ARBITRATION DECISION NO.:
32

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Bureau of Employment Services - Columbus North Office

DATE OF ARBITRATION:
April 17 and 23, 1987

DATE OF DECISION:
June 24, 1987

GRIEVANT:
Sheryl Holton

OCB GRIEVANCE NO.:
G86-0070

ARBITRATOR:
John E. Drotning

FOR THE UNION:
Linda K. Fiely, Esq.
Daniel Smith, Esq.

FOR THE EMPLOYER:
Robin Thomas, Esq.

KEY WORDS:
Work Week
Overtime
Schedule Change

ARTICLES:
Article 13 - Work Week, Schedules and Overtime
§ 13.02 - Work Schedules
§ 13.07 - Overtime
§ 13.10 - Payment for Overtime

FACTS:
CASE SYNOPSIS:
This grievance was brought in the name of the Grievant on behalf of herself and others similarly situated at the Ohio Bureau of Employment Services (OBES) .

The Grievant is an Employee Service Representative for OBES in the Employment Services Divisions. She has a regular work week from 8:00 a.m. to 5:00 p.m. Monday through Friday. During the 1986 Ohio State Fair the grievant agreed to work at the Fair but did not agree to any adjusted work schedule. The Grievant's schedule was re-arranged and she did work at the Fair on the weekend.

The Union argued that several provisions of the Collective Bargaining Agreement were violated by altering the standard work week of OBES employees. The Grievant (and others) had her schedule re-arranged from her regular schedule so she could work at the Ohio State Fair on Saturday and Sunday and not be paid overtime. The Union asserted if work was required to be performed on a Saturday and/or Sunday it should have been overtime assigned and worked on the basis of seniority.

The Union argued that the phrase "posted regular schedule" contained in Article 13.07 referred back to the language of Article 13.02 so that while there was no explicit requirement of posting for five day employees, there was an implicit posting for those employees which had the same effect as a posting in fact. if Article 13.07 applied only to seven day employees and not to others, the language would have been carefully worded to so indicate.

The Employer argued that Article 13.07 was clear and unambiguous in that it applied only to seven day operations and not five day operations which are not posted under Article 13.02. They asserted that the word "posted" in the Agreement referred to the publication of a work schedule. If the language in Article 13.07 was held to apply to five day employees, the notification provisions of Article 13.02 would have no meaning. In addition, the Employer argued the Ohio State Fair was an outside party who determined the schedules of OBES employees.

AWARD:

The arbitrator held that the second to last paragraph of Article 13.07 was violated and upheld the grievant's request for overtime pay. The fact that a five day operation work schedule for an employee is not posted on a periodic basis allows the inference that the schedule is an implicit rather than explicit posting. **As a result, five day employees are no different than seven day employees with respect to posting and their regular implicitly posted schedules may not be changed to avoid overtime**. The arbitrate determined it would be inconsistent to conclude that a seven day employee's set schedule may not be changed to avoid the payment of Overtime while at the same time allow an alteration of a five day employee's set schedule to avoid such a payment.

In addition, the arbitrator determined that the fact the Ohio State Fair needed OBES work on a Saturday or Sunday was not sufficient to conclude that it determined the work hours of OBES employees. OBES made the determination that the schedules needed to be changed. To conclude that an external party's needs allowed the Employer to change work schedules, thereby exempting the Employer from adhering to a regular schedule, would represent a finding that was inconsistent with reasonably clear contract language.

Comment: The arbitrator did not use past practice as a basis for interpreting this grievance because the contract language is fairly specific. Therefore, this language and the intent of the Contract overrides any past practice claim.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME

ARBITRATION AWARD

GRIEVANCE NUMBER: G-86-0070
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted hearings on April 17, 1987 and April 23, 1987 at 375 South High Street, Columbus, Ohio. Appearing for the Union were: Linda K. Fiely, Esq., Ms. Brenda Shelley, Ms. Denise Carque, Ms. Donna Lloyd, Daniel Smith, Esq., and the grievant, Ms. Sheryl Holton. Appearing for the Bureau were: Robin Thomas, Esq., Ms. Marlaina Eblin, Ms. Jane Moore, Mr. Douglas Gray, Ms. Cynthia Kramer, Mr. Ed Morales, and Mr. Gene Brundige.

The parties were given full opportunity to examine and cross examine witnesses and to submit written evidence and documents supporting their respective positions. Post hearing briefs were filed on or about May 29, 1987 and the case was closed. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly filed the following submission:

Whether the Employer's modification of the employees' regular schedules, was in violation of the Collective Bargaining Agreement? If so, what is the remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #8.

The parties agreed that the issue was properly before the Arbitrator.

Normal working hours for the Agency are 8:00 a.m. to 5:00 p.m., Monday through Friday, and the word "normal" is synonymous with the word, "regular".

In addition, the parties stipulated to the following facts:

1. On or about February 12, 1986, the union proposed posting of schedules for all employees using the following language:

Section 2 - Work Schedules

For the purpose of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e., hour of the day), days of the week, and physical location. Work schedules shall be posted at least twenty-eight (28) calendar days prior to the effective date of the posted schedule and shall not be charged within said twenty-eight (28) days, except in accordance with reassignment as provided for in this Article. Procedures for selecting shifts shall be defined in Supplemental Agreements.

2. On or about February 24, 1986, the Employer submitted the following counterproposal on work schedules:

6.02 - Work schedules

All work schedules shall be established in accordance with the standard work week and are subject to change to meet operational needs.

3. After these two proposals, during negotiations, the parties agreed that posting was unnecessary in 5 day operations.

4. On or about April 14, and again on May 1, the Union proposed the following language on work schedules:

Section 2 - Work Schedules

For purposes of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e., hours of the day), days of the week, and physical location. Work schedules for employees who work in five (5) day operations need not be posted. However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such. Work schedules for employees who work in seven (7) day operations shall be posted by the middle of each month for the following month and shall not be changed within that period, except in accordance with reassignment as provided for in this Article. Procedures for selecting shifts shall be defined in Supplemental Agreements.

5. The parties agreed that in the negotiations surrounding the inclusion of the words "However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such," three specific examples were discussed: Agriculture Meat and Egg

Inspectors; Tax Inspectors; and, ODOT Construction Project Inspectors.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. UNION

1. TESTIMONY AND EVIDENCE

Ms. Sheryl Holton testified that she works in the Columbus North Office of OBES in the Employment Services Divisions. She said that she is an Employee Service Representative and that she works with employers soliciting job orders or receiving job orders and helps in the selection of applicants to find a job. In short, she recruits for employers, said Holton.

Holton said that her normal work week is Monday through Friday from 8:00 a.m. to 5:00 p.m.. She said that she has worked outside those hours and noted that in 1985, she worked an hour longer a day for three days. In March of 1986, she worked a Saturday at the Eastlands Mall and she noted that in April 1987 she was asked to work on Saturday but she could not. Holton testified that she was paid overtime for the additional hour a day for three days in 1985 and for the Saturday workday in March of 1986.

Holton testified that she was involved in the negotiations and that overtime for work at the Ohio State Fair was discussed. She said that she grieved this case because the time worked at the Fair was not paid as overtime and seniority was not adhered to in terms of assignments (See Joint Exhibit #4).

Following the Fair, Holton testified she wen back on to the 8:00 a.m. to 5:00 p.m., Monday through Friday schedule.

Holton went on to testify that the work at the Fair was somewhat different than the normal work at the office. As a result, continued Holton, the efficiency of the service of the OBES was negatively affected by the inability of her to work effectively in her office because she was at the Fair.

Holton said that the employees objected to the schedule at the Fair and she talked to Jane Moore about that problem.

Holton, in response to the question as to whether or not she agreed to an adjusted work week without overtime, said that no one was asked to work overtime at the Fair after the Collective Bargaining Agreement was signed.

Holton said that she was on the negotiations team and was one of one hundred sixteen people on the team.

Holton went on to identify Union Exhibit #1 as a seniority list and it was posted in her office.

Ms. Donna Lloyd, an Employment Service Interviewer, testified that she assists applicants who seek jobs and that she works 8:00 a.m. to 4:30 p.m..

Lloyd said that she talked with Jane Moore about the Fair schedule and asked about overtime payments. She stated that she did not agree to an adjusted work week without overtime. Lloyd said that she did not work weekends at the Fair, but if there had been overtime, she would have.

Lloyd went on to say that normal operations in the office were curtailed as a result of work at the Fair.

The Union also cross-examined Management witnesses. Ms. Cynthia Kramer, Director of Employment Service, testified that she agreed that certain Employment Service functions would slide when the employees in the Service were working at the Fair.

Ms. Jane Moore, on cross, testified that telephone work is file search work in which one identifies applicants and calls applicants and tries to set them up or match them with vendors.

Moore testified that overtime has been paid in certain instances but she stated that she did not have specifics. She acknowledged that the Union objected to a flexible work schedule without overtime.

Mr. Douglas Gray, on cross, testified that he had no personal dealings with the Union on this

issue.

2. ARGUMENT

The Union argues that several provisions of the Collective-Bargaining Agreement were violated by altering the standard work week of OBES employees, which is Monday through Friday. Section 13.07 of the Contract, notes the Union, states in part that it is impermissible to change an employees regular posted schedule in order to avoid the payment of overtime.

In this case, the facts are that the grievant had a schedule re-arranged from that of the employee's posted regular schedule as shown on Joint Exhibit #5.

The Union argues that the employees' work week was re-arranged so that it was possible for them to work fit the State Fair on Saturday and Sunday and that meant that the work at the office was neglected.

The Union asserts that the Ohio State Fair schedule for Employment Service employees should have been based on a standard work week and that if work was required to be performed on Saturday and Sunday, it should have been overtime work and assigned on the basis of seniority.

The phrase "posted regular schedule" contained in the second to last paragraph of Article 13.07 refers back to the language of 13.02, notes the Union, but the Union reads the two sections together differently than does the Employer. In short, the Union notes that the Employer asserts that work schedules are only posted for seven day employees and not for employees who work in five day operations.

The Union goes on to say that in the negotiations, it proposed posting of schedules for both five and seven day operations, but the parties agreed that posting for five day operations was unnecessary. However, the Union argues that while there is no explicit posting for the five day employees, there is an implicit posting which has the same effect as a posting in fact.

The Union goes on to argue that if Section 13.07 only applied to seven day employees and not others, it would have been carefully spelled out.

The Union claims that the "posted regular schedule" is ambiguous in that Section 13.01 characterizes a five day operation as one with a standard work week and a seven day operation as non-standard. Since the seven day operations fluctuate, an emphasis or focus on the word "regular" could lead one to interpret the phrase "posted regular schedules" as being applicable to the five day but not the seven day operation.

The Union also argues that certain language of 13.02, which involves changing work hours of employees by third parties, was not included as part of Management's Position. The Union argues that this section covered situations where a third party dictated and required certain schedules and it cites specific examples discussed at negotiations (see Union Brief).

The Union notes that testimony indicates that Management was aware that the Union did not agree with the use of adjusted work schedules for staffing at the 1986 State Fair. In this case, the grievant agreed to work the Fair but not to the adjusted work schedule.

Moreover, the Union argues that language in Section 13.01 which talks about the parties' ability to schedule other arrangements really refers only to the Union and the State of Ohio and individual employees cannot waive such rights.

For all these reasons, the Union asked that the grievance be sustained.

B. EMPLOYER

1. TESTIMONY AND EVIDENCE

Ms. Cynthia Kramer testified that she is Chief Legal Counsel for OBES and she stated that the Employment Services provides a labor exchange function or matches supply and demand. She said that the normal work week was 8:00 a.m. to 5:00 p.m., Monday through Friday. Kramer

noted that the employees do work at the Ohio State Fair, County fairs, and they do some mass recruitment. Moreover, she said the Service schedules hours in order to serve the public other than simply at 8:00 a.m. to 5:00 p.m.. Kramer went on to say that if the Service did not agree to an employer's request for service at odd hours, it would lose its ability to place employees.

Kramer also said that Agency and the Employment Service are in a deficit. position and that Roberta Steinbacher has closed about forty-two agencies throughout the State.

Kramer said that. the Employment Service wants to meet the needs of employers and attempts to maintain job placement and develops statistics for funding purposes.

Kramer testified that if the Union wins the grievance, it will cost the Agency a good deal of money and hinder its ability to serve the public.

Ms. Jane Moore, the Employment Service at the Columbus North facility, testified that she is familiar with the staffing of the Fair and it has been scheduled since 1981 from her standpoint. Moore went on to say that the Employment Service works the Fairweeks before it actually opens and they interview 2000 applicants and that job orders from vendors and then call the applicants in and match them up with vendors. The State Fair Board, said Moore, wants the Employment Service two weeks prior to the Fair and they do the job every day at the Fair, seven days a week.

Moore said that the Service placed perhaps 750 people. She went on to say that she generated the staffing for the Fair and that she asks for volunteers and all those who volunteered for week one were accepted and she said that she has always asked for volunteers from qualified applicants.

Moore testified that overtime was not paid to Fair personnel in the past.

On redirect, Moore said that overtime was paid to employees working in a Job Training Partnership Act Program and that was on a Saturday and the overtime was paid by the JTPA.

Mr. Douglas Gray, a JTPA Supervisor, testified that he coordinates Employment Service offices in Franklin County. He said that he is familiar with the Bureau staffing at the State Fair in 1986 and he was asked to help out in scheduling. He stated that he asked for a list of volunteers and he worked out the schedule as noted on Joint Exhibit #4.

Gray said that he took the names of individuals and he made every effort to stay within the forty hour work week and five days in the week.

Gray said that he did not involuntarily schedule people on weekends and the two individuals who did not want to work a Saturday and Sunday were not scheduled.

Gray said that no overtime was paid employees in the past.

Gray also testified that the overtime paid at the JTPA conference work on Saturday was by that outside Agency.

The Service also cross-examined Union witnesses. Ms. Holton testified that she worked the Fair on weekends in the past and never got overtime and has done so for the past three or four years.

She stated that she wrote Joint Exhibit #7.

Donna Lloyd was not cross examined.

2. <u>ARGUMENT</u>

The Employer asserts that Section 13.07 of the Collective Bargaining Agreement (see Joint Exhibit #1) is clear and unambiguous in that it applies only to seven day operations and not five day operations which are not under 13.02.

The Employer claims that the work "posted" in the Collective Bargaining Agreement specifically refers to the publication of a work schedule and is essential for the seven day operation. Section 13.02 of the Contract, asserts the Employer, provides for an orderly way of five day employees to

be notified of changes. The Employer points out that if the 13.07 language were held to apply to five day employees, the notification provisions of 13.02 would have no meaning.

The Employer also points out that OBES occasionally modifies employees' schedules to meet the needs of employers. In this particular case, employees were told about the Fair schedule and given an opportunity to volunteer and the Employer obtained enough volunteers to avoid overtime. The grievant, herself, volunteered to work weekends even though she knew overtime was not and had not been offered in the past.

The Employer concludes that the language of Article 13.07, which prohibits the changing of an employee's regular posted schedule, does not apply to OBES because the parties reached an agreement on posting of work schedules under 13.02. As a matter of fact, the Employer notes that the Union's proposal on posting of schedules was adopted by the Employer as can be seen from Joint Stipulation #4.

Article 13.02 provides a way for five day operations to be adjusted when the needs of other parties dictate and the Service, claims the Employer, followed that procedure with respect to the 1986 Ohio State Fair.

For all these reasons, the Employer asks that the grievance be denied.

V. DISCUSSION AND AWARD

The parties agreed that the question is whether or not the Service's modification of the employees' work schedules, specifically for the Ohio State Fair in the summer of 1986, violated the Collective Bargaining Agreement? The employees involved work in the Columbus North office of the Ohio Bureau of Employment Service on a Monday through Friday and a 8:00 a.m. to 5:00 p.m. basis. In this case, the Union claims that the modification of the schedules for certain employees to include Saturday and Sunday prior to the Ohio State Fair in 1986 violated Articles 13.07 and 13.10. The pertinent paragraphs of these sections are as follows:

Section 13.07 - Overtime

. . . .

An employee's posted regular schedule shall not he changed to avoid the payment of overtime.

Section 13.10 - Payment for Overtime

All employees except those in current Schedule C shall be compensated for overtime work as follows:

1. Hours in an active pay status more than forty (40) hours in any calendar week shall be compensated at the rate of one and one-half (1 1/2) times the regular rate of pay for each hour of such time over forty (40) hours.

. . . .

The Employer argues that Article 13.02 permits schedule changes for employees in five (5) day operations and it reads as follows:

13.02 - Work Schedules

For purposes of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e., hours of the day) and days of the week and work area.

Work schedules for employees who work in five (5) day operations need not be posted. However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work

hours as soon as it is aware of such.

Work schedules for employees who work in seven (7) day operations shall be posted at least fourteen (14) calendar days in advance of the effective date. The work schedule shall be for a period of at least twenty-eight (28) days and shall not be changed within that period, except in accordance with reassignment as provided for in Section 13.05.

. . . .

The issue raises a number of concerns and to answer this question, it is necessary to pay close attention to Contract language. However, before considering the literal meaning of Articles 13.02, 13.07, and 13.10, one must deal with the question of past practice.

Past practice is not the basis for interpreting this contract since no collective agreement existed prior to Joint Exhibit #1. It makes little sense to utilize what was done in the past to interpret contract language unless that language is silent or vague and ambiguous as to render the contract language useless when interpreting its meaning. But that is not the case; the Contract language is fairly specific and therefore this language and the intent of the Contract overrides the past practice claim.

The first paragraph of Article 13.02 defines "work schedules" as:

". . . an employee's assigned work shift (i e., hours of the day) and days of the week and work area."

Under Article 13.02, work schedules for five day employees are not posted whereas the schedules for seven day employees are posted at least fourteen days in advance of the effective date. Does this fact mean that the prohibition in 13.07 that an employee's "posted regular schedule" shall not be changed to avoid payment of overtime only applies to employees in seven day operations for whom work schedules are actually posted fourteen days in advance of the beginning of each twenty-eight day period? Presumably, the work schedules for employees in seven day operations can vary or rotate, but a particular work schedule for a seven day operation employee lasts at least twenty-eight days and, in fact, be changed except in accordance with Article 13.05. Obviously, the work schedule for five day operations lasts far longer than twenty-eight days and, in fact, the days of the week aspect of the definition of "work schedule" could be considered set unless the nature of the operation changed. The fact that five day operation work schedules for employees are not actually posted on a periodic basis allows the inference, that in fact, the schedule is, as the Union claims, an implicit rather than explicit posting. There is no persuasive evidence on Contract language to distinguish the five day from seven day schedules simply because the five (5) day schedule might be more regular than the seven day. In short, the absence of a need to continually post the five day schedule represents only a superficial difference between five and seven day schedule. Employees of both five day and seven day operations have set schedules; only the former is less likely to change whereas the latter is set for a limited time of at least 28 days.

As noted above, the Contract prohibits the Employer from altering the 28 day schedule for seven (7) day employees without announcing it fourteen (14) days in advance, except for situations arising under 13.05. It is inconsistent to conclude that a seven (7) day employee's set schedule cannot be changed in order to avoid overtime and, at the same time, alter a five day employee's schedule to avoid overtime. That, of course. is the crux of the issue.

The Employer claims that the second paragraph of 13.02 allows schedule changes for employees of five day operations as a result of needs of outside parties. The subject of the second sentence of the second paragraph of 13.02 is "work hours"; that is, other parties determine the work hours of employees and the Employer must notify employees as soon as possible of

changes in work hours. This specific language does not refer to days of the week or work areas. But even if the hours, days of the week, and work area are considered to be part of the second paragraph of 13.02, the only requirement is that the Employer notify the employee of any change as soon as possible.

The precise intent of the language of 13.02 is not clear, but from the stipulations concerning, the negotiation proposals and counterproposals, it is clear that the State wanted more flexible scheduling whereas the Union wanted more or less established schedules with guidelines as to notification when an established schedule was to be changed. As the Union noted, the nature of the work of some employees, in five day operations was such that the specific agency or employer did not do the establishing of an employee's schedule but it was determined by the hours, routine, and schedules of others for whom the agency served. Presumably, given the examples, this circumstance was part and parcel of specific jobs and Section 13.02 does not seem particularly appropriate for the OBES employees whose normal 40 hour weekly work schedules are not "determined by schedules established by parties other than the Employer". The need of the Board of the State Fair to be serviced on weekends is not a case of where an employee's schedule is determined by a party other than the Employer. OBES determined that the schedules be changed.

Thus, the question remains as to whether the second to last paragraph of 13.07 was violated? The contractual and literal answer is yes.

There is no reason to think the violation was intentional. The Employer relied on what it had done in previous years. But the past practice when there was no Contract has limited use in interpreting the language of the initial Collective Bargaining Agreement. Furthermore, given that the intent of the parties as indicated by stipulations may not be such as to allow a definitive interpretation of Contract language, the only way to answer this question is to rely on a literal interpretation of existing Contract language. Section 13.07 says that the Employer cannot change an employee's posted regular schedule to avoid overtime.

It was concluded that five (5) day employees are no different than seven (7) day employees with respect to posting; it is just that the former is implied and the latter explicit. Work schedules of employees of seven day operations are set every twenty-eight days and once set may be changed for reasons given in 13.05 and according to the procedures in that section, but schedules are not to be changed to avoid overtime. Similarly employees in five day operations have regular, implicitly posted schedules which cannot be changed in order to avoid overtime.

In addition, as noted earlier, the fact that the Ohio State Fair needed OBES work on a Saturday and Sunday is not sufficient to conclude that it determines the work hours of OBES employees. To conclude that an external party's needs allows the Employer to change work schedules and therefore exempts the Employer from adhering to a regular schedule (see 13.07) would represent a finding that is inconsistent with reasonably clear contract language.

In this case the grievant’s schedule was changed, albeit in food faith, to avoid overtime and that assignment violated Contract language. Therefore, this grievance is sustained and the employees shall be awarded overtime pay for their Saturday and Sunday work.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
June 24, 1987