

Before: James S. Cooper, Arbitrator

In the Matter of Arbitration between:)	
)	
THE STATE EMPLOYEES' ASSOCIATION)	
OF NEW HAMPSHIRE, INC.)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 1984)	
)	
and)	OPINION AND AWARD
)	
STATE OF NEW HAMPSHIRE)	Grievance:
)	Holiday Pay
)	

Introduction

The State Employees' Association of New Hampshire, Inc. ("SEA" or "Union") and the State of New Hampshire ("State" or "Employer") are parties to a collective bargaining agreement ("Agreement") dated June 7, 2018 that provides in Article XIV, Grievance Procedure, §14.5.2 for final and binding arbitration of grievances.¹ On May 1, 2017, the Union, represented attorney Gary Snyder and Charles McMahon, and the State Represented by attorney Nancy Smith of the Department of Justice and Matthew J. Newland, Manager of Employee Relations, presented this matter in arbitration.

Issue

The parties agreed to the submission of the following issue for resolution:

1. Did the State violate Article IX, § 9.4.2 of the 2018-2019 Agreement² when the State limited employees working an alternative or flex schedule by paying time

¹ Article XIV, § 14.5.2 provides:

Arbitrator's Powers: The arbitrator shall have no power to render a decision that will add to, subtract from or alter, change or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration. To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding provided it is not contrary to existing law or regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature.

² Article IX, § 9.4.2 provides:

and one-half for either seven and one-half or eight hours (depending on the employees regularly scheduled hours) for time worked on a holiday and straight time for any hours in excess of either seven and one-half or eight hours?

2. Is so, is the arbitrator's remedy limited by Article XIV, §14.5.2 of the Agreement?
3. If not, what shall be the remedy?

Facts

For many years prior to the current Agreement, the State and the Union had the following provisions as Article IX, § 9.4, and § 9.5 as such appeared in the 2015-2017 Agreement:

§ 9.4 Holidays Worked:

When a full-time or regularly scheduled part-time employee works on a calendar holiday, he/she shall receive payment of the holiday at the regular rate and in addition, at the discretion of the Employer, (1) be paid at the rate of time and on half for hours actually worked on the holiday or (2) be given compensatory time off equal to one and one half the number of hours actually worked. A calendar holiday begins after 12:00 a.m. on the actual day of the holiday and ends at midnight on the same day. Only hours work on the actual calendar holiday are to be compensated as indicated above.

§9.5 Holidays on Flex Schedules:

The premium compensation provided by 9.4 for those employees on flexible or alternative work schedules shall be limited to seven and one-half (7½) hours for 37½ hour employees and eight (8) hours for forty (40) hour employees.

During the course of negotiations the Union sought to modify § 9.4 by separating out an employee's entitlement to holiday pay without regard to whether or not they worked on a holiday from an employee who collected his holiday pay plus, if he or she was required to work on the holiday, premium pay for such work. On January 31, 2017 the Union proposed the following new sections and the deletion in the then-existing language:

Holidays Worked: In addition to the provisions of 9.4 and 9.4.1 above, when a full-time or regularly scheduled part-time employee works on a calendar holiday, he or she shall, at the discretion of the Employer, (1) be paid at the rate of time and one half for hours actually worked on the holiday or (2) be given compensatory time off equal to one and one-half the number of hours actually worked. A calendar holiday begins after 12:00 a.m. on the actual day of the holiday and ends at midnight on the same day. Only hours worked on the actual calendar holiday are to be compensated as indicated above.

§ 9.4.: Holiday Pay:

A full-time employee shall receive payment for the holiday at the regular rate equivalent to eight (8) consecutive hours for forty (40) hour employees, or seven and one-half hours for 37.5 hour employees.

§ 9.4.1 Part-time employees:

Part-time employees: Regularly scheduled part-time employees shall be paid the number of hours they are normally scheduled on the day of the week the holiday is observed.

§ 9.4.2 Holiday Worked:

When a full-time or regularly scheduled part-time employee works on a calendar holiday, he/she shall receive payment of the holiday at the regular rate and in addition, at the discretion of the Employer, (1) be paid at the rate of time and on half for hours actually worked on the holiday or (2) be given compensatory time off equal to one and one half the number of hours actually worked. A calendar holiday begins after 12:00 a.m. on the actual day of the holiday and ends at midnight on the same day. Only hours work on the actual calendar holiday are to be compensated as indicated above.

On June 22, 2017, during mediation, the State adopted the Union's January 31, 2017 but also sought the elimination of § 9.5 by proposing the following:

~~§9.5 Holidays on Flex Schedules:~~

~~The premium compensation provided by 9.4 for those employees on flexible or alternative work schedules shall be limited to seven and one-half (7½) hours for 37½ hour employees and eight (8) hours for forty (40) hour employees.~~

The Union agreed to the State's June 22, 2017 counter proposal.

After the Agreement was signed on June 8, 2018, the next scheduled holiday was 4th of July. Around the 4th of July, the State's employees assigned to the Emergency 911 call center, who routinely work an alternative schedule of four ten hour days per week, inquired as to whether they would be paid for ten hours at time and one half, per the new contract language versus being paid eight hours at time and one-half and two hours at straight time, as they had previously been paid. The State denied this payment stating that the change in language was not

meant to alter the existing practice. The Union grieved. During the course of the processing of the Union's grievance, the State and the Union convened the Labor Management Committee who are charged, pursuant to Article IV, § 4.2.3³ with providing interpretative bulletins concerning the Agreement. The Committee issued an interpretive bulletin on July 18, 2018 in which it stated that this paragraph "represents the intent of the parties for the application of premiums compensation for employees working holidays on flex schedules":

Holidays on Flex Schedules:

The premium compensation provided by 9.4 for those employees on flexible or alternative work schedules shall be limited to seven and one-half (7½) hours for 37½ hour employees and eight (8) hours for forty (40) hour employees.

It was signed by the Manager of Employee Relations for the State and by the Chair of Collective Bargaining for the Union.

When the grievance could not be resolved, the parties submitted the matter to final and binding arbitration.

Discussion

The Union argues that the language of the Agreement is very clear on this issue, namely that employees who work on a holiday are entitled to premium pay (or the equivalent time off) for "hours actually worked." There is no ambiguity, not sleight of hand, no subtlety to this language and the arbitrator is obligated to enforce the contract by its terms. Pursuant to Article XIV, § 5.2 he arbitrator must not "add to, subtract from or alter, change or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration." Accordingly the grievance must be sustained without taking into account any collateral or interpretive document.

The State argues that the purpose of the Agreement is to carry out the intent of the parties. In this case the clear intent of the parties was to simply carry over the existing practice of limiting the holiday overtime to seven and a half or eight hours; not ten hours as now grieved. The Union agreed that this was the intent of the parties; why else would the Union sign the interpretive bulletin. The arbitrator's duty is to carry out the intent of the parties.

³ Article IV, **Labor Management Committee**, § 4.2.3. **Purpose:** The purpose of the Committee shall be to ensure the application, clarification and administration of this Agreement. The Committee shall have the authority to issue interpretive bulletins.

The Union counters that it does not matter what the Labor Management Committee did. This was not a matter of “interpreting” unclear language, but rather it was the wholesale reintroduction into the Agreement of something that had been specifically excluded. The Labor Management Committee does not have the authority to do such.

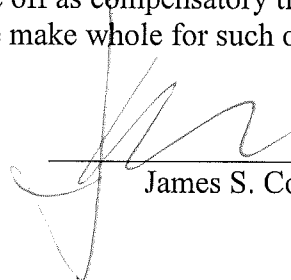
Award

I find that the language of the Agreement is explicit, unambiguous and, indeed, crystal clear. My job is to enforce the language as written. I need not and do not consider it relevant as to why the State proposed deleting the now sought for language or why the labor side of the Labor Management Committee signed the interpretive bulleting. I am simply enforcing the Agreement as written. I also find that this award does not require an appropriation of additional appropriation of funds since the contract language gives the State the right to offer compensatory time off, in lieu of additional wages.

For these reasons, I hereby award as follows:

1. The State violated Article IX, § 9.4.2 of the 2018-2019 Agreement when the State limited employees working an alternative or flex schedule by paying time and one-half for either seven and one-half or eight hours (depending on the employees regularly scheduled hours) for time worked on a holiday and straight time for any hours in excess of either seven and one-half or eight hours.
2. The arbitrator’s remedy is not limited by Article XIV, §14.5.2 of the Agreement because the remedy does not require an appropriation of funds.
3. The State shall pay all eligible employees time and one-half pay or provide the equivalent amount of time off as compensatory time for the hours actually worked on holidays and otherwise make whole for such other benefits as may be provided under the Agreement.

Date: May 7, 2019



James S. Cooper

ARBITRATOR'S BILL

This bill is submitted on behalf of the arbitrator.

Arbitrator James S. Cooper
Address 8 Winchester Street
Boston, Mass. 02116

Case Number:
Number of Issues: 3
Arbitrator Control No.: 9729

UNION

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, INC.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1984

EMPLOYER

STATE OF NEW HAMPSHIRE

ARBITRATOR COMPENSATION

Number of Hearing Days 1 @ \$ 1800 = \$ 1800.00

Hearing dates: May 1, 2019

Study/Preparation Days 1 @ \$1800 = \$ 1800.00

Study and Preparation Dates: May 6, 2019

Other (Specify) @ \$1800 = \$ N/A

FEE \$ 3600.00

ARBITRATOR EXPENSES

Transportation (180 miles) \$ 90.00

EXPENSES \$ 90.00

TOTAL \$ 3690.00

PAYABLE BY EMPLOYER \$ 1845.00

PAYABLE BY UNION \$ 1845.00

Arbitrator Signature


James S. Cooper

Date: May 7, 2019

Tax Identification Number: 04-2653510

PROMPT PAYMENT APPRECIATED