

IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

SASKATCHEWAN HEALTH AUTHORITY
(REFERRED TO AS THE "EMPLOYER" OR "SHA")

AND:

HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN
(REFERRED TO AS THE "UNION" OR "HSAS")

FIELD HOURS GRIEVANCE
Grievance # 004-2018

ARBITRATION BOARD: Allen Ponak (Chair)
Gordon Hunter (Employer Nominee)
Andrew Huculak (Union Nominee)

AWARD OF THE ARBITRATION BOARD

For the Union: Gary Bainbridge, QC

For the Employer: Lynn Sanya

Hearing at Regina, SK
May 1, 2, & 3, 2019

Award Issued: July 15, 2019.

ISSUE

This is a contract application and interpretation case about the rules for employees holding what are referred to as “field hours” positions. The collective agreement specifies a number of arrangements for hours of work for different groups of employees: standard hours, hours for emergency medical service employees, extended shifts, and field hours. The contract clause for field hours employees reads as follows (article 15.01C):

For field hours positions, hours of work will be two hundred and twenty-four (224) hours in a six (6) week period, the cycle of defined six week periods commencing and continuing from January 5, 2014. Within each six (6) week period, an Employee will have flexibility to govern her hours of work within any day or series of days to meet client and essential program needs.

The current grievance arose in Child and Youth Services (“CYS”) within the Mental Health and Addictions Program in Regina operated by the Saskatchewan Health Authority. Most of the professional staff are classified as field hours employees. More detail will be provided in the outline of the facts, but the essence of the dispute is with respect to management communications to field hours employees in 2017 and 2018 about conducting their work within core business hours, 8:30 AM to 5:00 PM, other than for exceptional circumstances. In particular, documentation, such as charting, was discouraged outside core hours.

The Union filed a grievance alleging that the Employer’s guidelines on what kind of work was permitted and not permitted outside of core business hours violated the field hours provision of the collective agreement. It was the Union’s position that the purpose of the field hours contract language is to enable professional employees to determine what work needs to be done and when. The alleged management restrictions curtailed these negotiated rights, according to the Union, and should be reversed.

The Employer disagreed. It argued that management simply had reiterated a long standing preference that work be conducted within core business hours in order to best meet client needs. In its submission, management had not imposed hard and fast rules and employees were still free to exercise professional judgement to determine what work needed to be done outside core hours. Management's only guideline, according to the Employer, was that the work being done outside core hours was necessary to meet client and essential program needs, an express requirement in article 15.01C. It asked that the grievance be dismissed.

EVIDENCE

The Union called three witnesses: Ms. Karen Wasylenko, Speech Pathologist, Saskatoon Public Health, and HSAS President; Ms. Cystal Bittman, Occupational Therapist, CYS Regina; and Ms. Melissa Derow, Psychologist, CYS Regina. Two witnesses testified on behalf of the Employer: Ms. Heather Skoretz, Program Manager, CYS, and a registered social worker; and Ms. Glenna Curry, CYS Director, 2012 - December 2018, and a registered social worker. Twelve exhibits were entered into evidence at the outset and during the course of the hearing, including exhibit 3, the Employer's book of documents, which has 33 tabs.

Child & Youth Services

The evidence showed that CYS is a community mental health agency whose clients are children and youths up to 18 years old. The agency operates in two physical locations in Regina and has a number of outreach programs, for example, in schools and aboriginal centres. It has eight program areas into which staff are assigned: Intake; Child Team; Youth Team; Young Offender Program; Randall Kinship Centre; Kids First; Complex Diagnostic Assessment Team; and Autism Centre. In the relevant time period CYS had a multidisciplinary staff equivalent to 77 FTE (full time equivalents) that included social workers, psychologists, occupational therapists, speech pathologists, addiction counselors, registered nurses, developmental pediatricians, and

a psychiatrist. Of these, 55 employees are members of HSAS and classified as field hours employees.

The majority of managerial, professional, and support staff work at a building at 1680 Albert Street which exclusively houses CYS. Business hours for the agency is 8:30 - 5:00. On Tuesday and Wednesday, hours are extended to 7 PM, primarily for group counseling. There is no weekend service to clients. Employees are responsible for booking appointments with their clients and entering their schedule on an on-line system called Sunrise Clinical Management (SCM), introduced in 2016. Staff and managers have access to the schedules, enabling them to see who is in the office and the work in which staff are engaged.

Ms. Curry and Ms. Skoretz testified that it is important to have sufficient professionals at work during business hours because clients are most likely to access services during the day. While most appointments are booked in advance, there are occasional walk-in clients and there must be staff on hand, particularly from Intake. If staff are arranging their time so that work is being performed outside core hours, there may insufficient staff available during the day to meet client needs.

Staff are entitled to overtime if they work more than 224 hours in a six week period (which equates to an average of 37.33 hours per week) or more than 12 hours a day, but overtime is very rare. In practice, where an employee has accumulated enough hours through weekend and evening work to potentially exceed the 224 hour limit, the employee requests offsetting time off, referred to as "TIL",¹ within the same six week period. Examples of offsetting time off requests and approvals were provided in the exhibits (3-5, 3-6, 3-9, 3-10, 3-11, 3-12, 3-15, 3-16, 3-17, 3-20, & 3-21). Typical is the following exchange between a staff member and

¹The initials "TIL" were used loosely by the witnesses to refer both to the rarely used time off in lieu of overtime under Article 15.05 and the more common simple offset of worked weekend and evening hours by taking time off as requested and approved.

Ms. Skoretz (exhibit 3-6): "Since it is the week six hustle I am going to burn my hour of TIL at the end of Thursday. Seems like everyone will be around except Esther". Ms. Skoretz replied "Sounds good – Esther will be here in the afternoon, she is only off in the morning".

Field Hours Grievance and Triggering Events

The current grievance was filed on February 6, 2018, a few weeks after a staff meeting in which field hours were discussed. The material parts of the grievance read as follows (exhibit 2):

Currently and for a number of years, employees and positions in the Child and Youth Services Department in Regina have been designated to operate under regime of "Field Hours" as per Article 15.01 C. In this context, in the past and until recently, the employer allowed these employees to exercise their professional discretion in regard of their flexibility to govern their hours of work within any day or series of days. This grievance arises due to the drastic change in the employer's interpretation and administration of field hours as per directives issued recently by employer to its field employees. These new employer's directives are in a direct violation of the Article 15.01 C Field Hours.

Now, these affected professional employees are instructed by their employer that they no longer have any flexibility to govern their hours of work within any day or series of days. Instead, the employer set a strict guideline to these employees that they are still expected to flex their hours of work outside of their core hours, but only when meeting face-to-face client(s) be that individually or in a group setting. However, the same employer directed the same field employees that outside of their core hours as defined by the employer (example 8:30 to 17:00) that these employees no longer have flexibility to govern their hours of work as it pertains to documentation as required by employer's job descriptions and also professional standards that these employees must follow.

These employees are now directed to do their paperwork (example: diagnostic reports) exclusively during "core hours" as defined rigidly by the employer. So "flexibility" is expected when it suits the employer, but the right of these employees to have flexibility to govern their hours of work is taken away by the same employer and replaced with strict directives. Furthermore, unlike the employer, the union considers work on professional documentation (reading, writing, and filing) as a part of essential program needs and an important part of essential care provided to the clients of the SHA. In summary, these employees have a right under the collective agreement to have "flexibility to govern" their hours of work but the employer is in violation of their contractual rights by taking away their "flexibility to govern" their hours of work.

The directives to which the grievance refers arose from a staff meeting on January 9, 2018, the relevant minutes of which are set out below (exhibit 3 - 29, italics in the original):

The Employer's interpretation of the contract language includes the following expectations:

- "Client and essential program needs" include face-to-face client interactions (i.e. scheduled appointments, group facilitation) and does not include documentation (i.e. Progress Notes, Letters), assessment scoring, or writing reports.
- Field employees are to attend work consistently during our core business hours (8:30-5:00); timesheets will reflect such. "Flex schedules" or altering work schedule outside of core business hours (e.g. shifting schedule to work 8:00-4:30) is not permitted.
- Field employees can choose to see clients outside of the core business hours as per the defined evening hours (i.e. Tues & Wed 5:00-7:00pm) or to facilitate evening groups (as approved by management). This time will be banked and used within the 6-week period (i.e. time in lieu); discussion regarding using banked time has to occur with the manager to ensure there are no coverage issues.
- Field employees are not permitted to complete documentation outside of the core business hours (8:30-5:00); established evening hours (i.e. Tues & Wed 5:00-7:00) are not considered "core business hours." Time in lieu will not be granted for time spent completing progress notes, assessment scoring, or report writing if done after hours, including during established agency evening hours.
 - The exception to this includes completing documentation pertaining to suicidal ideation.
 - *In the face of "exceptional circumstances," Field employees need to have a discussion with management regarding completing work outside of core business hours. "Exceptional circumstances" are governed by an employee's professional judgement; for example, completing essential documentation in crisis situations where other teams/professionals may need to intervene after-hours (e.g. COAST, Emergency Room). "Exceptional circumstances" does not include regularly and predictably scheduling documentation outside of core business hours.*
- Glenna [Curry] reported that all MHAS sites are abiding by the above expectations.

The Employees' interpretation of the contract language includes:

- "Client and essential program needs" may include documentation, assessment scoring, and writing reports as deemed necessary by the professional clinical judgement of the employee.
- Field employees have the right to govern their own schedules while being respectful of coverage concerns. This may include: seeing clients during established evening hours, facilitating evening groups, completing documentation/assessment scoring/report writing. Prior approval from management is not in the contract language.
- Time-in-lieu accrued for work completed outside of core business hours must be taken within a 6-week period, with consideration given for coverage issues.
- Mandated work hours by an employee would mean that employees are no longer "field employees"; this change would need to be purposed by management to SAHO and included in discussions with HSAS during contract negotiations.

- Glenna acknowledged a difference in the interpretation between the Employer and Employee's interpretation of the contract language. Glenna will contact Labour Relations at the SKHA to discuss further.
- Employees will follow management direction. If they do not agree with a management decision, employees should contact the HSAS Labor Relations Officer to grieve their concerns.

Following the initial draft of the minutes, Ms. Curry amended the draft, in consultation with the minutes taker, Ms. Jolene Sebastien, a psychologist and member of the bargaining unit. The final amended version is reflected in the italicized portion above. In the email exchange between Ms. Curry and Ms. Sebastien, and by way of clarification, Ms. Curry wrote "basically, regularly and predictably scheduling documentation after core hours is not the intention of Field Hours" (exhibit 3-29, page 2).

The January 9, 2018 meeting was preceded by email exchanges in 2017 over working hours between Ms. Derow and Ms. Skoretz (to whom Ms. Derow reported). On March 16, 2017, Ms. Skoretz emailed the CYS Youth team of which Ms. Derow is a member as follows (exhibit 9):

I'm signing off time sheets and just sending a reminder that core business hours are 830 am to 5 pm with hours extending to 7 pm on Tuesday and Wednesday. As field workers you do have flexibility to work outside these hours to meet client and essential program needs. If you have situations outside of direct client contact that require work outside these hours, please come and talk to me to discuss arrangements.

Ms. Derow responded four days later (exhibit 9):

You had asked for clarification if people have "situations outside of direct client contact that require work outside of regular hours", I have several of these situations currently: I think you know about all of them (new group development starting tonight, online course review, several committees, VTRA deadline approaching etc.) and I feel like we've already talked about the situations that are imposing on my time. So, I am going to assume this is to address other issues.

If there's any concerns about this please come talk to me.

There was another email exchange in December 2017 after Ms. Derow asked to work on a weekend. The emails are set out below (exhibit 10):

December 1: Derow to Skoretz

There's a chance I may come into the office on Sunday -- just giving you a heads up. I had an emergency yesterday (folding over to today) that has taken up most of my time and spend several unsuccessful hours today trying to get a working laptop for next week. I have a psych report that I planned to write that is now not complete. If I get a chance I be in on Sunday to complete it and will just bank the time to take here and there.

December 4: Skoretz to Derow

..... as we have discussed previously, our office is not open on the weekend, therefore, I will not sign off on hours worked on the weekend. If you have work that needs to be completed, let's discuss setting aside time during our regular hours of operation to complete this.

I was unable to connect with you last week to discuss your time sheet from the previous week as I see you have marked working evening hours, but there are no clients booked in SCM. Evening hours were designed to increase access opportunities for clients to attend appointments. You were also off all day on Friday because of these hours, which makes you unavailable to clients during business hours.

I would like to have a further discussion with you around your current workload so we can set aside some protected time for you to complete your work during regular office hours. I know you are at PCOMS this week, so how about Monday, Dec. 11th at 1030 am?

December 7: Derow to Skoretz

I did not end up coming in on the weekend — but was giving you a "heads up" as you had asked for me to let you know prior to me coming in on a weekend when I needed to. Given that I had an emergency Thursday and Friday, and was headed into 5 days of training — I am surprised that this would be a problem/concern.

I am unavailable for a meeting on Monday about this — I have my AU kid to case plan as soon as I return Monday morning as well as a meeting with the school consultants. I am available to miss the youth team Christmas lunch for work duties if you'd like to meet then. I trust you'll make whatever decision you need to regarding my evening hours last week.

After Ms. Skoretz confirmed a meeting for December 14th, Ms. Derow sent the following email.

I am unsure what it is we need to talk about again. I am well aware of what my job duties are. This isn't about my workload, it's about clients and sometimes their needs require more attention at specific periods of crisis time and for their clinicians to be flexible and responsive. My job in providing client care isn't only face to face contact, it includes documentation, report writing etc.

When you say that the use of evening/extra hours are for seeing clients only - that simply is not true. There are several staff that come in, outside of the 830-500 regular hours to do extra work in periods when workload demands are high. This is on every team. I am well aware of at least 7 consistent examples of staff who do phenomenal jobs for their

clients that stay late to work on reports, come in early to prep for their day or stay to complete documentation after a busy day.

I am more than willing to adhere to standards that apply to all staff consistently.

Ms. Derow and Ms. Skoretz met on December 14th. According to Ms. Skoretz's notes (exhibit 3-24) and testimony, she raised safety issues if staff were alone on weekends and also expressed concern about the coverage implications if staff worked outside core hours. Ms. Skoretz stated that Ms. Derow said she needed quiet time to prepare reports and she offered Ms. Derow "protected time" during the regular business day. At the end of the meeting, according to both Ms. Skoretz and Ms. Derow, no agreement was reached. Ms. Derow asked that the rules regarding field hours be put in writing, resulting in an email from Ms. Skoretz on December 18, 2017 (exhibit 11):

.... as discussed Field Hours allows you flexibility to govern your hours of work to meet client and essential program needs. While documentation is important, it is not a client or essential program need that this documentation be completed during non-CYS business hours. It is my expectation that documentation be completed during CYS core business hours.

CYS core business hours are Monday to Friday, 0830 to 1700. We are open 1700 to 1900 on Tuesdays and Wednesdays to allow for client appointments when clients are not otherwise able to attend during CYS core business hours. Weekend work requires prior approval by a Manager.

Ms. Derow responded with an email to Ms. Curry, the manager to whom Ms. Skoretz reported. This email, which was not copied to Ms. Skoretz, was sent on December 19, 2017 and is set out below (exhibit 11):

I have met with Heather about her direction that TIL cannot be accumulated unless it is for direct face to face contact with a client. I am wanting your input on this please. I would completely disagree that "client and essential program needs" do not include documentation and report writing, especially for psychology and especially when at least on youth team at least 60% of our requests are coming from psychiatry for help/direction regarding treatment. I am also unsure how other teams are allowed this flexibility, but not youth team.

Basically, there are employees on all other teams that stay late or come in early to work on documentation/report writing (within a balance obviously) in order to provide the best care for clients, without having direct face to face client contact during those hours. I am being directed that this is no longer an option for me. I am wondering why is this flexibility

being approved on other teams, (including intake), no longer applicable to youth team and how would you direct me to handle this workplace inequality?

Ms. Curry replied the next day, supporting Ms. Skoretz. Her email stated (exhibit 11):

I have reviewed the response that Heather sent you regarding working outside of core business hours. The expectations that were outlined are the expectations for all staff. Managers do address this matter with staff where there is a concern with appropriate use of field hours. Reports are only to be done outside of business hours on an exceptional basis, where it is time sensitive, and in consultation with their manager.

As already set out above, Ms. Curry reiterated this basic message at the staff meeting of January 9, 2018 and employees reaffirmed the position reflected in Ms. Derow's emails. The Union grievance followed.

In addition to the interactions with Ms. Derow in Fall 2017, it came to management's attention around this time that one of the professional employees within the HSAS bargaining unit was routinely starting work half an hour early each day, arriving at 8 AM. The early start time allowed the employee to bank time off, which was taken on Fridays as a TIL, and was more advantageous for her child care responsibilities (exhibit 3 - 25). When management became aware of this employee's practice, she was directed to report to work henceforth at 8:30 AM (exhibit 3-13). The employee complied.

Following the filing of the grievance and unsuccessful attempts to resolve the matter, Ms. Curry decided to hold another staff meeting to clarify expectations. A Union representative attended the meeting along with an SHA labour relations manager. Ms. Curry prepared notes in advance which she read verbatim. The relevant portion is set out below (exhibit 3-32):

5. I want to start by clarifying that in almost all cases we are aware of, field hours are being used correctly. We are not expecting any significant change to how employees utilize field hours.
6. Our concern is limited to situations where employees have adjusted their hours based on personal preference. Specifically, we are concerned where Employees prefer to complete non- urgent, non-emergent or otherwise non-time sensitive documentation outside of regular business hours.

7. The Employer has no concerns where staff have exercised their professional judgment and adjusted their hours so that they may meet client and essential program needs.
8. As mentioned, the employer will only raise a concern with staff when they have chosen to work outside of business hours due to personal preference.
9. The rationale behind this is operational. We want as many staff members to be present in the work place during business hours as possible so that staff are accessible to clients and their needs.
10. Reducing staff availability during business hours reduces capacity to provide emergent service and availability for client contact.
11. For this reason, working outside of business hours should be limited to cases where it will provide enhanced client service or is otherwise deemed necessary.
12. When it comes to 'taking back' time during regular business hours to manage your total hours, it is appropriate to take back time when it is personally convenient and beneficial so long as it is not detrimental to service.
13. Taking time back does not require approval but the Employer expects staff to use good judgement and communicate their intentions in advance for both operational and OH & S [sic] reasons.
14. There have been questions about working outside of business hours due to workload issues.
15. This will be appropriate from time to time on a limited short term basis such as to complete time sensitive documentation.
16. Working outside of business hours does not resolve chronic workload issues. It only takes from Peter to pay for Paul.
17. We expect that staff will approach us when you have chronic workload issues so that we can work to resolve the matter.
18. When staff are in need of time to 'catch up', we have in the past made arrangements during business hours to redirect calls and "cover off" app'ts so staff may have an opportunity to catch up on their work.

In January, I had provided a few examples of exercising professional judgment to work on documentation outside of core business hours. It is evident that more clarity is being sought; while it is not possible to provide a comprehensive list of examples; we have compiled a few examples for discussion:

1. Clinician has been dealing with a suicidal client throughout the day. The documentation was not complete by 5 pm, so the clinician exercises professional judgement and remains after business hours to ensure the documentation is complete should the client end up needing further services in the evening/night. This is an appropriate use of field hours.

2. Psychologist has a feedback session with parent on Thursday at 9:00. They secured time in their schedule on Tuesday to work on final analysis and recommendations in preparation for this app't. The Psychologist's schedule on Wednesday has clients booked all morning and 2 case conferences in the pm. On Tuesday, Psychologist had 2 emergency crisis requiring intervention, consultation and documentation and were not able complete report. Exercising professional judgement to use Field hours to work on this time sensitive report after business hours is appropriate to meet client need.
3. Clinician prefers to work when office is quiet and there are no interruptions. This reason is for personal preference and is not appropriate use of field hours.
please note, arrangements can be made if there are workload concerns due to interruptions
4. Clinician receives a call from a parent that they are moving to another province and leaving next week. They want a copy of the Psychological report and want the feedback session moved up. Using field hours to work on this report is appropriate in meeting client need.
5. Clinician has been away from the office for 2 days on management supported professional days, there are 2 Psychological reports that need to be completed by the following week. Client appt's are booked heavily during the business hours as a result of being away and needing to accommodate client's schedules. Exercising professional judgement to use field hours to work on psychological reports/documentation after business hours is appropriate.
6. Clinician prefers working 30 minutes late each day to coincide with the time they pickup their child from extracurricular activities. This is for personal preference and is not an appropriate use of field hours.

Witness Testimony

Witnesses elaborated on what is set out in the emails and what was discussed in the January 9, 2018 and June 5, 2018 meetings.

A. Karen Wasylenko

Ms. Wasylenko is a speech pathologist who is employed by Saskatoon Public Health. She holds a field hours position. As a speech pathologist, her profession is governed by statute and a professional regulatory agency. As HSAS president since 2011, Ms. Wasylenko has been at the provincial bargaining table and stated that there have been no recent changes in article 15.01C addressing field hours. Since becoming Union president that her professional practice has been reduced to about .25 FTE.

Ms. Wasylenko testified that as a field hours employee she does not have set hours and works as needed to meet client needs, whether from “9 to 5 or at other times”. She said she does not need management approval to work evenings or weekends, noting that her hours are recorded on timesheets and reviewed by her manager. She explained that she works evenings and weekends to see clients who are not available during the day but also to score tests and assessments, compile progress notes, carry out charting, and write reports.

Ms. Wasylenko described documentation as a client need and a crucial professional responsibility. She said documenting “right away” is best, but depending on the number of appointments, she may have to delay making progress reports or charting until after her appointments have ended. At most, she would not want to wait more than a day or two because memories fade and nuances may be lost. Under her professional association’s code of conduct, documentation was expected “in a timely fashion”. Written reports can take longer to prepare and Ms. Wasylenko agreed that there is more flexibility in when to allocate time to report writing. In her view, deciding when something needed to be done was her call to make as a professional but she accepted that management approval was required if she was working more than 224 hours in a six week period since this would trigger overtime pay.

B. Crystal Bittman

Ms. Bittman is an Occupational Therapist who has been a member of the Complex Diagnostic Assessment Team at CYS since 2007. She is governed by the Occupational Therapist Act and regulated by her professional licensing body. As such she is required to keep documentation “up to date”. The majority of her work is with clients who have Fetal Alcohol Spectrum Disorder, carrying out assessments relevant for diagnosis and assisting clients with basic motor skills and daily living skills. Ms. Bittman is part of a team that includes psychologists, a pediatrician, and a speech pathologist.

Ms. Bittman holds a field hours position. She testified that field hours enabled her to work extended hours within the “224 in 6” window as her case load and clinical judgement required. She books her own appointments in collaboration with her team as needed using SCM. She said she has no set hours and had never been told about or heard of “core hours” until the staff meeting in January 2018. Ms. Bittman completes weekly time sheets which records work on weekends and evenings and for TIL’s; if nothing is entered on a weekday time sheet, it means that she worked during the day but did no work in the evening. Time sheets are reviewed by management and she said her time sheets had always been approved.

Ms. Bittman testified that she has worked on evenings and weekends to run groups for parents and to complete documentation. She explained that her assessments were integral to the work of her team and needed to be completed quickly to maintain the team’s work flow. She denied that evening or weekend work was to suit her own personal needs – it was for the benefit of clients and to move people through the system efficiently. Ms. Bittman noted that there is a six month wait list for assessments.

Ms. Bittman attended the January 9, 2018 staff meeting. She said that staff were told that there was to be “no documentation after core business hours” and evenings and weekends were only for face-to-face client meetings. Documentation included progress notes, assessment reports, and assessment scoring. In Ms. Bittman’s opinion, management’s instructions were a change in the way work had previously been conducted and that staff across all teams had reacted negatively and vocally. She also attended the June 5, 2018 meeting and stated that the clarification did not resolve her concerns. Documentation outside core hours had to be “urgent, emergent, or time sensitive”, a “heavy-handed” restriction in her opinion.

Ms. Bittman testified that she followed the directives. For example, on January 12, 2018 she emailed her manager (Ms. Donna Upshall) for permission to stay late to complete an

assessment needed by the rest of her team. Permission was granted (exhibit 4). Ms. Bittman explained that in the past, she would not have asked permission, but would have made the decision herself. She stated that the management rules on after hours work has impacted her practice. She is less efficient in her documentation and has more trouble controlling the ebb and flow of her work. She also felt uncertain whether something was “emergent, urgent, and time sensitive” and believed she could no longer exercise her own best professional judgement.

In cross-examination, Ms. Bittman agreed that CYS business hours have been 8:30 - 5:00 for at least the past ten years and that it is important to have staff available during those hours. Ms. Bittman testified that in the past, when she took holidays, she would work evenings and weekends in advance of the time off or afterwards because the work continued while she was on vacation. Since 2018, she has not been able to do so, meaning she is experiencing more pressure to keep up in her work – “I am feeling overwhelmed lately”. She conceded that she had not approached management to see if there was a way to alleviate these pressures.

Ms. Bittman described the different types of documentation that she performs: progress notes, scoring, assessments, and report writing. She said that her work days are a mix of these activities as well as direct interaction with clients. She agreed that some types of work could be easily seen as urgent, emergent, or time sensitive, such as a suicidal client or a court ordered intervention. In her view, it ought to be up to her own professional judgement to decide what work needed to be done outside core hours.

Prior to January 2018, Ms. Bittman said she worked more evenings so she could have quiet time for report writing – during the day, there were simply too many interruptions. She calculated that she had typically worked 8 hours outside core business hours in any six week period. Since 2018, she calculated that she had only worked evenings on three occasions. Except for the 2018 directive, she would have done so more often.

C. Melissa Derow

Ms. Derow is a psychologist who has worked at CYS since 2007. She is on the Youth Team and is currently a .85 FTE (192 hours each 6 weeks). Her profession is statutorily regulated and she is governed by the Saskatchewan College of Psychologists and must adhere to a code of conduct. Her duties include youth psychological assessment, diagnosis, treatment recommendation, family, group, and individual therapy, and the supervision of provisional psychologists. She chairs the 17 member psychologists group at CYS.

Ms. Derow's views on field hours are reflected in her email exchanges with Ms. Skoretz and Ms. Curry, set out earlier in the award. In her testimony, she emphasized that she "uses her professional judgement to decide best how to meet client and program needs" and that she was in the best position to make that call on behalf of her clients. Prior to the January 2018 staff meeting, Ms. Derow testified that she generally worked when the Albert Street office was open, 8:30 - 5:00, but used evening and weekend hours when needed. She would record these hours on her time sheets which were submitted regularly to her manager. In her view, core business hours were not enforced in a rigid or strict way.

Ms. Derow's time sheets for two six-week blocks in 2017 were entered into evidence. They showed that she had worked 12 hours outside core business hours in one period and 12.75 hours in the other period (exhibits 6 & 7). She testified that the evening and weekend work was for client and program needs, not personal preferences, although she could not recall specific details of what work she had been doing given that it was well over a year ago. She noted that if someone needs time off for personal reasons, there are a number of contractual leave provisions for that purpose.

Some of the evening and weekend work was for the purpose of documentation. This included report writing, documenting of client contacts in phone calls, preparing progress notes

and charting, and organizing group sessions. In Ms. Derow's opinion, documenting all client contacts in a timely fashion is a critical component of her work as a professional psychologist – "it informs the care" and ideally should be done right after the contact, whether it be a phone call or counseling session. However, for various reasons, immediate documenting is not always possible, hence the need to sometimes stay late or come to work on a weekend to catch up. Delay increased the chance of error.

Ms. Derow stated that she is frustrated by what she sees as rule changes beginning in late 2017 that impacted her practice. She now needs management approval for work done during non-core hours, which was not a previous requirement, although she usually informally communicated with her manager when she worked in the evening or on a weekend. She said that she no longer has the flexibility to exercise her professional judgement as to when documentation needs to be carried out because management does not see documentation, unless for exceptional reasons, as a client or essential program need. According to Ms. Derow, neither she nor other staff members were ever provided a reason for these changes.

Ms. Derow did not believe that the June 5, 2018 staff meeting resolved the issues. Employees were still required to seek management approval to work evenings or weekends and it was still made clear that documentation should be carried out during core business hours unless it involved a matter that was "emergent, urgent, or time sensitive". These terms were not defined and Ms. Derow asked rhetorically – "how do I quantify mental health in children and what is not urgent?" As a result of the unclear rules, Ms. Derow testified that she does not work as much on evenings and weekends as she had in the past. The net effect, in her opinion, is that she is restricted in how she exercises her clinical judgement and cannot provide the best care to her clients.

In cross-examination, Ms. Derow agreed that some staff take progress notes while talking to their clients but said that this approach impacts her interaction with clients. She prefers to make notes after the session and this process takes from 15 to 30 minutes. If the matter is urgent, she will make the notes immediately, otherwise she will try to complete the notes within 24 hours. Ms. Derow agreed that managers had encouraged her to leave time in her schedule to make notes during the day. Reports, on the other hand, may be completed over a period of weeks or months and depending on the complexity might take 15 hours or more to finalize. She said that reports may not have specific deadlines and it is up to her to exercise her professional judgement and prioritize what needs to be done first. Since the 2018 staff meeting she has not worked on reports on evenings and weekends and has not tried to seek approval for that work. She could not speak for her co-workers.

D. Heather Skoretz

Ms. Skoretz is a professional social worker who manages the Youth Team, Intake Team, and Community Mental Health Team, all in the Albert Street building. A total of 17 people report to her, with the largest group being the Youth Team (which includes Ms. Derow). All HSAS members who she supervises are in field hours positions.

Ms. Skoretz testified the expectation for professional staff is that 60 percent of their working time is devoted to individual and group sessions with clients, meetings with other care providers such as teachers, phone consultations with physicians and other health professionals, and supervision of students. The remaining 40 percent of working time is allocated to documentation, committee work, and staff meetings.

Ms. Skoretz emphasized that it is important that staff be available during regular business hours and that the purpose of field hours is to give employees flexibility if essential program needs cannot be met during regular hours, for example if a client can only meet in the

evening. Field hours are not to be used for personal purposes, such as children's events. Ms. Skoretz said that it is her job to ensure that staff are on hand when someone walks in the door. She said that there has been no change in staff coverage issues in the past few years; staff continue to notify managers when they are away, for example when using a TIL or for a medical appointment. The number of staff that can be out of the office varies by the size of the team.

Ms. Skoretz stated that she trusted staff to use field hours appropriately but she had the ability to audit its use through the SCM system which would show the purpose of after hours work (exhibit 3-23). If she had concerns, she could query her staff and had done so on some occasions with respect to Ms. Derow.

In cross-examination, Ms. Skoretz agreed that in the past employees wishing to work on evenings and weekends did not need to get advance approval. On the other hand, advance approval was required for TIL's. She conceded that the January 2018 staff meeting seemed to draw a distinction between documentation and direct face-to-face work with clients. Ms Skoretz agreed that she had said the same thing in a December 18, 2017 email to Ms. Derow when she told her that "it is my expectation that documentation be completed during CY's core business hours" (exhibit 3-7). It remained the Employer's position.

E. Glenna Curry

Ms. Curry was Director, CYS, for six years and, since January 1, 2019, is Transition Lead for CYS. She is a registered social worker and has been in a management position since 2005. As CYS director she had overall responsibility for the agency and was part of the executive team for Saskatchewan Mental Health and Addictions. Program managers, including Ms. Skoretz, reported to her.

Ms. Curry echoed the views expressed by Ms. Skoretz about the importance of having clinicians in the office during business hours to meet client needs. She explained that each staff

member is responsible for his or her own schedule – stating that “they are autonomous for their own schedule” and the schedule “is not imposed on them”. Ms. Curry said that staff are expected to meet three requirements: 1) keep their on-line schedule up to date on SCM; 2) complete a weekly time sheet; and 3) communicate with peers and managers to ensure coverage during office hours. In Ms. Curry’s opinion, staff are expected to use professional judgement to decide when they need to perform work outside the core business hours. She testified that it is impossible to have a comprehensive list of situations when it would be appropriate to work outside the core hours as there are simply too many variables. On most work days, however, it was not essential for staff to work beyond the core hours.

Client appointments are normally scheduled during core business hours. Time should be set aside during core hours to complete the required documentation after each client session. Ms. Curry observed that some clinicians take notes in real time during appointments, but some prefer to make notes after the appointment. CYS had been reconfiguring offices to facilitate note taking during client sessions. Either way, there is a professional expectation to complete client documentation as soon as possible and, in any event, within 24 hours.

Ms. Curry expressed the opinion that it is not appropriate to carry out documentation outside core hours unless the situation was exceptional. She re-affirmed an email she had sent to Ms. Derow on December 19, 2017 in which she wrote that “reports are only to be done outside of business hours on an exceptional basis, where it is time sensitive, and in consultation with their manager” (exhibit 11). She stood by her statement at the June 5, 2018 staff meeting, about her concern where employees “prefer to complete non-urgent, non-emergent or otherwise non-time sensitive documentation outside of regular business hours” (exhibit 3 - 32) – “it was not good enough that an employee ‘preferred’ to document after hours”. She emphasized, however, that employees were almost always using field hours correctly.

In cross-examination, Ms. Curry agreed that documentation requirements might vary by profession and the type of client. She accepted that documentation was important, but disagreed that it was necessary in most cases to carry out documentation after hours. She pointed out that 40 percent of staff time was allocated to work other than direct client interaction and that this time ought to be sufficient for report writing, progress notes, and other documentation requirements. Ms. Curry denied that she or any other manager had prohibited documentation outside core business hours. In the end, it was up to the clinicians to assess the needs of clients and meet those needs.

Safety Issues of After Hours Work

Ms. Skoretz and Ms. Curry both raised safety concerns in their testimony as a reason why staff should reduce weekend and evening work (other than up to 7 PM on Tuesdays and Wednesdays) and why advising management in advance of any such plans was important. CYS offices are located in an area frequented by street people. During core hours there are many staff on hand to deal with any intrusions. On Tuesday and Wednesday evenings, security personnel are on duty from 5 PM to 8 PM. Staff have access cards for entering the building after hours. On the weekend and on other evenings, the building is locked and alarmed, but there is no other security. A staff member working late or on a Saturday or Sunday may therefore be alone, creating a safety risk.

The evidence showed that there are safety policies in place about off-site visits (exhibit 3-3) and a draft policy about working alone that points out the risks and stresses the importance of ensuring appointments are inputted into the SCM system (exhibit 3-4). Ms. Curry drew attention to protocols for potentially dangerous clients, such as including this information in the SCM. Training is available for responding to assaults and panic buttons have been introduced. There is also a procedure known as "Code White" for responding to dangerous situations. Ms.

Curry agreed that the last three Code White's all occurred during regular business hours.

While safety was raised as a concern during the arbitration hearing, the evidence established that neither Ms. Curry nor Ms. Skoretz raised safety as a factor during the staff meetings in January and June 2018 when after-hours work was discussed. Ms. Curry was asked by the arbitrator whether employees were required to seek approval or merely provide notice if they intended to work after hours. She indicated that weekend work was about safety and that "approval is required for security reasons". When asked whether simple notification would accomplish the same thing, she replied that "weekend work is something we just don't do" because of the safety risk.

COLLECTIVE AGREEMENT

ARTICLE 7 - MANAGEMENT RIGHTS

The union acknowledges that it is the right of the Employer to manage its operation and to direct the work force. Management rights are subject to the terms of the Collective Agreement.

ARTICLE 15 - HOURS OF WORK

Except as otherwise provided by this agreement, standard annual hours for full-time Employees shall be 1948.8 hours, and the provisions of Article 15.01 (Standard Hours of Work), and other associated provisions, including Article 15.04 (Overtime and Premium Rates), will apply. The parties may meet from time to time, provincially or at the local level, to negotiate modifications in the patterns of work hours, or to confirm the extension of such modifications. As well as such modifications for which provisions are made herein, the parties may make modifications which alter some aspects of the administration of this agreement, as long as no Employee be required to work more than full-time hours, as averaged over some reasonable period of time, not to exceed six (6) months.

15.01C Field Hours

For field hours positions, hours of work will be two hundred and twenty-four (224) hours in a six (6) week period, the cycle of defined six week periods commencing and continuing from January 5, 2014. Within each six (6) week period, an Employee will have flexibility to govern her hours of work within any day or series of days to meet client and essential program needs.

The following provisions will apply:

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- (a) Overtime rates, as per Article 15.04, shall be paid for any hours worked that exceed twelve (12) hours in a day or two hundred and twenty-four (224) hours in any six (6) week period.
 - (b) In addition to the regular rates of pay, a shift premium of \$2.10 (\$2.75 effective July 1, 2015) per hour for all work required to be performed between 1800 and 0700 hours.
 - (c) Within each six week cycle, an Employee shall be entitled to a minimum of twelve (12) days off.

Additionally, full-time Employees shall be entitled to two Additional Day(s) of Rest (ADR) within each six week cycle. Field Employees shall be entitled to the provisions of Article 15.01 A. (b) with respect to banking ADRs.

- (d) Each day paid for sick leave, annual vacation, public holiday and paid leave of absence shall be considered a shift worked.
- (e) For the purpose of tracking field hours of work, the Employer will post in the same location as Employee time-sheets, the attached calendar as per the Collective Agreement marking the weeks 1-6.

The designation of position(s) as field hours positions shall be subject to discussion by the parties. Factors to be considered when reviewing the matter shall include the following:

- Nature of the work
- Type of service provided
- Operational considerations.

Requests for a change to the designation of a position(s) may be initiated by the Employer, Employee, or union. Consideration of such a request shall include the same above factors.

Should agreement not be reached by the parties on the designation of a position, then the matter may be referred to arbitration in accordance with Article 9.08, or some other mutually agreed to adjudication process.

15.05 Time Off in Lieu of Overtime

Where mutually agreed between the Employer and Employee, time off, calculated at the appropriate overtime rates in lieu of overtime pay may be banked to a maximum of one-hundred (100) hours. Time off in lieu shall be taken at a time mutually acceptable between the Employee and the Employer and must be recorded on time sheets and work records. Any unused portion of the time in lieu bank as of February month end payroll report will be paid out prior to March 31 of each year.

23.01 Occupational Health And Safety Act And Regulations

The current Saskatchewan Employment Act and Regulations shall apply. The legislation allows every worker the right to know the hazards at work, participate in occupational health and safety, and refuse work which the worker believes is unusually dangerous.

UNION ARGUMENT

The Union provided oral and written submissions. It began by recognizing that “in most cases, management has a presumptive right to establish working times” (Union brief, paragraph 10): *Regina School Division # 4 and CUPE (2019) SLAA # 6 (Ponak)* and *HSAS and Unifor, Local 609 (2017) 2017 CarswellSask 360 (Wallace)*. It was argued that article 15.01C had expressly circumscribed this management right for employees in field hours positions: such employees “will have flexibility to govern her hours of work ... to meet client and essential program needs”. Contract interpretation principles required that the arbitration board “give effect to the mutual intention of the parties” (Union brief, paragraph 11).

The Union submitted that this language provided field hours employees with the professional discretion to determine their hours of work so as to meet client and essential program needs. It is employees who are given the right to decide how to allocate their hours, not management, and those decisions are quite properly based on the circumstances. Furthermore, different employees may react differently in the same situation, because “discretion is a matter of judgement” (Union brief, paragraph 12, citing *British Columbia and BCGEU (2001) CarswellBC 3976 (Nordlinger)*).

The Union argued that the restrictions imposed by the Employer, as reflected in emails and the staff meetings of January and June 2018, were neither found nor contemplated in the collective agreement. There was no language about “core business hours”, documentation, “urgent, emergent, or time sensitive” work, or face-to-face client meetings. There was nothing in article 15.01C about the need for prior management approval, or even notification, unlike other

contract provisions. Furthermore, there was no basis for suggesting that somehow documentation was not an integral client need or essential program need. Indeed, there were recent authorities that said the opposite: *Five Hills Heath Region and HSAS (2016) SLAA # 17 (Ponak)*. The Union reasoned as follows (Union brief, paragraphs 24 - 27):

24. To be clear, the Union is not asserting an unrestricted right for employees to choose their own hours of work based exclusively on their own personal preferences. It will be noted that the collective agreement contains some restriction on how flexible working hours should be used: the restriction is to meet "client and essential program needs".

25. The Union is simply asserting the bargained right as it is written. Workers may exercise discretion to govern their own hours of work, and they may use flexibility in their hours "to meet client or essential program needs".

26. The employer seeks to restrict Field Hours employees' ability to perform work outside of "core hours" except in emergency situations or time-sensitive circumstances. However, the collective agreement does not support restricting flexible hours to only cases of "emergency" situations or where there is some absolutely critically time-sensitive matter. Nor does the collective agreement support the employer's direction that employees seek approval or permission in advance of performing such work, or in cases of emergency. Further still, there is no "notification" requirement in the collective agreement - as notification simply invites potential questioning or concerns from the employer. These limits, if desired by the employer, simply must be bargained to be enforceable.

27. In short, the employer's rule does not respect or promote employees' use of discretion over their own working hours. Additionally, the employer's overly restrictive rule prevents workers from conducting necessary and essential work when they should be doing it. By preventing workers from performing paperwork (report writing, charting, etc.) outside of "core" hours, the employer is negating employees' bargained right to discretion and flexibility, and is interfering with client and essential program needs.

The Union submitted that not only did the Employer's position violate the collective agreement, the evidence had offered no rationale for management's restrictive approach. There was no evidence that there were insufficient employees at work during the main business hours of CYS or that employees were working excessively on evenings or weekends. The evidence of Ms. Derow showed that she had worked just five percent of her hours on evenings and weekends, some of which may have been face to face with clients. There was no evidence employees were working overtime. The only evidence of abuse was in relation to a single

employee who had come in early each day for personal, not client or program, reasons. When management became aware of the practice, it put a stop to it, an appropriate response. There was no need to impose general restrictions on all staff to solve a problem that did not exist.

Finally, the Union submitted that the “safety defense” of management should be rejected. It was not part of the rationale in emails or mentioned in the 2018 staff meetings. The Union described it as a “hail Mary” without any merit.

The Union asked for a declaration that the collective agreement had been violated and that the Employer be directed to abide by the collective agreement going forward. In support of its position, the Union cited two authorities in addition to the ones already referenced: *New Brunswick and CUPE* (2001) CarswellNB 585 (McEvoy) and *British Columbia and BCGEU* (1995) CarswellBC 3197 (Hope).

EMPLOYER ARGUMENT

The Employer provided oral and written submissions². It began by focusing on article 15.01C and accepting that this provision “permits HSAS staff flexibility to govern hours of work where the flexibility is required to meet a client or essential program need” and accepting that “HSAS staff must exercise professional judgement to determine if the client need or essential program need requires hours of work to be adjusted in order to be met” (Employer brief, paragraph 3). That said, the Employer denied that it had changed its application of article 15.01C or that its guidelines to employees in the January and June 2018 staff meetings or in any other communication had violated the collective agreement.

The Employer submitted that it “does not accept the Union’s interpretation of article 15.01C which appears to be that HSAS staff have flexibility to govern hours of work as they

²For paragraph numbering in the Employer’s brief we are relying on the hard copy provided at the arbitration hearing. For undetermined reasons (likely due to word processing differences) the paragraph numbers are different in the electronic version provided to the arbitration board chair.

decide provided in their professional judgement they are doing work that meets a client need or program need” (Employer brief, paragraph 6). The Employer argued that the Union bore the onus of demonstrating that management had violated the collective agreement based on a strict interpretation of the relevant contract provisions, akin to situations where a union is asserting entitlement to a monetary benefit (*Health Employers Association of British Columbia and British Columbia Nurses’ Union* (2004) BCCAAA # 36 (Gordon)). For the analytical approach to interpreting the contract, the Employer cited the modern method of contract interpretation set out in *Imperial Oil and CEP, Local 777* (2004) 30 LAC (4th) 239 (Elliot).

Applying these principles, the Employer pointed to the management rights clause which, it was submitted, gives management the authority to direct the work force, including the assignment of hours, unless expressly restricted. Only clear contract language can circumscribe the “presumptive management right to establish working times” (*HSAS and Brown & Beatty, Canadian Labour Arbitration*, paragraph 5:3110).

The Employer agreed that article 15.01C sets out an alternative scheme to the standard for those employees designated as “field hours”. In examining the purpose of this alternative scheme, the Employer drew attention to 15.01C(e) which specified the factors that are considered when determining whether a position should qualify as field hours: nature of the work; type of service provided; and operational considerations. In the Employer’s submission, these factors must be considered in the application of the field hours provision. The Employer reasoned as follows (Employer brief, paragraphs 24, 25, & 26):

The Employer further submits that the interpretation of Article 15.01C must be considered in the context of the Employer’s right to manage its operation and deliver the mental health and additions services it is mandated to provide the children and youth in Regina. It is a reasonable exercise of this right for the Employer to establish hours of operation during which it offers service to clients. It is also a reasonable exercise to direct the HSAS Staff to be available as much as possible during those operating hours to deliver the service and have client contact; to make the teams available to work together at common times and to provide resources to manage emergent service needs during the hours of operation.

The Employer submits that hours of operation also provide the infrastructure that the HSAS Staff need to carry out their responsibilities. The buildings are open with doors unlocked for clients; administrative staff are answering phones; managers are available to support. Team members are available for consults and teamwork. Community partner resources are available.

In addition during core business hours workplace safety measures are in place. It is a reasonable expectation for the Employer to be made aware of where its staff are and what duties they are carrying out. These expectations are not "approvals" but serve both to enable safe workplaces and to ensure staff accountability. The Employer submits that none of these rights or responsibilities have been bargained away.

Considering the above factors, the Employer recognized that the "crux of the issue" was the question of "conditions placed on the flexing of hours" (Employer brief, paragraph 27). The Employer then argued as follows (paragraphs 28 - 31):

The Employer's interpretation is that Article 15.01 C. grants HSAS Staff the flexibility to govern hours of work under certain conditions. The Employer submits that those conditions are met when, in a staff member's professional judgment, a client need or an essential program need requires an adjustment to working hours outside the service's hours of operation in order to be met.

In application, the Employer acknowledges that in almost all cases the HSAS Staff use field hours correctly. It has no concerns where HSAS Staff have exercised their professional judgment and adjusted their hours so that they may meet client or essential program needs that require the adjustment. It is common ground between the parties that meeting with clients is an example of an appropriate time to flex hours of work. It is also common ground that personal preference is not an appropriate way to flex hours of work.

The Employer recognizes it is impossible to provide a comprehensive list of examples of when it is appropriate to flex hours of work. Examples were provided to the HSAS Staff and managers have worked through some situations that staff have brought forward. Some words used at the June 2018 staff meeting to describe some appropriate times to adjust hours for documentation are emergent, urgent or time sensitive work. The Employer is clear that field hours are not to be used for chronic workload issues. Short term workload issues caused by vacation or other short term commitments can be appropriate times to adjust hours of work.

What is common in all of these circumstances is that it remains the responsibility of the HSAS Staff member to exercise professional judgment to determine whether a client need or essential program need requires her to adjust her hours of work in order to meet the need. One of those two needs must require the adjustment. The adjustment cannot be done to meet a preference for a particular time to work. If one of the two triggers is met, a HSAS Staff member may adjust her hours of work without requiring manager approval.

Put another way, the Employer submitted that all services to clients are client needs but not all client needs require employees to work on an evening or weekend.

The Employer rejected the suggestion that management had changed its application of the field hours provision. In its view, management had always required staff to adhere to regular business hours unless client or essential program needs dictated otherwise. There was nothing wrong if management asked employees to explain why they were working outside regular business hours. The Employer submitted that employees had mistook management's decision to "refresh its staff on expectations" (Employer brief, paragraph 33) as a change in the rules for field hours employees.

The focus of the Union's position, according to the Employer, was the alleged change regarding documentation and the proposition that working after hours on documentation should occur if the matter was "emergent, urgent, or time sensitive". Yet, the Employer argued, Union witnesses could not provide examples of situations in which they had documented after hours that were not in some sense urgent, emergent, or time sensitive. It was the Employer's position that these terms were simply another way to describe appropriate client or essential program needs. Otherwise, "the only other reason offered for doing documentation outside of core business hours were workload and the preference for quiet to write reports", neither of which was a valid reason to work on an evening or weekend (Employer brief, paragraph 36).

The Employer asked that the Board find that the Employer had interpreted the collective agreement correctly, that there had been no change in its application of the material provisions, and that the Union had failed to establish that the contract had been violated.

UNION REPLY

The Union replied that the Employer's general views notwithstanding, it was clear that managers were in fact placing restrictions on what work staff could perform on evenings and weekends. It pointed to Ms. Skoretz's email to Ms. Derow in December 2017 advising her she would not sign off hours worked on the weekend (exhibit 10). Despite the Employer's assertion

that no change had taken place, it was clear from emails and the minutes of the January and June 2018 meetings that managers were telling employees when they could work and what professional duties were permitted and not permitted on evenings and weekends. This kind of “guidance”, according to the Union, violated article 15.01C.

DECISION

The principles for the interpretation of collective agreements have been well established. I accept the approach articulated by Arbitrator Elliot in *Imperial Oil*. The key elements are summarized in that decision as follows (paragraphs 40 & 41):

In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.

Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.

There is some divided opinion in the labour arbitration jurisprudence as to whether the question of onus arises in collective agreement interpretation cases that are a mixture of interpretation and administration (for a thorough review, see *HSAS*). It is unnecessary for this Board to wade into this debate. Even if the Union has the onus in this case, it is the Board’s conclusion that this onus has been satisfied. For the reasons set out below, the Board concludes that the Employer imposed restrictions on the use of field hours beyond any restrictions found in the contract and that the grievance must be sustained.

As a point of departure, the Board makes the following factual findings.

1. With one exception that was readily addressed, there was no evidence that field hours employees were abusing their right to work on evenings³ and weekends. The Employer

³Reference to “evenings” is not intended to include work on Tuesday and Wednesday evenings to 7 PM that were expressly deemed as extended hours. For the purposes of this award, “evenings” means work after 5 PM on other evenings or work on Tuesday or Wednesday after 7 PM.

was clear that “in almost all cases we are aware of, field hours are being used correctly” (exhibit 3-32).

2. The only evidence of the frequency with which employees worked outside regular business hours was provided in the case of Ms. Derow. Her timetable showed that for two six-week periods in 2017 she worked evenings and weekends approximately 6 percent of the time. There was no evidence presented that the amount of hours worked by any employee on evenings and weekends could be considered excessive.
3. There was no evidence that as a consequence of employees working on evening and weekends and then taking offsetting time off (TIL) there was insufficient staff during the regular business hours of CYS to meet client needs or insufficient staff to have effective team and collegial interaction.
4. The evidence establishes that management took no issue with employees working on evenings and weekends for the purpose of face-to-face interaction with clients.
5. The evidence establishes that Ms. Curry advised employees at a January 9, 2018 staff meeting that “client and essential program needs” does not include documentation unless there are exceptional circumstances and that exceptional circumstances “does not include regularly and predictably scheduling documentation outside of core hours” (exhibit 3-29, page 5).
6. The evidence establishes that Ms. Curry advised employees at a June 5, 2018 staff meeting that her concern lay with employees adjusting their hours based on personal preference – “specifically, we are concerned where employees prefer to complete non urgent, non emergent or otherwise non time sensitive documentation outside of regular core hours” (exhibit 3-32, page 1). As an example, Ms. Curry advised staff that preferring to work on a report “when the office quiet and there are no interruptions is a personal preference and is not appropriate for field hours” (exhibit 3-32, page 2).

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7. The evidence establishes that Ms. Skoretz told Ms. Derow in an email on December 18, 2017 that documentation is “not a client or essential program need” and that “it is my expectation that documentation be completed during CYS core business hours” (exhibit 11). Ms. Curry supported Ms. Skoretz’s position in a follow-up email on December 19, 2017 (exhibit 11).
 8. It is unclear from the evidence to what degree the pronouncements of Ms. Curry and Ms. Skoretz represented a change from previous practice. However, there is no evidence that the express written and oral guidance defining “client and essential program needs” had previously been brought to the attention of CYS staff in this manner. The Board finds that the express communication of management guidelines by Ms. Curry and Ms. Skoretz represented a change in management’s approach to the use of field hours under article 15.01C.

Bearing these facts in mind, we now turn to the collective agreement. Field hours employees are governed by their own specific provision, article 15.01C. These employees work (if full time) 224 hours in a six week cycle. Within this cycle, the contract states that “an employee will have flexibility to govern her hours of work to meet client and essential program needs”. The wording confers a right on the employee, using imperative language, to flexibly govern her hours of work. The word “govern” connotes a degree of control attached to the person entitled to do the governing, in this case the field hours employee. According to the Merriam-Webster dictionary, synonyms of “govern” include “control”, “direct” and “determine”.⁴ The Free Legal Dictionary defines “govern” to include “control”, and “exert authority”.⁵ The wording in article 15.01C does not include the need for pre-approval from management, mutual

⁴www.merriam-webster.com/dictionary

⁵<https://legal-dictionary.thefreedictionary.com>

agreement between the employee and her supervisor, or even advance notification of management. In contrast, use of time off in lieu of overtime (TIL) under article 15.05 requires mutual agreement between the employee and management. There is no such requirement in article 15.01C, either expressly or implicitly, suggesting none was intended. It is the Board's conclusion that the right to flexibly govern working hours is conferred unambiguously and exclusively on employees who hold field hours positions.

The right to flexibly govern hours of work is not unrestricted – it is expressly tied to meeting “client and essential program needs”. The flexibility is not for other purposes, for example, banking time for a three-day weekend by staying half an hour late every day, or freeing up time to attend a child's school concert by working on a Saturday. It is solely for the purpose of meeting client and essential program needs.

There was substantial agreement between the parties on what client and essential program needs included and excluded. It did not include the examples set out in the previous paragraph (e.g. banking time for a three day weekend). It did not include an employee starting work half an hour early on a regular and predictable basis in order to not work on Friday afternoons. There was agreement that “client and essential program needs” did include face-to-face meetings with clients, intervening with family and other care givers in a potentially life threatening crisis (e.g. a suicidal client), or preparing a court report within extremely tight deadlines. In each of those situations, there was agreement that working on an evening or weekend was not only appropriate but indeed a necessary professional obligation.

The parties parted ways over documentation. There was no dispute that documentation is an integral part of the professional responsibility of CYS staff. It is work that needs to be performed to meet legal, ethical, and professional requirements (*Five Hills*). Documentation is also fundamental to client and program needs. It is self-evident that without timely and accurate charting, diagnostic records, and test scoring client and program needs cannot be met.

The evidence showed that there are different types of documentation and that there can be variation across professions, clients, and program. For example, the type of documentation performed by a speech pathologist may be quite different than the documentation of an addiction counselor. A court ordered report may be different than a report for a school. Employees who perform intake assessment may have different documentation protocols than an employee who is providing on-going family counseling. Progress reports and charting for autistic clients may well be different from the reports and charts for a client suffering a fetal alcohol spectrum disorder.

The Employer accepted that all of the various types of documentation mentioned in the previous paragraph must be carried out. It asserted, however, that it could specify when the documentation should be completed – namely, during regular business hours unless it was for “exceptional circumstances” or involved documentation that was “urgent, emergent, or time sensitive”. In essence, by this guideline the Employer was defining “client and essential program needs” to exclude most documentation (i.e., documentation that was not exceptional), therefore rendering most documentation ineligible for evening and weekend work. It is true that Ms. Curry and Ms. Skoretz continually stressed that staff should exercise their own professional judgement in deciding when documentation needed to be carried out. But this professional judgement would have to be exercised against a backdrop in which employees knew that their managers discouraged documentation on evenings and weekends.

The Board is satisfied that the Employer’s written and verbal direction on what type of documentation could be carried out after regular hours has a dampening impact on the exercise of discretion the collective agreement accords to field hours staff to govern their hours of work. Having one’s boss telling an employee “exercise judgement but don’t document on evenings unless it is exceptional” cannot help but interfere with the flexibility of an employee to govern her hours of work as she is entitled to do under the language of article 15.01C. The decision on

when to carry out documentation is up to the employee based on her professional judgement of client and essential program needs. The whole point of the discretion is to enable field hours employees to decide how to best carry out their work. This discretion clearly includes deciding when the work needs to be done. The Employer's articulation of guidelines amounts to adding restrictions to article 15.01C that are not contained in that provision. Such restrictions constitute a violation of the collective agreement and on that basis the grievance is sustained.

In reaching this conclusion, the Board is not suggesting (nor did the Union argue) that management cannot monitor the use of field hours. Employees are expected to record their working times on the SCM system and submit weekly time sheets. Patterns of excessive evening and/or weekend work can legitimately prompt inquiries and a request for information. Similarly, working the same evening or weekend hours on a regular basis may raise questions as to whether personal needs rather than client or program needs are being served. Management is entitled to make these type of inquiries and employees are obligated to respond. But the default is that field hours employees can decide to work on evenings and weekends unless there is a reason to suspect abuse.

Safety concerns were raised by Ms. Curry and Ms. Skoretz in their testimony. The Board is satisfied that their concerns about staff working alone on evenings and weekends are legitimate and appropriate. One does not need to wait for something bad to happen to take safety seriously. That said, there is no basis in the evidence to conclude that safety issues are of such magnitude that evening and weekend work must be prohibited. It is up to the Employer to develop protocols for how safety is to be managed when staff are in the building alone. As a reasonable first step, the Board is satisfied that it would not be a violation of article 15.01C for the Employer to require employees to notify the appropriate manager, in advance if possible, when an employee is working on an evening or weekend. Notification is not the same as approval, however; approval is not required under article 15.01C.

The Board has reviewed the case law provided by the parties. The contract language in each of the cited cases differs from the language in this case, making them of limited applicability. For example, *New Brunswick* is a case that involved professional employees in probation services. Employees worked 36 hours per week and “by mutual agreement” the hours could be averaged over four weeks. The provision in dispute was entitled “Flexibility of Hours” and reads “the parties recognize that the above hours have to be flexible due to the nature of the service provided by members of the bargaining unit”. This language is a far cry from the current contract and does not provide employees with the express right to “govern” their hours of work.

The most relevant case is *HSAS* which was cited by both the Union and Employer. The case involves labour relations officers (LRO’s) represented by Unifor who were employed by the Health Sciences Association Saskatchewan, the Union in the current case. The contract language in dispute in that case (article 14.2) reads: “Field Staff – Full time Labour Relations Officers shall normally work 112.5 hours in a 3 week period”. The grievors argued that this language enabled them to average their work time as they deemed necessary within the three week window and that their employer’s requirement to file weekly time sheets interfered with this right. The arbitrator disagreed and denied the grievance. Of direct interest in the current case is that the evidence showed that the LRO’s had attempted to negotiate contract language in their own agreement that mirrored article 15.01C but had been unsuccessful. Arbitrator Wallace commented as follows (paragraph 50, emphasis added by this Board):

There is nothing in the plain language of Article 14.2 to suggest the LRO is the person who decides on the LRO's schedule of hours for each three weeks or that the Employer has in any way given up its right to schedule the LROs hours of work as it sees fit as long as the total hours normally worked are 112.5 in three weeks. *This is not a case like the HSAS/SAHO agreement where the Employer has specifically given the employees the flexibility to govern their hours of work within any day or series of days to meet client and essential program needs. Article 14.2 contains no such language.*

While Arbitrator Wallace's words are not in any way binding on this Board, they are certainly consistent with our own conclusions that article 15.01C gives field hours employees the right to decide their own hours as long as those hours are for the purpose of client and essential program needs. Documentation meets client and essential program needs. The right of field hours employees to decide when to carry out documentation is their decision to make under article 15.01C and restricting that right violates the contract.

AWARD

For all the above reasons, the grievance is sustained. The Board concludes that the Employer violated article 15.01C when it restricted the right of field hours employees to decide to carry out documentation on evenings and weekends. The Employer is directed to remove this restriction and allow its field hours employees to govern their hours of work in accordance with Article 15.01C of the Collective Agreement.

Mr. Huculak, nominee of the Union, concurs with this award.

Mr. Hunter, nominee of the Employer, concurs with this award.

Dated on July 15, 2019 in Saskatoon.



Allen Ponak