

Arb Decision

1136

STATE OF OHIO, OHIO BUREAU OF WORKERS' COMPENSATION

vs.

LOIS BRYANT & THE OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION

Grievance No. 34-12-121012-0052-01-09

OPINION AND AWARD

Arbitrator Meeta A. Bass
Award date July 7, 2014

RECEIVED / REVIEWED
JUL - 7 2014
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PROCEDURAL HISTORY

The Ohio Bureau of Workers Compensation is hereinafter referred to as "Employer" or the "Bureau". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Lois Bryant is the Grievant.

Grievance No. 34-12-121012-0052-01-09 was submitted by Union to Employer in writing on September 10, 2012 pursuant to the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2012-2015 Collective Bargaining Agreement.

Pursuant to the Collective Bargaining Agreement, hereinafter referred to as the "CBA" between Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on May 5, 2014 in Columbus, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered. The parties submitted post-hearing briefs on or before May 19, 2014. The hearing record was closed on May 19, 2014.

The parties stipulated that the grievance and arbitration were properly advanced before the Arbitrator. The parties did stipulate to the issue as follows:

"Did the Employer violate the Collective Bargaining Agreement when it denied Grievant's Request for Leave (RFL) for Personal Leave submitted on August 29, 2012 for two (2) hour of absence on August 27, 2012? If so, what shall the remedy be?"

Pertinent Provisions of the 2012-2015 Collective Bargaining Agreement

PREAMBLE

This Agreement, is hereby entered into by and between the State of Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, AFSCME, Local11, AFL-CIO, hereinafter referred to as the Union, has as its purpose the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of wages, hours, and other terms and conditions of employment.

13.07 Overtime

The Employer has the right to determine overtime opportunities as needed. Except as otherwise established by the Employer an employee's posted regular schedule shall not be established in such a manner to require the Employer to pay overtime. An employee's posted regular schedule shall not be changed solely to avoid the payment of overtime within a single workweek or pay period.

13.10 (Payment for Overtime) (1) and (2)

All employees, except those whose job duties require him or her to maintain a license to practice law, 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 (1½) times the employee's total rate of pay for each hour of such time over forty (40) hours;
2. For purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay and includes, but is not limited to, vacation leave, and personal leave. Sick leave and any leave used in lieu of sick leave shall not be considered as active pay status for purposes of this Article.

27.02 Personal Leave Accrual

Employees shall be entitled to four (4) personal leave days each year. Eight (8) hours of personal leave shall be credited to each employee in the first earnings statement, which the employee receives after the first day of January, April, July and October of each year. Full-time employees who are hired after the start of a calendar quarter shall be credited with personal leave on a prorated basis. Part-time employees shall accrue

personal leave on a prorated basis. Proration shall be based upon a formula of .015 hours per hour of non-overtime work.

27.04 Notifications and Approval of Use of Personal Leave

Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice. In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.

44.04 Work Rules

After the effective date of this Agreement, Agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them.

Appendix Q- Agency Specific Agreement Ohio Bureau of Workers Compensation

B. 13.07 - Overtime

Management has the sole and executive right to determine the need for overtime.

Insofar as practicable, overtime opportunity hours shall be equitably distributed on a rotating basis by seniority among those who normally perform the work as defined in the classification specification and/or position description. In the event the Employer has determined the need for overtime, and a sufficient number of employees is not secured through the above provisions, the Employer shall have the right to require the least senior employee who normally performs the work to perform said overtime.

The overtime policy shall not apply to overtime work which is specific to a particular employee, classification and/or position description, or specialized work assignment (e.g., work associated with lump-sum settlement teams), or when the incumbent is required to finish a work assignment, or to situations when the Bureau offers overtime opportunities to all available, qualified employees (e.g., copying or filing work).

In all other circumstances, the Bureau shall comply with the overtime policy and shall post overtime rosters in accordance with Article 13 of the Contract. At those times rosters are necessary, the

Bureau shall provide said rosters to the chief steward, within a reasonable time, if so requested. The rosters shall be updated every quarter in which any affected employee had overtime offered.

Joint Documents

1. The Contract between the State of Ohio and the Ohio Civil Services Employees Association, OCSEA, AFSCME Local 11 AFL-CIO, 2012-2015,
2. November 5, 2012 Step 3 Grievance Response,
3. September 10, 2012 Grievance Form,
4. Email from Service Office Manager Hampton dated August 7, 2012,
5. Grievant's Timesheet for week of August 27, 2012, and
6. Grievant's Request for Personal Leave dated August 29, 2012

UNION POSITION

Union argues that Employer violated Article 13.07 of the CBA. Article 13.07 states that Employer cannot change schedules to avoid paying overtime. When Employer requires an employee to flex time instead of approving personal leave that is afforded under Article 27.01 of the CBA, Employer is changing the work schedule to avoid overtime in violation of the CBA.

Union argues that Employer violated the CBA when it denied Grievant the use of personal leave for two (2) hours. Article 27.04 states that in an emergency, the request shall be made as soon as possible, the supervisor will respond promptly, and the leave shall not be unreasonably denied. In allowing Grievant to leave the workplace, the supervisor approved the leave. Grievant is entitled to compensation for two (2) hours of overtime for the flexed hours worked.

Union argues that other individuals' requests for leave during the scheduled overtime week were approved. And the denial of her request for personal leave contributes disparate treatment.

Union requests that the grievance be granted, the leave request be granted, and Grievant awarded two (2) hour of overtime that she was denied.

Employer Position

Employer contends that Grievant suffered no harm as a result of the denial of her request for leave. The purpose of personal leave is to allow an employee time off from work. Grievant was permitted to leave the work place for two (2) hours as requested. Grievant actually worked forty-six (46) hours the week of August 27, 2012 and received compensation at time and one-half for six hours. Grievant was not harmed.

Employer contends there were sound business reasons to deny Grievant's discretionary leave request. The CBA provides that request for leave forms submitted less than 48 hours in advance should not be unreasonably denied. On August 27, 2012, Grievant asked her supervisor to leave work two (2) hours early because her daughter and grandchildren needed transportation from the airport. Under Article 24.07 of the CBA, approval was not mandatory. Due to the operational needs of employer during the overtime week, Employer denied the discretionary leave request when it was submitted. There was no contractual violation of the CBA.

Employer contends that advance notice of the denial of discretionary leave requests was given to Union and Employees. The notice gave employees the option to flex their time to address personal matters that required them to be away from work during the normally scheduled workweek. Grievant's supervisor advised her that the request for personal leave would not be granted because overtime had been called for the week. Her supervisor advised that she could take the time off from work but she had to flex her time later that week. Grievant agreed.

Employer contends there was no violation of the contract, and the grievance should be denied in its entirety.

BACKGROUND

The Ohio Bureau of Workers' Compensation provides workers' compensation insurance coverage for Ohio's employers and employees. Grievant is a claims service specialist for the Bureau at their Garfield Heights Office. The claim service specialist is responsible for administering all the claim activity related to an injured workers claim, i.e. making claim determinations, loss wages, settlement of claims, and so forth. In 2010 there were 465 claims service specialists working at the Bureau and in 2012, the number was reduced to 378.

Prior to 2012, overtime opportunities were rarely afforded to field operations claims staff. However in 2012, new administration took office that redirected the focus of the Bureau to meeting service expectations which included statutory mandates related to time frames for making determinations on claim allowances and other agency objectives and goals. In meeting these mandates and goals, Employer recognized a need to offer overtime during peak periods of operations. The Bureau was struggling to meet statutory mandates and the agency goals due to the reduction in staff, holidays and vacation leave which caused a loss of production hours. Employees were returning to work to manage high case lists placing the Bureau at risk for not meeting claim service levels. Employer initiated discussions with Union regarding said issue without any resolution of the issue.

Employer determined a need for overtime for the week of August 27, 2012. This week included Labor Day weekend and it was also the final payroll reporting period for approximately 240,000 private employers in the State of Ohio. On August 7, 2012 the Service Office Manager noticed all field staff in the Garland Heights Office of the overtime opportunity.

The email read:

"In preparation for the Labor Day Holiday and the final week of payroll period, the Administrator has approved up to 8 hours of overtime for the week of August 27, 2012, Monday through Friday.

This overtime is being offered to all field staff.

To allow management to plan resources/tasks to perform field work tasks and assist with peak I-800 call volumes, you should notify your immediate supervisor of your interest and the number of overtime hours you are willing to work per day.

Per [REDACTED], if you already have an RFL in for time off during the week of overtime it will be honored. However, effective immediately, any new RFL for that week for individuals who wish to participate in overtime will not be approved.

If you have any questions, please see your manager."

The email was sent to the clerks, claims assistants, claim services specialists, and all other field services staff at the Garfield Heights Office.

Grievant notified her supervisor the week prior to August 27, 2012 of her desire to work overtime for the week of August 27, 2012. Grievant reported to work on August 27, 2012. Approximately two (2) hours before her shift ended, Grievant approached her supervisor to discuss a personal emergency, which necessitated her leaving the workplace. Grievant informed her supervisor that her daughter and two grandchildren needed transportation from the airport. Their flight had arrived earlier than expected, and no one was available to transport them home. Her supervisor advised Grievant that overtime was offered, and once overtime was offered request for leave forms would not be accepted but she would be able to flex that time throughout the week. There was no consideration of staff levels or business productivity for that date. Grievant agreed, and left for the day. Grievant submitted a request for

leave on August 29, 2012, two days later, for the personal leave which she originally requested. Her supervisor denied the request.

Grievant worked forty-six (46) hours for the week of August 27, 2012. She was paid forty (40) hours at her regular rate, and six (6) hours of overtime.

Union filed its grievance on September 10, 2012, alleging a violation of the Preamble, Article 13.07, 13.10(1) and (2), 28.03, of the Collective Bargaining Agreement, BWC Memo 3.04 and any and all other "related violations". Union added violations of Article 27.02, 27.04 and 44.04 of the Collective Bargaining Agreement at the Step 3 meeting. Union deleted Article 28.03 at the step 3 meeting. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

DISCUSSION

It is not disputed that the Employer has the right to determine overtime opportunities as needed. Employer in this instance had determined the need for overtime for the week of August 27, 2012 to address the shortage of staff to provide services for the final private employer payroll week and to cover absences due to the Labor Day weekend. More specifically, Employer loses eight (8) hours of production due to the Monday holiday. Employees historically have taken vacation time to extend the holiday break, which decreases the number of staff reporting to work. Lastly, the final employer payroll week is a peak period at the Bureau for reporting payroll and making premiums for approximately 240,000 private employers.

All field staff at the Garfield Heights office was notified by email that overtime will be offered the week of August 27, 2012 and states that:

"if you already have an RFL in for time off during the week of overtime it will be honored. However, effective immediately, any new RFL for that week for individuals who wish to participate in overtime will not be approved."

On August 27, 2012 Grievant approached her supervisor to request the remaining two (2) hours of her shift to be used as personal leave due to a personal emergency. Grievant informed her supervisor that her daughter and two grandchildren needed transportation from the airport. Her supervisor advised Grievant not to submit a request for leave for personal leave because it would not be approved per the email notification on overtime for said week. Nonetheless, Grievant could take the time off but had to flex the two (2) hours later that week. Grievant left the workplace for the two (2) hours left remaining on her shift. Grievant later submitted her request for leave for personal leave two (2) days later; it was denied because "she was working overtime for the week of 08/27/12" therefore "time needs to be flexed."

Article 27.04 of the Collective Bargaining Agreement provides in pertinent part that:

Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice. In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.

The Collective Bargaining Agreement establishes two different scenarios for personal leave approval. When an employee gives forty-eight (48) hour notice, approval is mandatory. The operative contract language is "*shall be granted*". If notice is given less than forty-eight (48) hours, the reason for the leave must be communicated to Employer and must rise to the level of an emergency. Approval in this instance is discretionary by Employer. However, Employer must have a legitimate reason to justify the denial.

The crux of this grievance is the discretionary leave of Article 27.04. Employer maintains there was no actual harm to Grievant. Grievant was permitted to leave the workplace for the two hours requested. By flexing her time, the actual worked hours of Grievant was forty-six (46) hours, and Grievant was paid for forty (40) hours at her normal rate of pay and six (6) hours at her overtime rate. Grievant initially sought approval for two hours of personal leave pursuant to Article 27.04 of the CBA. Contrary to the process set forth in Article 27.04, Grievant was informed not to submit a request for leave pursuant to the CBA but instead she was to flex her hours. She agreed and left the workplace to attend to her personal matters. Two days later she submitted her leave request for personal leave for the two (2) hours.

The email notification denies Grievant the right to use personal leave during overtime week if she wants to participate in the overtime opportunity, and further denies her of the right to file a grievance on the reason for the denial. The policy in effect requires Grievant to waive her contractual rights to personal leave afforded under the CBA to participate in the overtime opportunity. Grievant is entitled to know whether she can take discretionary personal leave during overtime week under the terms of the CBA, and be permitted to avail herself of the grievance process if her request was unreasonably denied.

Employer maintains that it is costly to the employer to offer overtime during this week. Employer has budgeted \$140,000.00 for overtime in order to meet its operational needs during this week. Employer objects to personal leave being counted as hours worked for overtime purposes and takes the position that it does not make business sense to allow employees to take discretionary time off and then to pay them overtime in the same week. Flexing their normal work hours still provides the employee the opportunity to leave the workplace to address their personal matters and provides Employer with the production hours to meet its goals. A win-win for both parties. Except, personal leave is a bargained benefit of Grievant. An employee is entitled to four (4) personal leaves day per year. The plain unambiguous language of Article 13.10 provides that Grievant shall be compensated for overtime work for hours in active pay status more than forty (40) hours and specifically defines active pay status to include personal leave.¹

¹ Article 13.10 (Payment for Overtime) (1) and (2)
All employees, except those whose job duties require him or her to maintain a license to practice law, shall be compensated for overtime work as follows:

Flexing also changes the normal work schedule of employee to avoid overtime. Consequently it is a violation of the CBA to require Grievant to flex her time instead of submitting the request for leave for a determination of whether or not an emergency exists and if Employer can accommodate the request during the requested period.

Grievant submitted her request for personal leave for two (2) hours on August 29, 2012. The comment section in the General Information Section of the form states, "thru lunch Staff with TL (BEV), will be flexing 2 hours overtime. No request for leave is needed. Emailed TL of change and requesting no flexing." Her supervisor denied her request for personal leave, and the decision maker comments of the form read CSS is working overtime for the week of 08/27/12. Time needs to be flexed." As stated above, overtime is not a legitimate reason to deny said leave.

In hindsight, Employer argues that no emergency existed as required by Article 27.04 of the CBA. This Arbitrator agrees. Notwithstanding, her supervisor allowed Grievant to leave the workplace for the requested two (2) hours for the stated reason. Employer is estopped from making a different determination at this stage, and is bound by the overtime reason as stated on the form.

There was insufficient evidence of disparate treatment.

In conclusion, Union has met its burden of proof in establishing that Employer violated the CBA. Article 27.04 states that in an emergency, the request shall be made as soon as

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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 employee's total rate of pay for each hour of such time over forty (40) hours;
 2. For purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay and includes, but is not limited to, vacation leave, and personal leave. Sick leave and any leave used in lieu of sick leave shall not be considered as active pay status for purposes of this Article.

possible, the supervisor will respond promptly, and the leave shall not be unreasonably denied. In allowing Grievant to leave the workplace, the supervisor approved the leave. Employer cannot circumvent this process by requiring Grievant to flex her hours to avoid the payment of overtime. When Employer requires an employee to flex time instead of approving or denying personal leave that is afforded under Article 27.01 of the CBA, Employer is causing a change in the work schedule to avoid the payment of overtime in violation of the CBA. Grievance is sustained.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance No. 34-12-121012-0052-01-09 is granted. Employer is directed to approve said personal leave request, adjust the personal leave balance of Grievant for the requested two (2) hours, and pay the additional two (2) hours of overtime worked as flex time.

July 7, 2014

____ */s/ Meeta A. Bass* _____
Arbitrator Meeta A. Bass
Steubenville, Ohio