Decision #1188
Rec'd 12/7/2020

OPINION AND AWARD

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

APPEARANCES

For DYS
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For OCSEA
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Case-Specific Data

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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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I. The Facts

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

Before addressing the substance of the instant dispute, a brief historical reference is indicated for proper perspective.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

* * * *

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

Returning to the substance, the instant dispute erupted on or about April 18, 2019 when the Grievant refused to work mandatory overtime after several second-shift employees were legitimately absent ("shift shortages" or "second-shift shortages"). In response, DYS terminated the Grievant for violation of DYS Rule 2.08—Failure to Work Mandatory Overtime. DYS argues that the Grievant's violation of Rule 208A also violated the LCA, which was still in effect. The Union grieved Management's disciplinary decision as violative of both the Collective-bargaining Agreement[6] and the Pick-A-Post Agreement.[7]

II. The Arbitral Hearing

The Parties ultimately failed to resolve the dispute and submitted it to the Undersigned for arbitral review. On 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.

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

III. The Issue

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

IV. Relevant Contractual and Regulatory Provisions

Section 5—Pick-A-Post Agreement

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

Contractual Provisions

Section 13.07 Overtime
The ***Employer*** has the ***right to determine overtime opportunities as needed***.[10]

Article 5-Management Rights

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

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

Rule 208A

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

V. Summaries of the Parties' Arguments

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.

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.

VI. Evidentiary Preliminaries

Because this is a disciplinary dispute,[13] DYS shoulders the burden of proof/persuasion regarding its charge that the Grievant violated the LCA by declining to work mandatory overtime on April 18, 2019. Therefore, DYS must establish its charge by preponderant evidence in the arbitral record as a whole. Because DYS has the burden of persuasion in this dispute, the Arbitrator shall resolve all ***reasonable doubts*** regarding the charge against DYS. Irrespective of the strength or weakness of the Union's case, DYS cannot prevail in this dispute without adducing preponderant evidence in the arbitral record as a whole that the Grievant violated the LCA by refusing to work mandatory overtime. Finally, the Union has the burden of persuasion with respect to its allegations and affirmative defenses, both of which the Union must establish by preponderant evidence in the arbitral record as a whole. Reasonable doubts about whether the Union satisfied these evidentiary burdens shall be resolved against the Union.

VII. Analysis and Discussion

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

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

with the relevant language of Paragraph 1 and the Note.

Section 5 contains the following provisions:

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

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

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

1. PARAGRAPH 1

Paragraph 1 and the Note contain several features that are pivotal to resolving this dispute. First, paragraphs1 and the Note recognize two classes of employees: SDSP employees and SDSP Youth Specialist. Second. Paragraph 1 and the Note contain "Mitigating/aggravating circumstances." Third, Paragraph 1 and the Note address two ***wholly*** different subjects: Paragraph 1 addresses only "visitations"; the Note addresses only "overtime" and "retention." Fourth, Paragraph 1 ***unconditionally*** requires SDSP employees to work "visitations" that happen to occur on holidays and weekends. Conversely, Paragraph 1 categorically ***exempts*** SDSP Youth Specialists from working "Visitations" on holidays and weekends ***unless*** those "Visitations" occur under "mitigating/aggravating circumstances . . . [that] arise ***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.

2. The Note

The Note provides: Special Duty staff are NOT available for 2nd shift ***retention or overtime unless*** mitigating/aggravating circumstances arise. . . ." As previously mentioned, the Note focuses exclusively on overtime and retention and broadly exempts all SDSP employees from ***second-shift retention or overtime*** unless "mitigating/aggravating circumstances arise."

The question is whether the drafters intended for ***shift shortages*** to qualify as "mitigating/aggravating circumstances" under the Note? Because Paragraph 1 ***does not*** address ***overtime and retention***, resolution of this dispute turns ***primarily*** on whether the drafters intended to grant Management authority to ***mandate overtime*** under the Note.

Although Paragraph 1 is silent regarding overtime, proper assessment of the parties' intent in Paragraph 1 is a precondition to soberly assessing the Parties' intent under the Note. Thus, one must read Paragraph 1 and the Note together (in "Para Materia").

3. Absence of "Operationally" in the Note

As mentioned above, Management persuasively stressed "operationally" in Paragraph 1 to underscore the inherent ***operational*** nature of shift shortages that places them squarely within the scope of "mitigating/aggravating circumstances." The problem for Management, however, is that "operationally" appears only in Paragraph 1, which only addresses "Visitations." The Note addresses only "overtime."

The ***inherent*** operational nature of shift shortages together with the stark omission of "operationally" in the Note are ***outcome-determinative*** in this dispute. Standing alone, the omission of "operationally" manifests an intent to distinguish between the functional scopes of "mitigating/aggravating circumstances" in Paragraph 1and the Note. Specifically, when the drafters wished to ***include*** "operationally" as a modifier of "mitigating/aggravating circumstances," they explicitly included it, thereby obviating questions about their intent. Similarly, when the drafters wished to ***exclude*** "operationally" from the Note, they simply omitted it, again excluding questions about their intent. Furthermore, the proximity of paragraph1 and the Note foreclose ***reasonable*** efforts to credit happenstance/oversight for the omission of "operationally" in the Note. It defies reason that the drafters somehow merely forgot to include "operationally" in the Note.

4. Management's Authority to Mandate Overtime Under the Note

As noted above "operationally" appears only in Paragraph 1, which addresses only "Visitations" and not t "Overtime." Consequently, "operationally" in Paragraph 1 applies only to "***Visitations"*** and not to ***"overtime."*** If the drafters intended

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

(a) Impact of Articles 5 and 13.07

Article 5 ("Management Rights") provides in relevant part:

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

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

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

B. Obey and Grieve

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

VIII. Penalty Assessment

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

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

IX. The Award

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

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[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.