

BACKGROUND

The State of Washington and the Washington Federation of State Employees, hereinafter referred to as the Union, entered into a Collective Bargaining Agreement covering several State Agencies, including the Department of Health and Human Services. The Department operates the Naselle Youth Camp. It houses juvenile offenders there.

Grievant is employed at the Youth Camp. The camp in years past operated on a 4x10 shift schedule. For various reasons, including financial considerations, it changed the schedule. Grievant’s schedule was affected by the change. In November of 2009 his days off were Thursday and Friday. He worked from 2:00 p.m. to 10:00 p.m. on Sunday, Tuesday, Wednesday and Saturday. On Monday’s he only worked from 2:00- 9:00 p.m. This was his schedule until October 2, 2011. His schedule was changed to the following:

Sunday	off
Monday	off
Tuesday	1:00 p.m.- 10:30 p.m.
Wednesday	2:30 p.m.- 10:30 p.m.
Thursday	2:30 p.m.- 10:30 p.m.
Friday	2:30 p.m.- 10:30 p.m..
Saturday	2:30 p.m.- 9:00 p.m.

The Agreement provides for a shift premium to be paid for evening and night shifts. Article 42 in pertinent part states:

42.15 Shift Premium

A. For purposes of this Section, the following definitions apply:

1. “Evening shift” is a work shift of eight (8) or more hours which ends at or after 10:00 p.m.
2. “Night shift” is a work shift of eight (8) or more hours which begins by 3:00 a.m.

B. A basic shift premium of sixty-five cents (\$0.65) per hour will be paid to full-time employees under the following circumstances:

1. Regularly scheduled evening and night shift employees are entitled to shift premium for all hours worked.

2. Regularly scheduled day shift employees are not entitled to shift premium unless:

a. The employee's regular or temporary scheduled work shift includes hours after 6:00 p.m. and before 6:00 a.m. where no overtime, schedule change pay, or callback compensation is received. Shift premium is paid only for those hours actually worked after 6:00 p.m. and before 6:00 a.m.

b. The employee is temporarily assigned a full evening or night shift where no overtime, schedule change pay, or callback compensation is received. Shift premium is paid only for all evening or night shift hours worked in this circumstance.

3. Employees regularly scheduled to work at least one (1), but not all, evening and/or night shifts are entitled to shift premium for those shifts. Additionally, these employees are entitled to shift premium for all hours adjoining that evening or night shift which are worked.

This matter involves three separate time frames where Grievant was not paid shift premium for certain hours he believed he was entitled to receive it. The Union filed three separate grievances covering each of the time periods in question. The Parties agreed to consolidate them for the hearing. The first grievance involved shift premium pay for November 2 and 9, 2009. On both those days, Grievant was scheduled to work from 2:00 – 9:00 p.m. He was paid shift premium for all the hours worked after 6:00 p.m. He was not paid a premium for the hours before 6. He believed he was entitled to the premium for the whole shift.

The Second grievance involved the denial of shift premium to Grievant on August 16, 2010. Grievant in addition to his regular duties was also on fire

detail. When there was a fire in the State, he could be called to help fight the fire. He was called to work a fire August 16-18. His hours on those days were:

Monday, August 16, 2010
3:00 a.m.–11:30 a.m. (8.5 hours)
4:00 p.m.–12:00 midnight (8 hours)
Tuesday, August 17, 2010
12:00 midnight–8:00 a.m. (8 hours)
4:00 p.m.–12:00 midnight (8 hours)
Wednesday, August 18, 2010
12:00 midnight–3:00 p.m. (15 hours)

Since Grievant did not get a five hour break as required by Section 4.2.27(A)(2) of the Agreement he was paid for all his hours, including the hours of the shortened break. Grievant was thus paid overtime for the hours between 11:30 a.m. and 4 p.m. on August 16. Grievant was also paid overtime for the 16 hours he worked on August 17 plus the first five hours of his break. He was paid overtime for all hours worked on August 18. He was not paid shift premium for any of the hours he worked on August 16. August 16 was a Saturday so he was scheduled to only work to 9:00 p.m. that day. He did receive shift premium for the 16 hours he worked on August 17, but not for any of the hours during the eight hour break. He was paid shift premium for all the hours worked on August 18.

The third grievance is over the denial of shift premium pay on Saturday June 23 and Sunday June 24, 2012. Grievant did not work his regular schedule on June 23. He worked from 3:30 p.m. - 8:15 a.m. He was paid shift premium for the hours between 6-10 p.m. or four hours. Grievant received overtime pay for all the hours worked on June 24, but was not given premium pay for any of the hours. For both the second and third grievance, the

Department believed the provisions of Article 42.15(B)(2)(a) applied thus disqualifying Grievant for shift pay as he was paid overtime for those hours.

POSITION OF THE UNION

The Agreement provides that a regularly scheduled evening shift employee is entitled to receive a shift premium. The meaning of the words regularly scheduled used in this Section must be given the same meaning throughout the Collective Bargaining Agreement. While evening shift is defined in the Agreement, the words regularly scheduled are not. It is then proper to look to the Washington Code for its definition of the word. It defines regularly scheduled as someone permanently assigned to a schedule. From that definition it is clear Grievant is a de facto evening shift employee as most of his workdays are in the evening. The Employer refusal to categorize him as a regular evening shift employee violates the Agreement and WAC 356-15-60. As an evening shift employee he is entitled to the shift premium for all days worked.

The Employer relies upon Article 42.15 (B)(3). That Section says an employee who works one or more evening shifts is entitled to the premium for those shifts. This Section was only meant to apply to employees who sporadically worked evenings, not someone like Grievant who worked four out of five days on evening shift.

The Employer argues since evening and night shift are defined, any shift not meeting the definition must be considered a day shift. One Employer witness testified that a shift beginning at 5:00 p.m. and ending at midnight would be

considered a day shift since it does not meet the definition of evening or night shift. Such a result is an absurdity.

The Employer denied shift premium in all three grievances because Grievant was not scheduled to work the hours that fit the definition of an evening shift on those days. Since he was a regularly scheduled evening shift employee under Section B(1), that does not matter. Section B(1) says a regularly scheduled evening shift employee “is entitled to shift premium for all hours worked.” It does not matter what those hours worked are. Grievant should be made whole and paid all the premium pay he is due.

POSITION OF THE DEPARTMENT

Article 42.15 and Article 42.27 control the outcome of this case. The language in those Sections is clear. Use of extrinsic evidence is then unwarranted. Section 42.15 defines an evening shift. It must be 8 hours long and end at 10:00 p.m. or later. The Article also provides that employees who are regularly scheduled to one or more evening shifts get paid the shift premium for those evening shifts. A Day shift is not defined in the Agreement. Since the term is used and undefined the Employer considers any shift not meeting the definition of evening or night shift to be a day shift. To treat the term any other way would be to rewrite the Agreement and could result in the loss of premium pay for employees under Article 42.15.B.3.

The Union contends Grievant meets the definition of a regularly scheduled evening shift employee for all days he worked. It ignores 42.15.B.3 in making that argument. That Section says an employee is entitled to the shift premium

for each day the employee works an evening shift. It is a day-by-day analysis as to whether shift premium is paid. Adopting the Union position would render this Section meaningless.

The Employer pays a shift premium to an employee regularly scheduled for evening shift work even if the employee works different hours. It also pays shift premium to day shift employees for all hours worked after 6 p.m. and to employees who are temporarily assigned an evening or night shift. This practice is accord with the terms of the Agreement.

The Employer followed the terms of the Agreement with regard to each of the instances listed in the grievances. Grievant was not scheduled to work an evening shift on any of the days in question and thus is not entitled to shift premium for those days.

DISCUSSION

The three grievances were consolidated because they all revolve around the same question. The Union believes because Grievant worked an evening shift four out of five days every week he fit the definition of a regularly scheduled evening shift employee under Section 42.15(B)(1) for the entire week, including the day he only worked until 9. If they are correct then on each date listed in the three grievances Grievant would be entitled to the shift premium “for all hours worked.” The Arbitrator shall, therefore, begin with a discussion of that Section of the Agreement, but must do so while relating it to the remainder of 42.15. As noted by both Parties, an Arbitrator must look to the entire

Agreement, not to just any single provision when interpreting contract language.

Grievant had a set schedule. On four of his five days he clearly met the definition of an evening shift worker. If Grievant or any other employee is scheduled to work an evening shift and winds up working a day shift, the employee still gets the premium because he was a regularly scheduled evening shift employee that day. Section B(1) says an employee is paid the premium for all hours worked. That is so regardless of the hours actually worked. That is what the Department has done and it is in accord with the Section. He is entitled to be paid the shift premium on those days for as long as his regular schedule remains as it is. Even if his schedule is temporarily changed to meet a need for a short period of time, he still is entitled to the premium on those four days because his regular schedule still falls within the definition of evening work on those four days.

One day a week Grievant clearly did not fit the definition of an evening shift employee. The Department has not paid shift premium on those days except for the hours worked after 6. It has said it is not Section B(1) that controls on those days, but B(3). Eligibility determination it says is made daily based on the schedule for that day. The Arbitrator finds Section B(3) does impact the outcome here. It says an employee who regularly works one or more evening shifts is paid the premium for those shifts. The use of the words one or more evening shifts is significant. It is true that the Grievant spent far more time working evenings than any other shift, but this Section does not limit the number of shifts to which it applies. It added the word "more," which signifies

it can be over one. Furthermore, there is nothing to indicate the Union contention that this Section was only meant to apply to an employee who sporadically worked an evening shift was the Parties intent when they drafted the Section. To the contrary, the Section uses the words “regularly scheduled” which would be inconsistent with that argument. The evening shift schedule is not sporadic, but a regular occurrence. That is exactly what Grievant’s schedule is four days out of five, but only four out of five.

The Union believes regardless of the above, the simple fact that Grievant spent the overwhelming majority of his time working evenings meant that he met the definition of a regularly scheduled evening shift employee and thus should be paid the premium for all his hours each day. The Union bases that argument on the use of the word regularly. The Union refers the Arbitrator to the definition of the word regularly in the WAC, and says that should be applied here. The WAC defines regularly scheduled to mean a “permanently assigned work schedule/shift...”

The Arbitrator agrees the word regularly is important and must be given meaning. However, to do that the Arbitrator must look not just to Section B(1), or the WAC, but also to other provisions of 42.15. B(2)(a) says a regularly scheduled day shift employee “whose regular or temporary schedule” includes hours after 6 is paid the premium if the employee does not receive overtime or some other payment listed in the Section. The significance is it uses the words regular and temporary. It distinguishes between the two. Similarly, Section B(2)b) uses the words temporarily assigned to an evening shift. The word regular refers to the employee’s normal schedule, as opposed to one that is only

temporary as referenced in Section 2(b). The WAC itself says regularly scheduled means an employee's "permanently assigned work schedule/work shift". It too breaks the schedule down by shift. That is exactly what has been done here. Thus, regularly scheduled refers to the normal schedule as opposed to one that is unusual or temporary. Grievant had a normal schedule in which he worked evenings four out of five days. This was his regular schedule and on those days he was an evening shift employee. He was paid premium pay no matter when he worked on those days. Conversely, on the fifth day, he also worked a regular schedule but it did not meet the definition of an evening shift and consequently he was not entitled to shift premium except as in 2(B)(2).

Any Arbitrator when interpreting contract language must, as noted at the outset look to the entire Agreement and not to any single provision. That is what this Arbitrator has done. The Arbitrator here has looked at the entire Article and Section when interpreting the words "regularly scheduled." He has attributed meaning to the words based on how it is used in Section B(1) and (3) and distinguished it from the word temporary in B(2).¹ The Arbitrator will now apply the findings here to the specific grievances.

The Arbitrator must reject the first and second grievances. On November 2 and 9 Grievant was scheduled to work only until 9 p.m., not 10 and he worked less than 8 hours. His shift was too short and ended too soon to qualify. He was paid for the hours he worked after 6 and that was all he was entitled to

¹ It should be noted that there is no allegation and no evidence that the change was made in bad faith. There were factors, not the least of which was financial considerations that prompted the change and not any animus on the part of the Department.

receive. Similarly, Grievant's regularly scheduled shift on August 16 did not meet the definition of an evening shift.²

This leaves the third grievance, which has a slightly different twist. The Arbitrator agrees with the Union that the default position taken by the Employer that anyone not falling within the definition of evening or night shift should be considered to be on day shift can be problematic in some situations. June 23 was a Saturday and thus fits within the same pattern as the first two grievances and is similarly denied. June 24 was a Sunday. What is different is that this was his day off. Since it was his day off, the Employer using its default interpretation considered him a day shift employee. Under that theory, even if Grievant worked five out of five days as an evening shift employee he would not get shift premium for any hours on his day off because he was getting overtime for those hours. Section 2 states that "regularly scheduled day shift employees" do not get a shift premium if they are paid overtime or one of the other listed payments. Clearly, an employee who works an entire week's schedule as an evening shift employee cannot be considered a "regularly scheduled day shift employee" on any day since the employee has no day where he could be considered to be on a day shift schedule. Similarly, an employee, like Grievant whose schedule is almost all evenings should not be considered a regularly scheduled day shift employee on his days off. In reality he has no schedule that day, be it day or evening. That is different than those days he was scheduled to work a shortened day. He did not meet the definition of an

² It is unclear if Grievant also alleges he should have been paid the premium for the five hour break. He was paid overtime for the break, but not given shift premium for that time. If Grievant is making that claim, the Arbitrator must reject it. Premium pay is given for "all hour worked." He did not work during his break and is not entitled to premium pay for those hours.

evening shift employee on those days. While the Agreement lacks a definition for a day shift employee, it does use the words “regularly scheduled” in B(2) just as it does in Section 1. If Section 1 is interpreted to mean, as this Arbitrator does, that if the employee’s regular schedule on any of the days worked does not meet the definition of an evening shift employee the employee is not entitled to shift premium that day, then he must also find that on a day off the employee does not qualify as a regularly scheduled day shift employee on a day the employee has no schedule. Put another way, it is one thing to take an employee who has a schedule that does not fit the definition of an evening shift employee and say that employee is a day shift employee and quite another to take an employee who has no schedule and say that employee is a regularly scheduled day shift employee for that day. Instead, one must find a logical fit for an employee who works an unscheduled day. To fit the employee into a slot that is not representative of the employee’s true regular schedule is not fair to the employee and not required by the terms of the Agreement. The Arbitrator, therefore, finds for the Grievant on June 24. He should have been paid shift premium for all hours worked that unscheduled day.

AWARD

1. The Grievance requesting shift premium for November 2 and 9, 2009 is denied.
2. The Grievance requesting shift premium for August 16 or 17, 2010 is denied.
3. That portion of the Grievance requesting shift premium for June 23, 2012 is denied. That portion of the Grievance requesting shift premium for June 24, 2012 is granted. Grievant shall be paid shift premium for all hours worked on that date.

Dated: February 6, 2013

A handwritten signature in cursive script, reading "Fredric R. Dichter", is written over a horizontal line.

Fredric R. Dichter,
Arbitrator