#864

OPINION AND AWARD
Grievance No. 16-11-030325-0032-01-09

In the Matter of the Arbitration

- between -

The State of Ohio

- and -

Ohio Civil Service Employees Association, OCSEA, Local 11

REVIEWED BY
JUN 0 3 2004
Cl. 6-3-04
GRIEVANCE COORDINATOR

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Union: Lynn Kemp
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Sharon Ralph
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Also Present: Ed Connors
Union Steward

Jason Rozycki
Union Steward

For the State: Richard G. Corbin
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Ohio Department of Jobs and Family Services
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Andrew Shuman
2nd Chair

Also Present: Keith Nichols
Deputy Director, ODJFS

Ronald DeLisio
Assistant Deputy Director, ODJFS

Dan Koncos
Cleveland Local Office Manager, ODJFS

BACKGROUND:

This is a dispute about the interpretation of one of the four sections of the agency's specific agreement between the Union and the Ohio Department of Jobs and Family Services (ODJFS). That section is found in Appendix Q of the collective bargaining agreement and is entitled "Established Term Appointments."

The section permits the Department to use two types of established term appointments, both of which are entitled to "all the rights and benefits of the Collective Bargaining Agreement between the parties, except as modified by this Appendix." This case turns on whether the Department properly applied the section to the work scheduling of one type of established term appointments--the type entitled established term regular appointment (ETR).

A few days after the ratification date of the collective bargaining agreement containing Appendix Q, a steward learned that the ETRs were working less than a 40-hour workweek. He filed a state-wide grievance on behalf of the ETRs stating:

> ODJFS has and is currently working ETRs within the Office of Local Operations in violation of Appendix Q of the current collective bargaining agreement. The CBA states ETRs "shall normally be scheduled to work a standard 40-hour work week." Management has intentionally reduced the hours in an effort to work them in a manner outside the intent of the agreement.

The grievance stated the Union's interpretation of the section on ETRs as mandating a 40-hour per week work schedule. The Union formulated its requested remedy based upon this interpretation of the section.

> The Union requests as a remedy that all ETRs in the ODJFS Office of Local Operations who were not scheduled to work the obligatory 40-hours per week be paid for the number of hours that they were shorted in violation of the contract. We respectfully request that their leave balances, seniority credits, PERS, contributions, and health insurance adjustments be made as if they had been scheduled to work the normal 40-hour schedule contractually mandated. (Union post-hearing brief at 9).

The concept of established term appointments in Appendix Q was derived from a Memorandum of Understanding (MOU) negotiated by the parties in August in 2001. The MOU settled a previously filed state-wide grievance against the Department challenging its extensive use of non-bargaining unit employees--intermittent employees--to supplement the bargaining unit workforce. As the former Head of Labor Relation of the Department testified in this arbitration, "we needed the MOU because we were using intermittent employees under Section 7.03 to supplement the workforce even though Section 7.03 limited intermittence to work that is irregular and unpredictable."

The parties stipulated that the MOU expired with the inception of the current collective bargaining agreement on March 1, 2003. The bargain, therefore, regarding established

term appointments, including ETRs is now found only in Appendix Q in the section entitled "Established Term Appointments."

STIPULATED ISSUE:

Did management violate Appendix Q of the 2003-2006 Contract by failing to schedule ETFs in accordance with the contract? If so, what shall the remedy be?

RELATIVE CONTRACT PROVISIONS:

APPENDIX Q - AGENCY SPECIFIC AGREEMENTS

The following supplemental agreements apply to OCSEA/AFSCME bargaining unit employees within the specified agencies only:

. . .

DEPARTMENT OF JOBS AND FAMILY SERVICES
Additional Work Supplement Program

. . .

Established Term Appointments

A. The Ohio Department of Job and Family Services is committed to reducing their reliance on non-union intermittent, temporary, and non-permanent employees. In order to achieve the goal, ODJFS may use established term regular and irregular appointment types for the purpose of supplementing the permanent work force and agrees that they will not use such appointment types for the purposes of eroding the bargaining unit.

. . .

C. Established term regular (ETR) appointment types may be used to perform work that is expected to be less than full-time, but is predictable in nature and conforms to the following standards:

1. In local operations and U.C. Tax:
   A. No less than 400 hours in a State fiscal year

B. No more than 1300 hours in a State fiscal year
C. Shall normally be scheduled to work a standard 40-hour workweek

2. In Offices, Bureaus, and Sections were ETRs have not been utilized previously:
   A. No less than 400 hours in a State fiscal year
   B. No more than 800 hours in a State fiscal year
   C. Shall normally work a non-standard work schedule
   D. All increase beyond 800 hours may be granted with mutual agreement of the parties, but under no circumstances shall the total hours exceed 1300.

. . .

E. Appropriate use of Established Term appointment types may include, but is not limited to, the following:

1. To fill in for employees on any form of leave to include, but is not limited to:
   A. Sick leave
   B. Personal leave
   C. Vacation
   D. Compensatory time
   E. Bereavement
   F. Disability
   G. Worker Compensation
   H. Approved Union leave
   I. Administrative leave
   J. Leave under the Faculty & Medical Leave Act
   K. Education leave, i.e. Workforce Development

2. Staffing around holidays
3. To staff for mandated or other training
4. To avoid the use of mandatory overtime
5. Predictable workload increases
6. Operational need that is not contrary to the intent of this agreement

OPINION:

The Union's case is bottomed on paragraph C of the section of the Department's specific agreement relating to Established

Term Appointments. Sub-section 1 (C) of the paragraph states that the work of the ETR should conform to the following standards:

> C. Shall normally be scheduled to work a standard 40-hour workweek.

The Union points to the change it achieved in bargaining for this standard in Appendix Q when compared to the similar standard expressed in the MOU dated August of 2001. Referring to ETRs, the MOU stated:

> These employees may normally be scheduled to work a standard 40-hour week . . .

The change from "may normally be scheduled" in the MOU to "shall normally be scheduled" in Appendix Q is a change from a permissive 40-hour week schedule to a mandatory 40-hour a week schedule. As stated in the Grievance quoted above, this is the core of the Union's case in this arbitration. The Union contends that the change in language from "may" to "shall" constitutes a contractually mandated 40-hour workweek for ETRs.

There was no extrinsic evidence to this language change from the MOU to the contract, such as bargaining history, to explain the mutual understanding between the parties of this change from "may" to "shall." The Union's view is that no such extrinsic evidence is necessary because the language of the standard expressed in Appendix Q is clear and unambiguous.

The Union's position is troublesome if the analysis is limited solely to the standard in Appendix Q found in paragraph C, Sub-section 1 (C). The Union's position is unacceptable and inconsistent with the contract when this standard is interpreted in light of its position as one of other provisions in Appendix Q bearing on work envisioned by the parties as appropriate assignments for ETRs.

The auxiliary verb was changed in the standard in Appendix Q as compared to the standard in the MOU. "May" became "shall." What was not changed was the adverb and verb to which the auxiliary verb was attached. "Normally be scheduled" was carried forward from the MOU to the Appendix Q.

The adverb "normally" continued to modify the verb phrase "shall be scheduled" in Appendix Q. The Union offered its definition based upon various dictionaries of the meaning of the adverb "normally." They include "typical," "the usual or expected . . . degree," "an average."

At a very minimum the continuation of the adverb "normal" as modifying the verb phrase "shall be scheduled" expresses an acknowledgment that there will be occasions when the schedule for ETRs would not be 40 hours per week. Nevertheless, the evidence presented by the Union in support of its requested remedy is compensation for all ETRs in the office of local

operations[1/] for each week of less than 40 hours work without exception.

The work standard relied upon the Union in paragraph C Sub-section 1 (C) is not the only provision bearing on work schedules for ETRs in the Section entitled "Established Term Appointments" in Appendix Q. Paragraph E of this Section states a non-exclusive list of illustrations of how the Department may appropriately use persons in the two types of established term appointments. "Appropriate use of Established Term appointment types may include, but is not limited to, the following:".

The Union presented the testimony of two witnesses both of whom participated in negotiating the agency specific agreement for the Department in Appendix Q. Both testified 1: that ETRs work under paragraph E and 2: that some of the illustrations of appropriate use of ETRs in paragraph E were for work less than 40 hours per week. For example, paragraph E lists 11 types of leaves for which ETRs can appropriately be used to substitute for employees on any of the 11 leaves. None of the 11 leaves must be taken

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[1/] The evidence did not include ETRs working in call centers.

in 40-hour increments and certain of the leaves, e.g., bereavement, are at a maximum period of time less than 40 hours per week.

Section 6 of paragraph E permits the Department to use ETRs for its "operation need." As one Union witness testified, this permits the Department to use ETRs when its operations require a full work force, and to do this with bargaining unit employees instead of intermittents (non-bargaining unit employees).

The Union argued that "management could certainly use established term irregulars for work that is unpredictable and anticipated to last less than 40-hours, and that operational need is only one consideration." (Union post-hearing brief at 6). Paragraph E contains no qualification on the use by the Department for work schedules that the Union witnesses agreed often are less than 40 per week schedules.

The Union and the Employer jointly prepared surveys for all persons in the two types of established term appointments--ETRs and ETIs. The survey contained a one-page list of common questions and answers setting forth information about established term appointments. One question and answer stated as follows:

> 10 Question: Can ETRs be used to fill in for vacation that is less than 40 hours?

> Answer: Yes, since this was one of the conditions mentioned under appropriate use of ETAs in the Agency Specific Agreement.

The chief Union negotiator for the Appendix Q stated that she agreed with this answer.

There are, therefore, two provisions in Appendix Q bearing on the work schedule for ETRs. Paragraph E lists illustrations of appropriate use of ETRs and none are required to be under a 40 per week schedule. On the other hand, there is a work schedule set forth in paragraph C stating a standard for ETRs as: "shall normally be scheduled to work a standard 40-hour week."

The Employer suggests that paragraph E permits the Department to schedule ETRs on a year-round basis on a less than 40-hour per week schedule.

> All witnesses both Union and Employer agreed the parties intended and condoned the use of ETRs working less than forty (40) hour workweeks under E. Clearly there is no restriction on the time of the year that ETRs may work less than 40-hour work schedules. (Department post-hearing brief at 3).

Later in its argument, the Department made this point on a more explicit basis. "It is also apparent E would allow for such scheduling (less than 40 hours per week) even on a year-round basis." (Department post-hearing brief at 6).

The consequence of the Department's view of paragraph E is that E trumps the work standard set forth in paragraph C and

fully negates this standard. The record in this case, however, does not support this consequence; rather, the record supports a harmonization of paragraph E and C.

The work standard in paragraph C qualifies a general proposition stated in paragraph C that ETRs "may be used to perform work which is expected to be less than full-time, but is predictable in nature . . ." All witnesses agreed that there are periods of time called "peak periods" of high volume work that are predictable. The Union agreed that these peak times were discussed during the negotiations both of the MOU and Appendix Q. "It is true that these 'peak times' were discussed negotiations of the MOU of 2001 and the Agency Specific negotiations." (Union post-hearing brief at 6). The Union further argued, however, that the work standard set forth in paragraph C of 40-hour week schedules was not tied only to peak periods. (Id. at 7). The record in this case, and the language of paragraph C simply does not support the Union's view of the absence of a connection between the 40-hour per week standard and the predictable peak periods.

We are left, therefore, with two provisions bearing on work schedules for ETRs. Paragraph E envisions work schedules of less than 40 hours per week and is not tied to any particular period of time. By contrast, the standard for work schedules in

paragraph C is specifically tied to particular periods of time otherwise known by the parties as "peak periods." Where there are two provisions in a contract bearing on the same subject matter, the provision of specificity qualifies the provision of generality. The provision of specificity controls to the limit of its scope.

The Union did gain from its negotiations in the change from the permissive "may" to the mandatory "shall" with respect to the work standard in paragraph C of Appendix Q. This means that the Department is obligated during the peak periods to work ETRs in accordance with the standard set forth in paragraph C. However, as noted in the beginning of this analysis, the work standard in paragraph C does not obligate the Department to work all ETRs for 40 hours per week without exception during peak periods. The work standard is a contractually mandated norm for the Employer during these peak periods.

The record shows that the Department did meet this standard when it declared a peak period between December 1, 2003 and February 29, 2004. At meetings with the managers, the person who declared the peak period told the managers that the ETRs would normally be scheduled for 40 hours. As one of the managers testified, he was told that he should attempt to work

the ETRs 40 hours per week, and that he should make every effort to schedule the ETRs on a 40-hour per week basis.

AWARD:

For the reasons stated above, the grievance is denied.

Date: May 30, 2004

John J. Murphy
Arbitrator