

**IN ARBITRATION
BEFORE MARK E. BRENNAN, J.D.**

**WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,**

Employer,

and

**WASHINGTON FEDERATION OF
STATE EMPLOYEES,**

Union.

(Alexander King Grievance)

AAA CASE NO. 01-15-0002-8026

ARBITRATOR'S DECISION AND AWARD

For the Union:

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I. INTRODUCTION

This dispute between the Washington State Department of Social and Health Services (the “Employer” or “DSHS”) and the Washington Federation of State Employees (the “Union” or “WFSE”), concerns a grievance filed on behalf of Alexander King under the parties’ 2013-2015 Collective Bargaining Agreement (the “Agreement”). The parties stipulated that the matter was properly before the Arbitrator for decision. The Union asserts that the Employer violated the Agreement when it changed King’s work schedule during the week of January 12, 2014 to avoid the payment of overtime.

At a hearing held in Vancouver, Washington on March 31, 2016, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine each other’s witnesses. The proceedings were transcribed and the court reporter provided a transcript that I reviewed along with the exhibits to fully analyze the evidence. The representatives filed post hearing briefs electronically with the American Arbitration Association and me on June 17, 2016. With receipt of the briefs, the record was closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties could not agree on the issue. As a result, they asked me to formulate the issue.

The Union stated the issue should be:

Did the Employer violate the Agreement when it required King to accept flex time during the week of January 13-18, 2014?

The Employer stated the issue should be:

Whether the Employer violated Articles 6, 7 or 42 of the Agreement? If so, what is the proper remedy?

I conclude that the issue for determination is:

Did the Employer violate the Agreement by the manner in which it scheduled and paid King during the week of January 12-18, 2014? If so, what is the proper remedy?

The parties agreed that I would retain jurisdiction for sixty days following issuance of the Decision and Award, in the event I determine some remedy is appropriate, solely to resolve any disputes over that remedy that the parties are unable to resolve on their own.

III. FACTS

At all times material to this matter, Alexander King worked for the Employer at its Columbia River Community Services Office, located in Vancouver, Washington, as a Financial Services Specialist 4. The Financial Services Specialist 4 position is a lead position, and assists line staff to ensure that clients receive appropriate assistance.

King was regularly scheduled Monday through Friday from 8:00 AM to 4:30 PM. Beginning on or about January 1, 2014, Mitchell Lambert was his supervisor.

In early January 2014, King learned that he was expected to attend training for his lead position. The training session was scheduled to begin at 9:00 AM in Seattle, Washington, on Monday, January 13, 2014, and to last about six hours. Drive time between Vancouver and Seattle is at least three hours. Driving during either morning or evening rush hour would likely add an additional hour to the drive time.

On January 8, 2014, Lambert and King discussed whether King should drive up on Sunday, a scheduled day off for King, and then attend the training and return on Monday, or drive round trip and attend the training on Monday. According to Lambert, the conversation was casual. King asked Lambert if he could travel on Sunday. Lambert said that it was up to King to do whatever

he wanted; he did not direct King to travel on Sunday. King could not recall any details about the conversation.¹

King chose to travel on Sunday, January 12, 2014, from Vancouver to Seattle. The trip took three hours. He stayed in a hotel, paid for by the Employer.² He attended the training and returned to Vancouver on Monday, January 13, 2014. The training and trip back to Seattle took a total of ten hours.

On January 14, 2014, Lambert and King discussed how King was to be compensated for his hours of work on Sunday and Monday. All parties agree travel time to and from the training is considered work time. King believed that he was entitled to five hours of overtime; three from Sunday and two in excess of eight on Monday. Lambert explained that King would need to take flex time for the five hours.³

Flex time is not defined or even mentioned in the Agreement. The parties agree to its meaning, however. At its simplest, it means employees who work more hours than they are scheduled on one or more days in a work week, flex their schedules later in that same week to work less hours per shift or shifts, so that they do not work more than forty hours in the work week. They, thereby, do not earn overtime premium pay, or accrue compensatory time.

¹ King testified that he came to understand he had the option of which day to travel, (Tr. 18), but could not recall the details of any conversation with Lambert on the subject (Tr. 20).

² The Employer contended at the hearing that King did not stay at a hotel, implying that he stayed instead with either his mother or brother. In support of that contention it placed into evidence a reimbursement report for King that showed no reimbursement for the hotel. King credibly explained that the Employer paid for the hotel room directly. There was also a dispute about whether King drove in an Employer-owned vehicle or his own. I credit King's testimony that he drove in an Employer-owned car over evidence submitted by the Employer. The Employer's evidence consisted of Lambert's "understanding" based on his discussion with other employees.

³ The Union contends that because the Employer mandated King take five hours of flex time following his trip to and from Seattle, King did not choose to adjust his hours. This conflates King's earlier decision to travel on Sunday, rather than Monday, with the consequences of that decision.

Under the Agreement, employees in King's job classification are entitled to overtime pay or compensatory time for all hours worked in excess of forty in a work week. Overtime is paid at time and one-half. Compensatory time (or time off) is earned at the time and one-half rate.

Once Lambert told King that King had to flex his schedule, King requested to flex five hours on Tuesday. It turns out that King had already worked 3.5 hours that day, so he could only flex 4.5 hours that day. He flexed an additional .5 hours on Friday of that week in connection with other leave. S-8-10. King ended up receiving straight time pay for 40 hours of work that week.

For several weeks, King attempted to receive overtime pay for the excess hours through his chain of command. On February 10, 2014, the Employer told him that under Article 6.3 of the Agreement he was entitled to five hours of flex time and not overtime or compensatory time. U-16. The grievance at issue in this matter followed.

Article 6.3, which is set forth below, has been in the parties' collective bargaining agreements since 2007. The highlighted portion of the language was added during negotiations for the 2007-2009 agreement, as a compromise. The Union sought to have all overtime eligible employees receive overtime or compensatory time for all hours worked in excess of their normal daily schedule.

IV. PERTINENT CONTRACT PROVISIONS

ARTICLE 6 HOURS OF WORK

6.3 Overtime-Eligible Employees (Excluding Law Enforcement Employees)

A. Regular Work Schedules

The regular work schedule for overtime-eligible employees will not be more than forty (40) hours in a workweek, with starting and ending times as determined by the requirements of the position and the Employer. The regular work schedule will normally include two (2) consecutive scheduled days off. The Employer may adjust the regular work schedule with prior notice to the employee. *If the Employer extends an employee's daily work schedule by more than two (2) hours on any given day, the Employer will not adjust another workday or the employee's workweek to avoid the payment of overtime or accrual of compensatory time. This provision will not apply:*

1. *When an employee requests to adjust his or her hours within the workweek and works no more than forty (40) hours within that workweek;*
(emphasis added)

* * *

G. Employee-Requested Schedule Changes

Overtime-eligible employees' workweeks and work schedules may be changed at the employee's request and with the Employer's approval provided the Employer's business and customer service needs are met and no overtime expense is incurred.

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ARTICLE 29 -- GRIEVANCE PROCEDURE

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STEP 5 – Arbitration

If the grievance is not resolved at Step 4 . . . the Union may file a request for arbitration. .

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D. Authority of the Arbitrator

1. The arbitrator will:
 - a. Have no authority to rule contrary to, add to, subtract from, or modify any provision of this Agreement;

- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance
- c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement.
- d. Not have the authority to order the Employer to modify his or her staffing levels or direct staff to work overtime.

* * *

- 3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitration Costs

- 1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

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- 3. If either party desires a record of the arbitration, a court reporter may be used. If that party purchases a transcript, a copy will be provided to the arbitrator free of charge. If the other party desires a copy of the transcript, it will pay for half of the costs of the fee for the court reporter, the original transcript and a copy.
- 4. Each party is responsible for the costs of its staff representatives, attorneys and all other costs related to the development and presentation of their case

V. POSITIONS OF THE PARTIES

A. The Union's Position.

The Employer violated Article 6.3(A) of the Agreement when it mandated that King take five hours of flex time during the week of January 13-17, 2014. The Agreement allows the Employer to flex an employee's schedule to avoid the payment of overtime only when the employee's schedule is extended by two hours or less.

Here, King was given a mandatory choice of travelling on Sunday, a day outside his regular schedule, or travelling to and from the seminar on Monday. King chose to travel on Sunday. He, thus, worked three hours on Sunday and ten on Monday. If he chose the alternative, he would have worked thirteen hours on Monday.

When the Employer mandated that King take five hours off without pay during the rest of the work week, to keep him at forty hours of work that week, it violated the Agreement. The Agreement's plain language demonstrates this.

First, the Employer did require King to work more than two hours past his daily schedule on Monday. That he was given the option of serving a portion of this time on Sunday does not erase this mandate. This interpretation of the language is bolstered by the reality that by choosing Sunday, King benefitted the Employer by reducing travel time by one hour and lessening the risk of accident due to fatigue.

Second, King's daily work schedule on Sunday was zero hours. He was required to work more than two hours beyond his daily work schedule that day. The prohibition set forth in Article 6.3(A) was, therefore, invoked.

B. The Employer's Position.

There was no violation of the Agreement. The Grievance should be denied.

Article 6.3(A)'s language is plain and clear. It states that the Employer must be the one to initiate the extension of an employee's daily work schedule by more than two hours for that section's prohibition against the Employer later adjusting the work schedule to avoid overtime to apply. In addition, Article 6.3(A) continues on to spell out a specific exception to the rule prohibiting the Employer from later adjusting the schedule "when an employee requests to adjust

his or her work hours within the workweek and works no more than forty (40) hours within that workweek.”

Here, King requested to travel on Sunday. The Employer did not tell King that he had to travel on Sunday for the Monday training. It was King’s preference to travel on Sunday. Because King requested to adjust his hours within the workweek, the Agreement was not violated when the Employer required him to flex his schedule during the same work week.

Even if the Arbitrator finds there was a contract violation, there is no further remedy to grant. The Employer satisfied the entire remedy requested by the Union in its grievance.

VI. DECISION

In contract interpretation cases, arbitrators must determine the parties’ mutual intent. The contract’s written words are the starting point to determine that intent. The contract as a whole must be reviewed to determine if a plain meaning can be ascertained – that is, are the words plain and clear, conveying a distinct meaning. If they are not, such matters as bargaining history, and custom and practice of the parties are used to guide the arbitrator to the parties’ intent.

I find that the language in Article 6.3 is plain and clear, and conveys a distinct meaning. Overtime- eligible employees will have a regular weekly work schedule of not more than forty hours, with starting and ending times determined by their position’s requirement and the Employer.

If the Employer extends an employee’s daily work schedule by more than two hours on any given day, then the Employer may not adjust another workday of the employee that week to avoid overtime or compensatory time. By implication and consistent with the practice and understanding of the parties, if a daily work schedule is extended for less than two hours, then the Employer can flex the employee’s schedule, adjust other workdays that week, to ensure the

employee does not work more than 40 hours that pay period and prevent payment of overtime pay or accrual of compensatory.

The provision that prohibits the Employer from adjusting an employee's schedule to prevent the payment of overtime when an employee's work day is extended by more than two hours does not apply when an employee requests to adjust his or her work hours. There is no limitation on that language. Whenever the employee requests a schedule change, the provision prohibiting the practice of flex time when more than two hours are worked past the daily work schedule does not apply. So long as an employee is not coerced into making the request, it does not matter that he believes the requested adjustment benefits the Employer. By the plain and clear language of the Agreement, an employee's request to change his schedule negates the prohibition against flex time.

In this matter, King was provided the opportunity to decide whether to change his schedule and travel to Seattle on Sunday, January 12, 2014, or to leave his schedule intact and travel to Seattle on Monday. From Lambert's unrebutted testimony, the decision was left solely in King's hands. Neither Lambert nor any other Employer representative coerced King in any way on which day he should travel. King's decision to travel on Sunday was, thus, by his request. The contractual language prohibiting the adjustment of hours later in the week did not apply.

The Employer did not violate the agreement with how it scheduled and paid King during the week of January 12-18, 2014.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following Award:

1. The Washington State Department of Social and Health Services did not violate the parties' 2013-15 Collective Bargaining Agreement by how it scheduled and paid Alexander King during the week of January 12-18, 2014;
2. The Washington Federation of State Employees' grievance is denied; and
3. The Washington State Department of Social and Health Services and the Washington Federation of State Employees shall be equally responsible for all costs and fees of arbitration.

DATED this 21st day of June, 2016



Mark E. Brennan, JD
Arbitrator