



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL #93,
LOCAL 3657

Petitioner

v.

HILLSBOROUGH COUNTY
DEPARTMENT OF CORRECTIONS

Respondent

CASE NO. A-0428:204

DECISION NO. 2000-091

APPEARANCES

Representing AFSCME, Local 3657:

Vincent Weners, Esquire

Representing Hillsborough County Department of Corrections:

Carolyn Kirby, Esquire

Also Appearing:

Gary Wulf, Hillsborough County
James O'Mara, Hillsborough County Department of Corrections
Joe Maccarone, AFSCME, Local 3657

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Council 93, Local 3657 (Union) filed unfair labor practice (ULP) charges on March 31, 2000 against Hillsborough County, Department of Corrections (County) alleging violations of RSA 273-A:5 I (e), (g), (h) and (i) resulting from breach of contract and refusal to bargain by unilaterally ceasing the practice and obligation to pay a \$1.00 per hour weekend differential to certain employees. The County filed its answer on April 17,

2000 after which this matter was twice set for hearing and continued at the request of the parties. This matter was then heard by the PELRB on August 22, 2000, at the conclusion of which the record was closed.

FINDINGS OF FACT

1. Hillsborough County operates the Hillsborough County Department of Corrections and Jail. In so doing, it employs personnel for this purpose and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. AFSCME, Council 93, Local 3657 is the duly certified bargaining agent for the clerk typists, secretaries, account clerks, correctional officers, cooks, nurses, maintenance workers, switchboard operator/receptionist, food service supervisor and CO/housekeeping supervisor employed at and by the Department of Corrections.
3. The County and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 through June 30, 2000 which was signed on or about October 12, 1999. Previously the parties signed a memorandum of understanding (MOU) on September 17, 1999 which outlined provisions of their tentative agreement. The CBA (Joint Exhibit No. 1) contains a "wage rate" article, Article XVII, several sections of which are germane to "differentials" and to these proceedings:

17.2 - In addition to the rates shown in Section 17.1, all personnel working on the 3-11 and 11-7 shift shall receive shift premium of .65 per hour. Weekend differential of 1.00 per hour will be paid. All other personnel to receive shift premium must have a minimum of two (2) hours lapover on the above mentioned shifts. Overtime will be paid on shift premium.

* * * * *

17.5 - Effective with the signing of this Agreement only the weekend Nurse will be covered by this section.

1. There shall be no qualifying period for those employees choosing the weekend shift.
2. Holiday pay shall be paid, providing the employee works his scheduled day in the week that the holiday occurs.
3. A sick/personal day for a weekend shift shall be 16.0 hours. Replacements shall be two 8 hour shifts.
4. A vacation day for weekend shift personnel shall be 20.0 hours.
5. Weekend shift personnel shall be allowed one (1)

extra personal day above those provided for in the collective bargaining Agreement.

6. While the County will post the open position for Lieutenants, the ultimate decision shall remain the prerogative of management and not subject to the grievance procedure.

7. The number of personnel to man the various shifts shall remain the prerogative of management, taking into consideration the safety of both employees and inmates.

8. A weekend shift employee shall be considered a full time employee under all conditions of the Collective Bargaining Agreement.

9. - First shift shall work Monday through Friday
7:00 AM to 3:00 PM
- Second shift shall work Monday through Friday
 - 3:00 PM to 11:00 PM.
 - Third shift shall work remain the same.
 - Weekend shift shall work Saturday and Sunday
 - 7:00 AM to 11:00 PM

By way of generalization, Article 17.2 applies to shift differentials and Article 17.5 applies to weekend differentials, further limited in this CBA to the "weekend nurse."

4. The parties arrived at a settlement on their new/current contract after years of strained relationships and protracted negotiations, inclusive of two fact finding proceedings. The second fact finding hearing was held on September 2, 1998 (Joint Exhibit No. 2), the contents of which did not address any change to Article 17.2 which was not a topic presented to the fact finder. The parties reviewed the fact finder's report upon receipt and, by January 18, 1999, County negotiator Wulf sent a memo to Union negotiator Anderson which incorporated a draft copy of the new contract "resulting from our negotiations and the acceptance by the parties of the Factfinder's Report." (Joint Exhibit No. 3.) Wulf's version proposed no changes to Article 17.2 from how it was worded in the immediately prior 1990-95 CBA (County Exhibit No. 5). He did, however, propose the complete deletion of Article 17.5 from how it appeared in the 1990-95 CBA. On February 3, 1999, Anderson (Joint Exhibit No. 4) responded, mentioning nothing about Article 17.2 and saying that "old" Article 17.5, sections 1-9 inclusive, must remain "as there are employees who still work the weekend shifts; i.e. the nurse..." Wulf followed up with a response on February 8, 1999 (County Exhibit No 2) in which there was no mention of Article 17.2 and in which he agreed to Anderson's recommendations relating to "old" Article 17.5, sections 1-9.

5. The fact finder's report (Joint Exhibit No. 2) recommended that the parties accept "a universal 4/2 schedule for maintenance personnel and correctional officers" to "go into effect three months from the signing of the agreement." According to County negotiator Wulf, the 4/2 shift for corrections officers was implemented on January 2, 2000, which effectively eliminated the "weekend shift" for correctional officers as of that date. Likewise, when the 4/2 schedule went into effect, the \$1.00 weekend differential for weekend with employees evaporated, with the exception of the provisions reserved for the nurse under "old" Article 17.5 as it now appears in the current CBA. Testimony from Superintendent James O'Mara confirmed that the practice of paying weekend differential was confined, historically, to employees assigned to the "weekend shift," and when the "weekend shift" disappeared with the advent of the "universal 4/2 schedule" for correctional officers, the practice of paying the \$1.00 per hour differential ceased. O'Mara explained that the "weekend shift" formerly consisted of corrections employees who worked from 7 am to 11 pm on Saturdays and Sundays, for a total of 32 hours, but were paid for a 40 hour week and received a full-time benefits package. The implementation of the 4/2 schedule, which rotates through the days of the week, (Union Exhibit No. 1), eliminated the need for the "weekend schedule" as it historically had been known and as referenced in Article 17.5, section 9 (Finding No. 3).
6. Notwithstanding the chronology of events in Finding No. 3 and 4, the Union filed a class action grievance on January 19, 2000 claiming a violation of Article 17.2, because "employees working during weekend shift hours are entitled to \$1.00 dollar per hour weekend shift differential," relying on the wording of Joint Exhibit No. 1, Article 17.2 to substantiate and verify that claim. The grievance was denied by O'Mara on January 26, 2000, who said "Only Nurse I and Nurse II positions are eligible to receive weekend shift differential. These job classifications are the sole remaining positions which have a weekend shift." Thereafter the grievance was appealed to and heard by the County Commissioners on February 16, 2000. The Commissioners denied the grievance by a vote of 2 to 0 on February 18, 2000. (County Exhibit No. 1.)
7. The County, through O'Mara's testimony, established that its consistent practice from January of 1999 through November of 1999, while there still was a "weekend shift" and prior to the implementation of the "universal 4/2 schedule," had been to pay third shift employees whose shifts intruded into weekend hours according to the 3-11 p.m. and the 11-7 a.m. shift premiums (at 65¢ per hour) referenced in Article 17.2, first sentence, rather than under the \$1 weekend shift differential of Article 17.2, second sentence. (County Exhibit Nos. 6 through 11, inclusive.) Conversely, correctional officer employees assigned to the "weekend shift" during the same period of time were paid under the "weekend shift differential"

provisions of Article 17.2, second sentence, at "straight time" differential of \$1 per hour or "overtime" differential of \$1.50 per hour. (County Exhibit Nos. 12 through 17, inclusive.

DECISION AND ORDER

The contract language in dispute in this case is that portion of Article 17.2 which provides that "weekend differential...will be paid." The Union claims a breach of contract and a unilateral change in working conditions because the County stopped paying that benefit to its members, namely correctional officers, when the 4/2 schedule was implemented on or about January 2, 2000. The County responded by saying that its actions were in accordance with established practice, that only employees assigned to the "weekend shift" were entitled to the differential and that, effective January 2, 2000, there was no longer a "weekend shift," thus there were no longer employees who qualified for the differential.

On its face, the language of Article 17.2 provides two types of differential pay: shift differential for 3 to 11 and 11 to 7 unit employees and a weekend differential. According to the testimony we heard, these benefits are not cumulative. The concept of differential pay dates back at least as far as the parties' 1985-88 CBA (County Exhibit No. 3), although that document did not mention a weekend differential and the hourly rates for shift differentials were lower than what appears in the current CBA. Weekend differential, *per se*, first appeared in the 1988-90 CBA. (County Exhibit No. 4) They were without restriction and give the appearance of applying to all qualifying employees in the bargaining unit. By the time the 1990-1995 CBA was negotiated, the language had been refined to "Weekend differential of 1.00 per hour will be paid." (County Exhibit No. 5) It remains unchanged in the present agreement (Joint Exhibit No. 1).

The parties were sufficiently skilled and articulate in their negotiations to isolate and define situations where a given benefit was not to apply to all members of the bargaining unit. A good example is the qualifier, new to Joint Exhibit No. 1 and modified from County Exhibit No. 5, which calls for the provisions of the current Article 17.5 to apply "only to the weekend Nurse." (Emphasis in original.) With this degree of diligence and specificity, we must read the language of Article 17.2, "weekend differential of 1.00 per hour will be paid," to mean what it says. It applies to all members of the bargaining unit unless there is compelling evidence or practice to suggest that it means otherwise.

We find that compelling evidence in what was presented to us as a practice which existed throughout 1999, without complaint or objection, as referenced in County Exhibit Nos. 6 through 17, and appears to have also been the practice pre-dating the foregoing documentary evidence. That practice was to pay shift employees, i.e., all shift employees other than "weekend shift" employees, their shift differential, currently .65¢ per hour, when they worked on a qualifying shift around or into the weekend. If they worked "extra" or overtime on the "weekend shift," then they were paid the \$1 weekend differential. Without being designated as being on the "weekend shift," they did not

receive the \$1.00 differential. Logically, factually and consistent with the County's testimony and documentary evidence, the only recipients of the \$1.00 weekend differential were personnel assigned to the weekend shift, a shift which was eliminated with the implementation of the "universal 4/2 schedule" last January.

This brings us to realize that the parties, by their deeds and practice, have ascribed a meaning to "weekend differential...will be paid" which differs from and is more restrictive than what those words convey on their face. We will not disturb the meaning the parties have historically given to these words in the administration of the current and former CBA's.

Past practice is an extremely important concept in labor negotiations and is an indispensable ingredient in permitting the parties to conduct their business within a given set of expectations until they negotiate or agree to the contrary. It is protected by both statute [e.g., RSA 273-A:5 I (e) for failure to bargain and unilaterally implementing a change in working conditions] and case law [e.g., Appeal of Nashua Board of Education, 141 NH 768, 777 (1997) and Appeal of Milton School District, 137 N.H. 240, 247 (1993)]. Without the doctrine of past practice, the parties would be crippled in their attempts to address and administer issues not specifically set forth in the contract or to rely on their long-term, open and consensual actions which have given added meaning to the generalized or non-specific words in their agreement. See "past practice," Roberts' Dictionary of Industrial Relations, 4th Edition. (Bureau of National Affairs, 1994). We will not disturb the practice and interpretation given and accorded to the contract language in question by the parties over a period of years so as to make it subordinate to a unilateral interpretation now sought by one of the parties.

The ULP is DISMISSED.

So Ordered.

Signed this 6th day of SEPTEMBER 2000.


BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and E. Vincent Hall present and voting.