Voluntary Labor Arbitration Proceeding

In the Matter of the Arbitration Between:

Department of Rehabilitation and Corrections

#1098

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: Sick Leave Pay Grievances and Comp Time Grievances

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: January 15, 2012

Appearances

For the Employer

Michael Duco	Deputy Director- Office of Collective Bargaining
Alan Lazaroff	Labor Relations Administrator
Angela Shull	Human Capital Manager
Kristen Rankin	Advocate

For the Union

Sandra F. Bell	General Counsel
James Adkins	Chapter President- ORW
Bob White	Chapter President- Richland
Brenda Campbell	Account Clerk 2
Patty Rich	Advocate

Introduction

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period of April 15, 2009 to February 29, 2012 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-

examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties agreed to submit briefs.

Stipulated Issues

- What should an employee be paid the week of a holiday if the employee uses sick leave, not withstanding Article 26.04?
- What should an employee be paid the week of a holiday if the employee uses a Cost Savings Day (CSD), notwithstanding Article 26.04?
- Can an employee convert any hours to comp time during the week of a holiday when an employee receives 12 hours of pay (8 hours coded- HOLPR which pays at time and a half)? If so, how many hours can be converted into comp time?

Stipulations

1. The grievances are properly before the Arbitrator and there are no procedural objections.
2. The B.U. 3,4 & 5 agreement was effective September 2009.
3. There is no dispute in regards to how employees are paid if they actually work the day of a holiday (only the time they can comp).
4. There are several grievances that are outlined in J-2, all grievances will be considered resolved from the outcome of this arbitration.

Case History

The grievances in dispute involve a contract interpretation matter. They involve application of Articles 13.10, 26.04, and a Letter of Agreement (Employer Exhibit 1) which became effective on September 1, 2009.Negotiations in 2009 centered on a budgetary crisis being experienced by the State of Ohio. It required extreme measures which the parties dealt with by devising Cost Saving Days (CSDs). This negotiated mechanism offset certain budgetary shortfalls and reduced projected layoffs.

The present disputes involve bargaining units 3, 4, and 5. These units include security and direct care personnel. Other units realized cost savings days which were operationalized as 10 unpaid days off. The units in question had Cost Savings Days defined as unpaid holidays.

These bargaining outcomes were eventually modified via an agreement (Joint Exhibit 3) directed specifically toward units 3,4, and 5, and better known as the "3,4,5 Agreement."

The Merits of the Case

The Union's Position

The Union asserts that a practice has been established by the parties which deals with the disputed matter. Employees have been paid fifty-two (52) hours a week when an employee calls in sick during a week containing a holiday, and his/her good day falls on the holiday. This practice had been applied until September of 2009.The record reflects the certainty of this mutually agreeable practice. It supports all of the criteria needed to establish a practice which overcomes clear contractual language: longevity, repetition, consistency, knowledge, and acceptance. The bargaining unit employees, as a consequence of the Employer's actions, expected and accepted this practice. As such, the Employer has acquiesced and concurred with the Union's interpretation.

Bargaining history, moreover, supports this view. Upon signing the CSD agreement (Joint Exhibit 3), the Union was advised taking a CSD would be equivalent to taking a sick day. It would never impact holiday pay. Signing the letter of Agreement never evidenced acquiescence by the Union regarding the new policy. The Employer never raised the upcoming charge during negotiations nor did the document itself reference such a dramatic change.

Article 26 does not contain clear and unambiguous language. Unambiguous language, more specifically, would have led to more consistent application throughout the system. The language in dispute should be viewed as amended by practice. The parties through their custom and practice, for an extended period of time, mutually agreed to knowingly apply a practice in lieu of ambiguous contract language.

The comp issue enjoys similar contract interpretation arguments. The "3,4,5 Agreement" (Joint Exhibit 3) did not impact an employee's ability to comp time during a holiday week. Also, Article 13.10 does not bar the conversion of overtime accrued during the week of a holiday to comp time. The Employer sought to support its interpretation by relying on administrative difficulties. This justification appears contrived since comp time has been handled this way for a considerable period of time.

The Employer's Position

The rights and benefits desired by the Union and the bargaining unit members were not agreed to by the Employer. Clear contract language binds the parties relationship. Past practices, even if established, may not amend mutually agreed to contract language. The Employer empathizes the dispute only deals with employees in the bargaining unites 3,4 and 5 who do not work on a holiday and take either a CSD or a sick day. They are not entitled to holiday premium pay. Also, Holiday premium pay cannot be converted to compensatory time.

Articles 13,10 and 26 contain language which is clear and unambiguous. They provide the parties with articulated guidance in support of the Employer's interpretation. This includes the impact of CSDs and sick leave on the calculations in dispute. With clear and unambiguous language, the Union's arguments and related interpretations become moot. As such, an arbitrator agreeing with the Union's views would be exceeding the scope of his or her authority. The Union was never able to articulate the existence of a binding practice.

The Union failed to meet its burden of proof regarding the necessary elements in support of this condition. Granted, a mixed practice might have been supported, but this condition undermines rather than supports the existence of a binding past practice. The very fact that some,

but not all, of the facilities made calculations in support of the Union's representations reinforces this conclusion.

Even if the Union establishes the practice, it still fails to bind the Employer because the contact language is still clear and unambiguous. The Employer enjoys an inherent right to enforce the language without notice to the Union. Article 44.03 states that all practices previously and presently in effect may be modified or discontinued at the sole discretion of the Employer.

The Employer, moreover, argues that holiday premium pay cannot be converted to compensatory time. Such conversions were burdensome when an employee wishes to convert a portion of a day to compensatory time. Also, the Employer bears certain economic costs when these conversions take place.

The Arbitrator's Opinion and Award

From the evidence and testimony presented at the hearing, a complete and impartial review of the record including pertinent contract provisions and the parties' briefs, it is this Arbitrator's opinion that with one exception the Employer's interpretation of the contract language is proper and accurate, The mixed practice raised by the Union cannot overcome clear and unambiguous contract language negotiated by the parties.

This finding requires an understanding of the interplay of several critical Articles, and the "3,4,5 Agreement" (Joint Exhibit 3). Article 13.10 discusses payment for overtime. Employees in active pay status working in excess of forty (40) hours in any calendar week are compensated at the rate of one and one-half (1 ½) times the total rate of pay for each hour.

Article 13.10(2), however, restricts such payments to active pay status situations. It states in pertinent part:

XXX

Sick leave and any leave used in lieu of sick leave shall not be considered as active pay status for purposes of this article

The parties also considered a similar restriction when dealing with active pay status and CSDs. Section 10 of the letter of Agreement states:

XXX

10. For the purposes of Article 13.10, CSDs are not considered active pay status. CSD time shall be treated the same as sick leave...

XXX

It appears that under these negotiated provisions neither sick leave nor CSD are considered active pay status.

Article 26.02 and 26.03 also play a critical role in this analysis. Article 26.02 deals with holiday pay. Under this provision, employees receive eight (8) hours of holiday pay if they are not scheduled to work the day of the holiday. These employees who are scheduled for work the day of the holiday receive eight (8) hours of holiday pay in addition to time and a half for hours worked on the holiday. This provision, moreover, does not reference any entitlement to premium pay nor conversion of these payments to compensatory time.

Article 26.03 deals with work on holidays by employees. These individuals receive time and a half for hours worked plus straight time pay for the holiday. The contract language also allows employees to convert hours worked on a holiday into compensatory time. An employee would still receive straight line pay for the holiday.

This analysis results in the following outcomes. An employee who works forty (40) regular hours the week of a holiday, but does not work on the holiday, the Section 13.10 deems the employee to be in active pay status for forty-eight (48) hours. Thus, the holiday pay has

placed the employee in an overtime status requiring the payment of the eight (8) hours at time and a half. It should be noted that to receive this payment an employee must enjoy active pay status for forty (40) hours and a holiday must fall during the week.

A similar analysis applies for those employees who use CSDs and/or sick leave the week of a holiday. It has already been established that sick leave and CSDs are excluded from the definition of active day status. As such, any employee who uses either of these options during the week of a holiday, not withstanding Section 26.04, and works his/her regular schedule is not going to be in active pay status in excess of forty (40) hours. Thus, an employee enjoying such a status will not receive the "holiday premium".

An employee may convert any hours to comp time during a week of a holiday when an employee receives twelve hours of pay which pays at time and a half. Nothing in the contract specifically excludes this outcome. The Employer's financially based arguments are not persuasive,

The Union's past practice arguments are equally unpersuasive. The parties presented grievances with system wide implications. They were not limited to two facilities. Similar practices at these facilities fail to establish a consistent way of handling a payment process across the Department. A mixed practice by its very nature fails to establish the very specific characteristics of a past practice. Even if a practice was established, it cannot prevent an employer from reverting to clear and unambiguous language contained in a contract. Article 44.03 supports this notion because it allows the Employer to modify or discontinue at its own discretion any benefits or practices previously in effect.

Award

The grievance is denied except for the issue dealing with the conversion of overtime into comp time per Article 13.10. The following findings are hereby articulated:

If the employee works on the holiday, the employee receives time and half for working the holiday, regardless of the employee's schedule for the rest of the week pursuant to 26.03. The OAKS code is HOLWK.

Holiday pay is the 8 hours of pay received whether the employee works or does not work the holiday, except for reasons why the employee would forfeit the holiday pay under Section 26.04. The holiday in this case will be coded as HOLLV.

If the employee takes sick leave, it is not considered active pay status and will not count toward 40 hours in active pay status for purposes of overtime or "holiday premium pay."

If the employee takes a CSD, it is not considered active pay status and will not count toward 40 hours in active pay status for the purpose of overtime or "holiday premium pay."

If the employee does not work the holiday(holiday is the employee's good day), but the employee is in active pay status (hours worked, vacation, etc.) for 40 additional hours during the week, the employee will receive 52 hours of pay (40 regular hours, 8 hours of holiday pay, plus 4 hours of premium pay because the holiday is also considered active pay status). The holiday in this case will be coded as HOLPR.

Chagrin Falls, OH

Dr. David M. Pincus
Arbitrator