DEPARTMENT OF ADMINISTRATIVE SERVICES
Chief Human Resources Office
Labor Relations Unit **INTEROFFICE MEMO**

DATE: September 11, 2012

TO: All Agencies with SEIU represented employees

FROM: Thomas Perry
Labor Relations Unit Manager

SUBJECT: Shift Differential Computation

DAS has learned that computation of shift differential is done in a variety of ways among agencies. SEIU recently appealed a grievance to DAS on this issue, which has lead to this communication.

Article 26, Section 5(a) provides that:

All employees shall be paid a differential as outlined in Subsections (b) and (c) below, for each hour or major portion thereof (thirty (30) minutes or more), worked between 6:00 p.m. and 6:00 a.m. and for each hour or major portion thereof worked on Saturday or Sunday.

This language was the subject of a grievance arbitration in 1980, decided by Arbitrator Carlton Snow. The issue was whether a period of thirty minutes or more constituted a *major portion of an hour,* and therefore justified a full hour's shift differential. The answer is yes. We have attached a scan of the decision; the dispositive opinion language is on the last page of the decision.

The content of the decision shows that shift differential is paid in full hour rates only; time worked within the eligible hours for less than thirty minutes does not generate a fraction of a shift differential payment. Time worked for more than thirty minutes but less than one full hour generates a full hour's payment, not a fraction of the rate (currently $.75 per hour.) An employee is either eligible for a full hour's differential, or receives nothing.

Please review your payroll practices concerning the payment of shift differential, and if they are not incompliance with the 1980 Snow decision, please bring them into compliance at your earliest opportunity.

As many of you know, employees may seek back payment for unpaid overtime or premium payments for up to two years per ORS 12.110, Section 3. Our review of shift differential payments among agencies showed that many of them appeared to be doing so in compliance with the Snow decision, but there were some anomalies in virtually all agencies. If you conduct a review of your shift differential payment practices, you may find that the state owes employees money, or that employees owe money to the State.

If you would like to discuss this in more detail, please contact me, or your assigned labor relations manager at your next convenience.

IN THE MATTER OF ARBITRATION)
BETWEEN)
OREGON STATE EMPLOYES ASSOCIATION)
AND)
STATE OF OREGON)

ANALYSIS AND AWARD:
Carlton J. Snow,
Arbitrator

I. BACKGROUND

This matter came for arbitration pursuant to a contract between the parties effective between July 1, 1979 and June 30, 1981. The parties met for a hearing on January 18, 1980 at 9:30 AM in the Board Room of the Oregon State Employes Association headquarters located in Salem, Oregon. Ms. Alice L. Dale represented the Oregon State Employes Association, and Mr. John W. DeMusiak, Director of the Labor Relations Division for the State of Oregon Executive Department, represented the Employer.

The parties agreed that the matter properly had been submitted to the arbitrator and that there were no questions of procedural or substantive arbitrability to be resolved. At the close of the hearing, the parties agreed to exchange briefs simultaneously on February 1, 1980. The arbitrator received a brief from the Association on February 4, 1980 that had been submitted in a timely fashion. The arbitrator received no post-hearing brief from the Employer.

II. THE ISSUE

The parties agreed in a pre-arbitration conference on October 11, 1979 that the issue before the arbitrator is as follows:

> Does a period of thirty minutes constitute a "major portion of an hour" within the meaning of Article 49 of the current collective bargaining agreement between the Executive Department, State of Oregon, and Oregon State Employes Association? (See, Joint Exhibit No. 2).

III. RELEVANT CONTRACTUAL PROVISIONS

Article 49: SHIFT DIFFERENTIAL

> Shift differential shall apply to all employes except temporary appointments and part-time employes working less than 32 hours per month. In order to qualify for the shift differential, an employe must be in a job classification which is allocated to salary range 22 or below. An employe shall be paid a shift differential of $.23 per hour for each hour or major portion thereof worked between 6:00 p.m. and 6:00 a.m. and for each hour or major portion thereof worked on Saturday and Sunday.

IV. STATEMENT OF FACTS

The facts in this matter are straightforward and not in dispute. The parties cannot agree whether thirty minutes constitutes a "major" portion of an hour. Swing shift employes in the Mental Health Division at Dammasch State Hospital are scheduled to work between the hours of

3:00 PM and 11:30 PM. They take their luncheon break before 6:00 PM, and then work for five and one-half hours between 6:00 PM and 11:30 PM. Beginning on the effective day of the new contract in July of 1979, the Employer paid these employes a shift differential of 23¢ an hour for each of the five full hours worked after 6:00 PM each day. But the Employer failed to pay them a shift differential for the additional one-half hour each night.

Dammasch Hospital swing shift employes filed a group grievance with the Association on August 7, 1979. (See, Joint Exhibit No. 2, p. 7). They alleged that the contract entitled them to receive a shift differential for the thirty minutes of work between 11:00 PM and 11:30 PM each night, since the one-half hour period constituted the "major portion" of an hour as described in Article 49 of their contract.

V. POSITIONS OF THE PARTIES

A. The Association: The Association argues that the term "major portion" does not necessarily mean more than 50% but can mean "considerable," "great," "substantial." According to the Association, in some cases it can even mean an amount less than 50%. At the bargaining table, the parties did not discuss the precise meaning of the words "major portion," but Association's representatives testified that they understood the term to mean a period of thirty

minutes, since that is a basic pay period in the state pay scheme.

Association witness Tom Gallagher, OSEA bargaining representative, testified that to a large extent he relied for his understanding of the term on an arbitration award issued by Arbitrator William H. Dorsey. Arbitrator Dorsey issued a decision in a similar complaint between the same parties only seven months prior to negotiations which produced the disputed term. (See, Association Exhibit No. 11). In that dispute, the Employer had interpreted a contractual provision granting employes a meal allowance for "more than two hours" work beyond their normal work day as requiring at least two hours and one minute of work. Arbitrator Dorsey held that the Employer's interpretation was "too technical" and a "de minimis" requirement. He concluded that the words "more than two hours" really meant "two hours or more." If an employe worked at least two hours, he qualified for the meal allowance. Mr. Gallagher testified further that he assumed the rational of Arbitrator Dorsey's award would apply to the shift differential provision and that a requirement of one minute or one second beyond thirty minutes would be a de minimis requirement that would be "too technical."

The parties did not discuss Arbitrator Dorsey's award at the bargaining table. The Association believes, however, that since both parties were aware of the award and the applicability of its reasoning to the interpretation of "major portion" of an hour, the Employer had the burden of notifying the Association at the bargaining table if it intended to interpret the language in a different manner. Since management gave no notice of a contrary intent, the Association argues that the

language should be construed in favor of the innocent contracting party, namely, the Association. The Association, therefore, contends that all swing shift employes at Dammasch Hospital who worked for a period of thirty minutes or more between the hours of 6:00 PM and 6:00 AM are entitled to a shift premium of 23¢.

B. The Employer: The Employer contends that a "major portion" of an hour is more than half an hour, that is, more than thirty minutes. The Employer argues that the parties specifically agreed to the term "major portion" at the bargaining table, and it must be construed in such a way as to give it meaning consistent with their intent. The term reflected a compromise arrived at through the bargaining process. The Employer had wanted a clause using the language "each full hour." This provision would have meant that an employe would receive no compensation unless he or she worked a full sixty minutes. The Union wanted a clause using the term "all hours," meaning all time worked would be compensated. The Employer contends further that the parties intended "major" to mean "greater than one-half" or the antonym of minor, which means "less than one-half."

The Employer contends that a period of precisely thirty minutes is neither a "major" portion nor a "minor" portion but only one of two equal parts of an hour. If the parties had intended to give shift differential pay for a half-hour of work, they would have said so, according to the Employer. Since they chose the words "major portion" instead, the Employer asserts they intended that an employe must work more than a half-hour in order to earn the differential.

Concerning how much more than thirty minutes is necessary, the Employer's witness, Mr. Bill Sager, contended at the hearing that "one minute, or even one second, more than thirty minutes" would be sufficient to constitute a "major portion" of an hour. The Employer maintains that since swing shift employes at Dammasch Hospital work exactly one-half hour beyond the five hours for which they are paid the shift differential, they are not eligible to receive shift differential for that additional period of time, because it is not the "major portion" of an hour.

VI. ANALYSIS

A. Guiding Principles: The duty of an arbitrator is to determine the intent of the parties as expressed in the terms of their labor contract so as to apply those terms to resolve disputes. If the parties do not agree concerning their understanding of the words they chose at the bargaining table, then the arbitrator must seek to determine whether one party had reason to know of the other's understanding of words used. If so, it must be determined whether the party who knew notified the unknowing party of its inconsistent interpretation of those words.

The arbitrator's duty is one of applying well-established principles of contract interpretation to a particular dispute. More precisely, the arbitrator evaluates "the meaning that is given to the language of the agreement by common usage; by usage in the trade or business or

profession of the parties; by communications between the parties during preliminary negotiations and during the execution of the writing; and by subsequent interpretations and practical application by either party that is assented to or acted upon by the other." (See, 3 Corbin on Contracts, Section 538 (1960)).

If an arbitrator determines through inquiry that the parties should have shared a common interpretation of words chosen by them but one party claims it had a different interpretation and failed to make that interpretation known at the bargaining table, then the non-communicating party "is bound in accordance with the meaning that he induces (the other) to understand and act upon, if he knows or has reason to know that the other will so understand and act." (See, 3 Corbin on Contracts, Section 538 (1960)). This modern principle of contract interpretation has been codified in the Restatement of Contracts, Second and is followed by courts and arbitrators alike. The underlying policy judgment is one favoring fuller communication at the bargaining table.

An example applying this principle can be found in Perry and Wallis, Inc. v. United States. (See, 427 F.2nd 722 (1970)). In that case, a subcontractor sued the National Park Service for overhead expenses and profits in addition to actual cost resulting from certain changes made in work hours under a construction contract. The Park Service rejected the subcontractor's claim because the contract included a clause permitting the "actual necessary cost" of changes plus a fixed fee of fifteen percent. The contract stated that the cost "in no case" was to include "general expense not directly attributable to the extra work." The Court of Claims held that, because the contractor

had knowledge of a prior ruling in a case between the same parties involving a similar contractual provision where overhead expenses and profits had been denied, he signed the contract with knowledge of the other party's past interpretation of this phrase in the contract. The court stated that:

> A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought that something else was meant. (See, Perry and Wallis, Inc. v. United States, 427 F2d 722 (1970)).

Concerning the problem at Dammasch State Hospital the arbitrator concludes that, based on the common usage of the term "major portion" and the similarity of this provision to the meal allowance provision discussed in Arbitrator Dorsey's arbitration decision, the Employer was aware or should have been aware of the interpretation that the Association attached to the meaning of Article 49. Since the evidence does not show that the Employer made clear its intention to deviate from that interpretation, it is bound by the Association's definition of the term. There follows a fuller explication of this conclusion.

B. Common Usage: First of all, the Association's contention that the words "major portion" do not necessarily mean "more than 50 percent" in common parlance and usage is reasonable. A reflection of its reasonableness is seen in the delightful contract case of Hurst v. W. J. Lake and Co. In that case the Oregon Supreme Court interpreted a clear-cut contractual requirement

calling for 50% protein in horse meat scraps as meaning 49.53% protein. (See, 141 Or. 306, 16 P.2d 627). The court viewed the requirement in terms of common usage.

Certainly, one would say that a "major portion" of his or her monthly income is spent on housing costs. Yet, normally housing costs absorb only one-fourth to one-third of a family income. Similarly, a lawyer might say that a "major portion" of his or her practice is in labor law. Yet, he or she might mean simply that no other single type of case consumes more hours each week. But such a lawyer might spend only ten or fifteen hours a week working in that area of the law.

It, therefore, does not necessarily follow that the term "major portion" as used in the shift differential article of the contract, clearly signifies a period of more than thirty minutes. The term by its nature is a flexible and ambiguous phrase, one desirable of more precise definition. If the Employer intended to interpret the phrase in the manner for which it now contends, it had an obligation clearly to indicate that intention at the table, or even more desirable, in the writing of the disputed provision itself.

Since only one of the four witnesses (all of whom were present at the relevant bargaining sessions) recalls a discussion <u>at the bargaining table</u> when the Employer disclosed such an intention, it is reasonable to conclude that the communication was at best inadequate. The Employer's negotiator, Mr. Bill Sager, testified that he recalls a discussion at the bargaining table when his team said the phrase "major portion" meant "more" than thirty minutes. The Employer's negotiator, Mr. James Bradshaw, said his memory was "hazy" concerning the meaning of "major

portion." He could not recall whether it was discussed in a management caucus or at the bargaining table, but he did "remember that the intent was that the words be interpreted as 'more than thirty minutes'." Mr. John DeMusiak, the Employer's chief negotiator and spokesman for the management team, did not testify concerning his recollection of relevant discussions at the bargaining table or his understanding of the disputed terms.

Association witnesses, Messrs. Tom Gallagher and Gordon Webb, testified that they recalled the discussion about shift differential, but they recollected no discussion regarding the meaning of "major portion" as meaning "more than thirty minutes." Mr. Webb testified that the primary discussion of Article 49 centered on whether shift differential premiums would be paid for work on Saturdays and Sundays.

On the other hand, all four witnesses testified that they all were aware of Arbitrator Dorsey's award and recalled discussing its relevance to the issue of shift differential during negotiations. This arbitrator, therefore, concludes that there is a high probability the Employer's bargaining team was aware of the meaning the Association's negotiators attached to the phrase "major portion" of an hour during bargaining about the term. That is, it meant "a half hour or more."

Association negotiator, Mr. Gallagher, testified that he "assumed there would be no problem with 'major portion' being interpreted as a half hour." He stated that, since Arbitrator Dorsey concluded one minute beyond two hours was a de minimis requirement for eligibility to receive a meal allowance, Mr. Gallagher assumed one minute beyond half hour would be a de minimis requirement for eligibility to receive

a 23¢ shift differential. The arbitrator concludes that his analysis was both reasonable and foreseeable and that if the Employer wished to deviate from that meaning, it had an obligation to express its position clearly and deliberately at the bargaining table. Since it did not do so, the term "major portion of an hour" must now be construed in accordance with the meaning attached by the Association at the time the parties made the agreement. This conclusion flows from the fact that the Association had no reason to know of any different meaning attached by the Employer, and the Employer had reason to know the meaning attached by the Association. (See, Restatement of Contracts, Second, Section 227).

C. The "De Minimis" Requirement Reconsidered: Although Mr. Bill Sager was the only witness who recalled a discussion at the bargaining table concerning the meaning of "major portion" being "more than thirty minutes," he also testified it was his understanding that one minute, "even one second," beyond thirty minutes would be sufficient to qualify for the differential. He stated that some state employes (namely, in forestry) end a shift at odd times, such as 6:35 or 6:40 PM. It was his understanding that such employes would receive no shift differential for working until 6:30 PM but "would get the shift differential for working thirty-five minutes or even thirty minutes plus one second."

Mr. James Bradshaw, the Associate Superintendent of Dammasch Hospital where the grievants work, admitted that most employes at the hospital start and stop work on the hour or half hour. He stated that

a few employes begin at quarter hour points on the clock. No employe is scheduled to start or stop work at thirty-one minutes or thirty-five minutes past the hour. Mr. Bradshaw conceded that, if an employe at Dammasch State Hospital works thirty-one minutes, he or she is paid only for thirty minutes of work, since an employe's pay is reported in half hour or quarter hour segments only.

As a practical matter, therefore, an employe at the hospital would not qualify for a shift differential under the phrase a "major portion" of an hour as interpreted by the Employer unless the employe worked at least forty-five minutes beyond 6:00 PM. Yet, neither Mr. Bradshaw nor any other witness recalled any discussion suggesting that forty-five minutes would be the smallest period of time for which shift differential would be paid.

Accepting the fact that the management bargaining team believed in good faith that the phrase a "major portion" of an hour referred to even one second beyond thirty minutes, it is reasonable to conclude that the team knew the result of such an interpretation would be inequitable. The team members knew that the labor contract would apply to all classified employes of the State of Oregon who are represented by the Association. Since salary payment at different agencies is administered in various ways, an employe at one location (such as at the forestry department which computes employes' pay according to their precise quitting time) would receive a shift differential for working thirty-one minutes after 6:00 PM. But a similar employe at another location (such as Dammasch Hospital) would receive no shift differential, even though he or she actually worked thirty-five or forty minutes and perhaps as much as

forty-four minutes after 6:00 PM. Additionally, it is unlikely that any state employe would receive a shift differential for working one second beyond thirty minutes, for time clocks usually do not print the precise second when a time card is punched. As a practical matter, therefore, probably no employe would receive a shift differential for working one second beyond 6:30 PM.

It was precisely this sort of strict interpretation by the Employer of a time limit triggering an employe benefit that Arbitrator Dorsey denied as "too technical" and "de minimis." His decision came only seven months before negotiations concerning the language disputed in this grievance. His reasoning clearly applies in this case. He stated:

> To hold that an employe is not entitled to a dinner allowance when working two hours longer than his or her "normal work schedule" but that this same employe, or another employe, is entitled to a dinner allowance under Section 6 for working two hours and one minute or two hours and fifteen minutes is to be too technical. One minute beyond two hours is a de minimis requirement and fifteen minutes beyond two hours is not even implied in Section 6, ... and would be an unfair requirement. (See, Association Exhibit No. 11, p. 8).

The United States Supreme Court, in addressing the issue of "de minimis time requirements" in wage issues stated:

> When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. (Anderson v. Mount Clemens Pottery Company, 328 U. S. 680, 692 (1946)).

In the Mount Clemens case the Court held that, when an employe brings suit for wages or unpaid overtime compensation, he or she has the burden of proving the employe performed work for which the employer refused proper compensation. Since precise records of hours worked are kept by the Employer in this case rather than the employe, the employe carries out his or her burden by producing sufficient evidence to show the amount and extent of work as a matter of just and reasonable inference. The arbitrator, therefore, concludes that the grievants in this case produced sufficient evidence to show as a matter of just and reasonable inference that they were eligible to receive a 23¢ shift differential for the one-half hour period between 11:00 and 11:30 PM each night, beginning on July 1, 1979.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that a thirty minute period constitutes the "major portion of an hour" as provided in Article 49 of the collective bargaining agreement between the parties. During the term of the contract whenever the Employer failed to compensate the grievants for shift differential after they worked a half hour or more between the hours of 6:00 PM and 6:00 AM, it violated the contract.

Proper compensation now is due and owing. The arbitrator shall retain jurisdiction of this matter for sixty days from the date of this award in order to resolve any back pay problems resulting from this report. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

Date: 3-26-80