BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

SEIU HEALTHCARE WISCONSIN

and

OAKWOOD LUTHERAN HOMES

Case ID: 440.0009
Case Type: A

AWARD NO. 7932

Appearances:

Nicholas E. Fairweather, for the Union.

Jon E. Anderson, for the Employer.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the parties selected the undersigned to serve as arbitrator of an overtime grievance. Hearing was held in Madison, Wisconsin, on June 23, 2016. The proceedings were not transcribed or otherwise recorded. Both parties filed written argument by July 29, 2016.

ISSUE

The parties were unable to agree upon a statement of the issue to be resolved by this Award but did agree I could frame the issue after considering their respective positions. Having done so, I frame the issue as follows:

> Did the Employer violate Section 18.4 of the agreement by the manner in which it calculated overtime for certain employees? If so, what remedy is appropriate?

DISCUSSION

On October 6, 2015, the Union filed a grievance with the Employer that cited Section 18.4 of the 2013-2015 contract and asserted "[t]he Employer is not paying overtime in accordance to the contract." The grievance described the relief sought as: "Provide employees with full back pay and pay overtime to all employees."

Section 18.4 of the agreement requires that all hours worked "in excess of eight (8) hours per day … shall be paid at a rate of one and one-half (½) times the regular rate."

Both parties acknowledge that the "day" for employees begins at 11:00 p.m. each calendar day. Both parties also acknowledge that a "day" has a length of 24 hours. The narrow dispute raised by the grievance is whether an employee who works consecutive shifts that straddle the 11:00 p.m. start of a "day" but who has an unpaid break between the two shifts is entitled to receive overtime for the second shift.

The Employer has a consistent practice of not paying overtime in the above circumstance and that practice is fully consistent with the contract language. The second shift is worked in a different "day" than the first shift and is the first eight hours worked that new "day." Overtime is earned for any subsequent (over eight) hours worked in that "new" day but not for the first shift of the "new" day.

However, this grievance exists because it has also been the Employer's consistent practice to pay overtime for the second shift that straddles 11:00 p.m. if there is no unpaid break between the two shifts. The Union points to this practice and argues that the Employer is obligated to also follow it in circumstances where there is an unpaid break. The Employer counters by asserting that although this practice is not contractually required, the practice does not provide a persuasive basis for finding a contractual violation in the "unpaid break" scenario presented by the grievance.

It is clear that although the Employer's practice of paying overtime for consecutive, continuous "straddle" shifts is contrary to the language of Section 18.4, it is also clear that the Employer cannot end that practice unless it provides proper notice and then meets its bargaining obligations. However, the question posed here is whether that extra-contractual overtime practice mandates creation of a contractual obligation in a slightly different fact scenario. I conclude it does not. A practice that is contrary to contract language (but which the Employer is obligated to maintain pending exhaustion of its bargaining obligation) does not require creation of a related contractual obligation. This is true even where, as here, the distinction relied on by the Employer for its actions (continuous pay status versus an unpaid break in service) also has no contractual support.

Given the foregoing, I conclude that the Employer did not violate Section 18.4 and the grievance is dismissed.

Dated at Madison, Wisconsin, this 27th day of September 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Arbitrator