, OCSEA
Jennie Lewis, Paralegal, OCSEA Office of General Counsel
Bruce Thompson, OCSEA Staff Representative

Case-Specific Data

Hearing Held

September 9, 2020

Case Number

DYS - 2019 – 02844-03

Subject

Violation of Last Chance Agreement—Removal

Decision

Grievance Sustained in Part and Denied in Part

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1 **I. The Facts**

2 The parties to this disciplinary dispute are the Ohio Department of Youth Services (“DYS” “Management”) and
3 the Ohio Civil Service Employees Association, Local 11, AFSCME (“OCSEA”), representing Mr. Steven Martin
4 (“Grievant”).¹ When he was terminated, the Grievant was a Youth Specialist assigned to a Special Duty Shift Post
5 (“SDSP Youth Specialist”).²

6 Before addressing the substance of the instant dispute, a brief historical reference is indicated for proper perspective.
7 On January 12, 2017 the Grievant was removed for “Failure to work mandatory overtime. Failure to work specific hours
8 or shifts when required (mandatory overtime).”³ Also, on January 12, 2017, the Parties entered a Last Chance Agreement
9 that reinstated the Grievant pursuant to the following continuing restrictions: * * * * Steven Martin agrees to follow all
10 rules, policies and procedures of the Department of Youth Services and the Indian River Juvenile Correctional Facility.⁴

11 * * * *

12 It is agreed by all of the parties that if the employee violates the *Last Chance Agreement*
13 or if there is continued violation of any *Attendance-Based* Work Rules(s) as contained
14 within DYS Policy 103.17 (to include Rule Violations and Discipline Grid) the
15 appropriate discipline shall be termination from . . . (his) position. The Department need
16 only *prove the employee violated the above agreement(s) Rule(s)*⁵

17 Returning to the substance, the instant dispute erupted on or about April 18, 2019 when the Grievant refused to work
18 mandatory overtime after several second-shift employees were legitimately absent (“shift shortages” or “second-shift
19 shortages”). In response, DYS terminated the Grievant for violation of DYS Rule 2.08—Failure to Work Mandatory
20 Overtime. DYS argues that the Grievant’s violation of Rule 208A also violated the LCA, which was still in effect. The
21 Union grieved Management’s disciplinary decision as violative of both the Collective-bargaining Agreement⁶ and the Pick-
22 A-Post Agreement.⁷

23 **II. The Arbitral Hearing**

24 The Parties ultimately failed to resolve the dispute and submitted it to the Undersigned for arbitral review. On
25 September 9, 2020, the Undersigned heard the instant dispute in a virtual arbitral hearing. During that hearing, the Parties’

¹ Hereinafter collectively referenced as “The Parties.”

² Other non-Youth Specialist employees assigned to Special Duty Shift Posts are hereinafter referenced as “SDSP employees.”

³ Joint Exhibit 13, at 73.

⁴ Joint Exhibit 13, at 74.

⁵ *Id.*, at 74 (emphasis added) (hereinafter referenced as “LCA.”)

⁶ Joint Exhibit 1.

⁷ Joint Exhibit 9.

1 advocates made opening statements and introduced documentary/testimonial evidence to support their respective positions
2 in this dispute. All documentary evidence was available for proper and relevant challenges. All witnesses were duly sworn
3 and subjected to both direct and cross-examination. At the close of the arbitral hearing, the Parties agreed to submit Post-
4 hearing Briefs. Upon receipt of those briefs, the Undersigned closed the official record for this matter.

5 III. The Issue

6 The Parties mutually adopted the following issue: Did the Grievant violate the LCA when he refused to work
7 mandatory overtime on April 18, 2019 in violation of DYS Work Rule 2.08A - Failure to Work Mandatory
8 Overtime? If not, what should the remedy be?
9

10 IV. Relevant Contractual and Regulatory Provisions

11 Section 5—Pick-A-Post Agreement

12 Special Duty Shifts Posts:

13 Management reserves the right to designate certain posts in special duty with specific days off in conjunction with that
14 post. . . . *Special duty shift posts* will have *weekends and holidays off* with the *exception of Visitation*. Youth Specialists
15 assigned to *Special Duty Posts* shall be *mandated* if *mitigating/aggravating circumstances arise operationally*.⁸
16 **Note:** *Special Duty shift* are NOT available for 2nd shift retention or overtime *unless mitigating/aggravating*
17 *circumstances arise*.⁹

18 Contractual Provisions

19 Section 13.07 Overtime

20 The *Employer* has the *right to determine overtime opportunities as needed*.¹⁰
21

22 Article 5-Management Rights

23 The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the
24 operation of its work and business and the *direction of its workforce* which the Employer has not *specifically abridged,*
25 *deleted, granted or modified by the express and specific written provision* of the Agreement are, and shall remain,
26 *exclusively* those of the Employer.¹¹

27 Additionally, the Employer retains the rights to. . . 4) determine the starting and quitting time and the *number of hours to*
28 *be worked* by its employees . . . 6) determine the *work assignments* of its employees.¹²

29 Rule 208A

30 Failure to work mandatory overtime. Failure to work specific hours or shifts when required (Mandatory overtime)

31 V. Summaries of the Parties' Arguments

32 A. Summary of DYS' Arguments

I. DYS maintains that based on the following reasons, it discharged the Grievant for just cause:

⁸ Hereinafter referenced as "Paragraph 1".

⁹ Joint Exhibit 9, at 22 (emphasis added) (Hereinafter referenced as "Note").

¹⁰ Joint Exhibit 1, at 32. (emphasis added).

¹¹ *Id.*, at 11 (emphasis added).

¹² *Id.*, at 11-12. (emphasis added).

- A. The language of Section 5 under the Pick-A-Post Agreement authorizes Management to mandate SDSP Youth Specialists to work overtime when there are mitigating /aggravating circumstances.
- B. Furthermore, DYS contends that shift shortages constitute mitigating/aggravating circumstances under Section 5.
- C. DYS also references Articles 5 (Management Rights) and 13.07 (Overtime) in the Parties' Collective-bargaining Agreement to corroborate its claim of authority under Section 5 of the Pick-A-Post Agreement.
- D. DYS contends that employees subject to Section 5 of the Pick-A-Post Agreement may decline mandatory overtime assignments only if those employees have either doctors' appointments or FMLA leave.
- E. DYS maintains that even if Management lacked authority to mandate overtime under Section 5 of the Pick-A-Post Agreement, the Grievant was obliged to obey and then grieve the erroneous mandatory overtime assignment.

1

B. Summary of OCSEA's Arguments

- I. The Union contends that for the following reasons, Management lacked just cause to fire the Grievant:
 - A. Shift shortages do not constitute "mitigating/aggravating circumstances" under Section 5 of the Pick-A-Post Agreement. Therefore, Management lack authority to mandate the Grievant to work overtime.
 - B. Management had other reasonable alternatives to mandating overtime for shift shortages.
 - C. Despite the Union's repeated requests for Management to define "mitigating/ aggravating circumstances," Management has failed to do so.

2.

3

VI. Evidentiary Preliminaries

4

Because this is a disciplinary dispute,¹³ DYS shoulders the burden of proof/persuasion regarding its charge that

5 the Grievant violated the LCA by declining to work mandatory overtime on April 18, 2019. Therefore, DYS must establish

6 its charge by preponderant evidence in the arbitral record as a whole. Because DYS has the burden of persuasion in this

7 dispute, the Arbitrator shall resolve all *reasonable doubts* regarding the charge against DYS. Irrespective of the strength

8 or weakness of the Union's case, DYS cannot prevail in this dispute without adducing preponderant evidence in the arbitral

9 record as a whole that the Grievant violated the LCA by refusing to work mandatory overtime. Finally, the Union has the

10 burden of persuasion with respect to its allegations and affirmative defenses, both of which the Union must establish by

11 preponderant evidence in the arbitral record as a whole. Reasonable doubts about whether the Union satisfied these

12 evidentiary burdens shall be resolved against the Union.

13

VII. Analysis and Discussion

14

A. Management's Authority Under Section 5 of Pick-A-Post Agreement

15 The pith of the Parties' disagreement in this dispute is whether Management had authority to assign the Grievant

16 mandatory overtime under Section 5 of the Parties' Pick-A-Post Agreement ("Section 5"). Accordingly, the analysis begins

¹³ Although the instant dispute is indeed disciplinary, resolution of this dispute turns largely on contractual interpretation.

1 with the relevant language of Paragraph 1 and the Note.

2 Section 5 contains the following provisions:

- 3 1. **(Paragraph 1)** SDSP employees are entitled to weekends and holidays off except when Visitation hours (Visitations")
4 fall on those either weekends or holidays. The next sentence, in the same paragraph, allows SDSP Youth Specialists
5 to be *mandated* should there be mitigating and aggravating circumstances *operationally*.
6 2. "Note: Special Duty staff are Not available for second shift *retention or overtime* unless mitigating/aggravating
7 circumstances arise. . . ."14

8
9 The gist of Management's position under Section 5 is: (1) Second-shift shortages triggered the need to mandate
10 overtime; and (2) Second-shift shortages constitute "mitigating/aggravating circumstances" under the Note. During the
11 arbitral hearing, Management twice referenced "operationally" under the Paragraph 1 to stress that shift shortages are
12 *operational* in nature and, therefore, qualify as "mitigating/aggravating circumstances" under the Note.¹⁵

13 The Arbitrator agrees that shift shortages are inherently operational. However, as discussed below, this conclusion
14 undermines Management's fundamental position in this dispute. First, Management's arguments essentially import
15 "Operationally" from Paragraph 1 into the Note. Yet, "Operationally" *does not* appear in the Note. As discussed in detail
16 below, the omission of "Operationally" in the Note eviscerates Management's interpretation of Paragraph 1 and the Note.

1. PARAGRAPH 1

17 Paragraph 1 and the Note contain several features that are pivotal to resolving this dispute. First, paragraphs 1 and the
18 Note recognize two classes of employees: SDSP employees and SDSP Youth Specialist. Second, Paragraph 1 and the
19 Note contain "Mitigating/aggravating circumstances." Third, Paragraph 1 and the Note address two *wholly* different
20 subjects: Paragraph 1 addresses only "visitations"; the Note addresses only "overtime" and "retention." Fourth, Paragraph
21 1 *unconditionally* requires SDSP employees to work "visitations" that happen to occur on holidays and weekends.
22 Conversely, Paragraph 1 categorically *exempts* SDSP Youth Specialists from working "Visitations" on holidays and
23 weekends *unless* those "Visitations" occur under "mitigating/aggravating circumstances . . . [that] arise
24 *OPERATIONALLY*."16

¹⁴ Joint Exhibit 9, at 22 (emphasis added).

¹⁵ During the arbitral hearing, Management claimed that a second-shift shortage not only triggered the need for mandatory overtime but also constituted an operational event that satisfied "operationally" in Paragraph 1.

¹⁶ Several times during the arbitral hearing, Management cited Articles 5 and 13.07 in the Parties' Collective-bargaining Agreement apparently contending that somehow Management retains *sole discretion* regarding overtime assignments, including assignments of mandatory overtime. As discussed below, however, this is an interpretive "bridge too far" in the instant dispute.

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1 to apply “operationally” to “overtime” in the Note, they could have done so. Because the Note lacks “operationally,”
2 Management’s stressing the operational nature of shift shortages in Paragraph 1 hardly qualifies those shortages as
3 “mitigating/ aggravating circumstances” in the Note. Therefore, the Undersigned holds that nothing, under either Section
4 5 in general or the Note in particular required the Grievant, as a SDSP Youth Specialist, to accept second-shift mandatory
5 overtime assignments. Correspondingly, nothing in Section 5 *authorized* Management to *mandate* the Grievant, as a
6 SDSP Youth Specialists to work mandated second-shift overtime.

7 **(a) Impact of Articles 5 and 13.07**

8 Article 5 (“Management Rights”) provides in relevant part:

9 The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in
10 regard to the operation of its work and business and the direction of its workforce which the Employer has
11 not specifically abridged, deleted, granted or modified by the express and specific written provision of the
12 Agreement are, and shall remain, exclusively those of the Employer. Additionally, the Employer retains the
13 rights to: . . . (4) determine . . . the number of hours to be worked by its employees; . . . (6) determine the
14 work assignments of its employees. . . .”
15

16 Article 13.07 (“Overtime”) provides in relevant part: “the Employer has the right to determine overtime opportunities as
17 needed.” Management contends that the foregoing language in Articles 5 and 13.07 grants Management absolute control
18 of overtime.

19 The Arbitrator disagrees. If taken literally, Management’s expansive reading of the foregoing contractual provisions
20 would effectively nullify/repeal Section 5. Yet, a cornerstone of contractual interpretation is to avoid nullifying any part
21 of the Parties’ regulatory scheme. Nothing in the arbitral record suggests that the Parties somehow intended to subordinate
22 the Pick-A-Post Agreement to the Collective-bargaining Agreement or vice versa. Instead, the accepted approach is to
23 interpret those agreements together in a manner that preserves the intent of each. Accordingly, one must read Articles 5
24 and 13.07 in light of Section 5. Having examined Articles 5, 13.07, and Section 5, the Arbitrator is persuaded that the
25 *inherent operational nature* of staff shortages precluded Management from using them as a basis for subjecting the
26 Grievant to mandatory overtime assignments under the Note. Restated, Management may not *mandate* the Grievant to
27 work *overtime* under the Note because of staff shortages.

1 **B. Obey and Grieve**

2 Management also contends that even if it lacked the authority to mandate overtime for the Grievant under Section 5,
3 the Grievant's termination stands. The rationale here is that the Grievant should have accepted the mandatory overtime
4 and subsequently grieved that assignment under the Parties' negotiated grievance procedure. The Arbitrator agrees with
5 Management but only to a point. In other words, the Grievant should have obeyed the order to work mandatory overtime
6 and then grieved it. His failure to do so constitutes a violation that warrants the imposition of *some disciplinary measure*.
7 However, as discussed below, that disciplinary measure hardly approaches termination.

8 **VIII. Penalty Assessment**

9 For all of the foregoing reasons set forth in this arbitral opinion, the Undersigned holds that the Grievant's refusal of
10 Management's mandatory overtime assignment under the Note *did not violate* Rule 208A. Therefore, the Grievant's
11 refusal to work mandatory overtime on April 18, 2019 *did not violate* the LCA. Management *lacked authority* under
12 Section 5 as well as under Articles 5 and 13.07 to mandate the Grievant to work overtime in the first instance. Thus, the
13 Grievant *violated none* of Management's *contractual or regulatory* provisions.

14 On the other hand, as mentioned above, the Grievant should have accepted the mandatory overtime assignment and
15 subsequently grieved it. His failure to do so warrants some measure of discipline.¹⁷ Under the totality of circumstances
16 in this dispute, the Arbitrator holds that the *reasonable* measure of discipline for the Grievant is a *three-day suspension*
17 without pay. Otherwise, DYS shall forthwith reinstate the Grievant upon receipt of this opinion and award. Furthermore,
18 DYS shall: (1) Compensate the Grievant for *all* backpay lost *because of* his wrongful termination;¹⁸ (2) Fully restore the
19 Grievant's seniority; and (3) Compensate the Grievant for any other *job-related losses* that he incurred *because of* his
20 wrongful termination.

21 **IX. The Award**

22 Based on the foregoing discussion and analysis, the Arbitrator holds that the Grievance is hereby *SUSTAINED* in Part
23 and *DENIED* in Part.

¹⁷ "Obey and grieve seldom finds its way into Collective-bargaining Agreements, but its acceptance within the labor-management community is well established.

¹⁸ Of course, this compensatory amount shall not include the three-day loss of compensation associated with the three-day suspension.