

Arb Decision

#1042

**LABOR ARBITRATION PROCEEDING**

**IN THE MATTER OF ARBITRATION BETWEEN:**

**THE INDUSTRIAL COMMISSION OF OHIO**

**- AND -**

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11**

**GRIEVANT: M. JILL TUMMLER-MAC KENZIE**

**GRIEVANCE NO: 17-15-20080103-0003-01-09**

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**ARBITRATOR'S OPINION AND AWARD**

**ARBITRATOR: DAVID M. PINCUS**

**JULY 29, 2009**

**Appearances**

**For The Employer**

Shelly Ahr  
Ryan Sarni  
John Dean

Claims Examiner Supervisor  
Second Chair  
Assistant Human Resource Manager

**For The Union**

M. Jill Tummler-Mac Kenzie  
Michael E. Martin

Grievant  
Staff Representative

## **INTRODUCTION**

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the Industrial Commission of Ohio, 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 march 1, 2006 to February 29, 2009 (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 did not select this option and provided verbal arguments which closed the hearing.

## **JOINT ISSUE**

Did the Industrial Commission of Ohio violate the contract when it denied the grievant's request to change her scheduled work hours? If so, what shall the remedy be?

## JOINT STIPULATIONS

1. The issue is properly before the arbitrator.
2. Jill Tumbler-Mac Kenzie is a Claims Examiner 3 in the Cincinnati Regional Office of the Industrial Commission.
3. On December 10, 2007, grievant was notified by letter that effective January 2, 2008, she would be transferred from the Hearing Administration section to the Claims Examiner section. The letter stated that this was a desk transfer and informed the grievant that her work schedule could be either 7:30 a.m. to 4:15 p.m. or 8:00 a.m. to 4:45 p.m. Grievant worked 7:00 a.m. to 3:45 p.m. in the Hearing Administration section and selected the 7:30 a.m. start time.
4. On December 24, 2007, grievant requested from Shelly Ahr, Claims Examiner Supervisor, that she be allowed to change her schedule from a 7:30 a.m. start time to a 7:00 a.m. start time and her lunch time from 12:30 p.m. to 12:45 p.m.
5. On December 27, 2007, Ms. Ahr denied the grievant's request for the schedule change and approved the requested change to her lunch period.

## CASE HISTORY

On December 10, 2007, M. Jill tumbler-Mac Kenzie, the Grievant, was informed she would be transferred from the Hearing Administration section to the Claims Examiner section effective January 2, 2008. At the time of the dispute, the Grievant was working as a Claims Examiner in the Cincinnati Regional Office of the Industrial Commission.

This was viewed by all participants as a desk transfer; which, itself, was never grieved. The Grievant, moreover, was advised that the transfer necessitated a scheduling change and was offered the following alternatives:

7:30 a.m. to 4:15 p.m. or 8:00 a.m. to 4:45 p.m. The Grievant initially selected the 7:30 a.m. option. It should be noted that the Grievant had a starting time of 7:00 a.m. while working in the Hearing Administration section.

On December 24, 2007, however, the Grievant initiated a request with her supervisor for a scheduling change. Shelly Ahr, the Claims Examiner Supervisor, was asked if the Grievant could change her starting time to 7:00 a.m. and her lunch time break from 12:30 p.m. to 12:45 p.m. (Joint Exhibit 2).

Ahr partially denied the request in a letter (Joint Exhibit 3) dated December 27, 2007. More specifically, she granted the lunch time break request, but denied the starting time change requested by the Grievant. The denial was based on "staffing needs of the Claims Examiner section."

On January 28, 2008, the Grievant formally challenged the previously mentioned denial. He grievance states in pertinent part:

**XXX**

On December 24, 2007 I requested that my hours of work be changed to 7am until 3:45 pm. Due to financial hardship. On December 27, 2008 Shelly Ahr denied this request due to staffing need of the Claims Examiner section.

**XXX**  
(Joint Exhibit 5)

The parties were unable to resolve the dispute during subsequent portions of the Grievance Procedure. Neither party raised procedural nor substantive arbitrability disputes. As such, the grievance is properly before the Arbitrator.

## THE MERITS OF THE CASE

### The Union's Position

The Union posits that the Employer's refusal to accommodate the contested scheduling change was a contract and policy violation. The denial, moreover, was a pretext and merely served as retaliation against the Grievant for engaging in lawful union activity.

A scheme was developed by management to eliminate the problems between the Grievant and Kathleen Hopkins, her immediate supervisor. These problems purportedly dealt with the Grievant's excessive union activity. As such, the Grievant's work location, direct supervisor, and starting times were altered. No other employee was impacted in a like manner.

The Grievant's subsequent request to adjust her starting time back to 7:00 a.m. to 3:45 p.m. was also unjustly denied. Her requested starting time was a valid option under the Hours of Work policy (Joint Exhibit 5). The denial by Ahr was viewed as an act of discrimination. The Grievant had worked the same starting time since September 9, 2002 without any supervision. Other employees have identical starting times without any supervision. Here, a Staff Hearing Officer 2 could have supervised the Grievant at 7:00 a.m., even if the Grievant's direct supervisor was unavailable.

### **The Employer's Position**

The Employer maintains the denial of the Grievant's request did not violate the Agreement (Joint Exhibit 1) or the Hours of Work policy (Joint Exhibit 5).

All similarly situated employees have been treated the same. All Claims Examiners, including the Grievant, have the same staggered schedule. Not every option is available in every section or office. Ahr testified she denied the Grievant's scheduling request to ensure proper staffing and supervisory levels in the Claims Examiner section of the Cincinnati Regional Office. The starting time options available to the Claims Examiners were in place prior to the Grievant joining the section, and have remained the same since.

### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion the Employer did not violate the Agreement (Joint Exhibit 1) when it denied the Grievant's request to change her scheduled work hours.

It should be noted neither the Union nor the Grievant challenged the Grievant's desk transfer from the Hearing Administration section to the claims Examiner section. As such, claims relating to anti-union animus, discrimination and/or harassment are virtually impossible to support. The record established there were some ongoing disagreement between the Grievant and her former supervisor. The desk transfer, therefore, appears justified as a means of alleviating future problems for all protagonists.

With respect to the scheduling request denial, that decision, itself, is supported by the Agreement (Joint Exhibit 1) and policy. Article 5 – Management Rights #4 reserves to the Employer the right to determine the starting and quitting time and the number of hours to be worked by its employees. Thus, the Employer has the right to schedule employees starting time.

The denial is also supported by Section 44.03 – Total Agreement. The Union emphasized the Grievant had enjoyed a 7:00 a.m. starting time for a considerable period of time, and thought she should retain this starting time. Section 44.03 states in pertinent part:

**XXX**

...All rules, regulations, practices and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer.

**XXX**

This provision basically allows the Employer to discontinue any practice and benefit in effect. Viewed generally, the Grievant's previous schedule, a benefit of sorts, was properly discontinued.

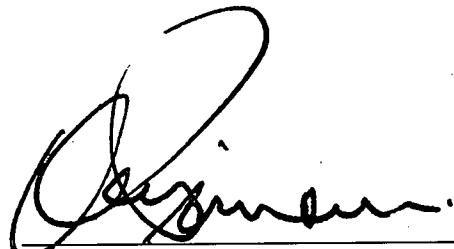
The Hours of Work policy (Joint Exhibit 5) does provide for the staggered hour schedule requested by the Grievant. Within Ahr's section, however, no employee under her supervision works the option requested by the Grievant. All have a starting time of 7:30 a.m. or 8:00 a.m. As such, the Grievant has not been treated differently than any other similarly situated employee. The Union was unable to properly support the unequal treatment charge.

The business justification provided by the Employer was also in accordance with the policy's requirements (Joint Exhibit 5). There is no supervisor available at 7:00 a.m. The Administrative Assistant 2, who does arrive at 7:00 a.m., does not supervise Claim Examiners; but does supervise clerks or clerical staff as specified in her Position Description (Joint Exhibit 6, Pg. 2).

**AWARD**

The grievance is denied.

7/30/09  
Date

  
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Dr. David M. Pincus  
Arbitrator