



## ISSUE

Did the Employer violate Article 24, Section 1 of the Collective Bargaining Agreement by changing the language and practice under the physical therapy section of the County of Monmouth's Policy and Procedure for the "Workers' Compensation Managed Care Program" ( effective February 1, 1997) in the January 2004 revision of that policy? If so, what shall be the remedy?

## DISCUSSION

In the earlier policy, "Workers' Compensation Managed Care Program," effective February 1, 1997, the language under physical therapy was:

In the event that you have returned to duty but require physical therapy, it will be scheduled, to the extent possible, so as not to interfere with work operation. Any conflict scheduling should be referred to the Monmouth County Medical Coordinator at 866-3581.

Two sections in the 2004 policy manual refer to the scheduling of physical therapy sessions. The first is under Section III, Employee Instructions and Responsibilities, Physical Therapy:

Employees returning to work who require physical therapy will have their therapy scheduled outside their work hours. Employees may use their sick, vacation, or personal time to attend physical therapy during their regularly scheduled work hours, however, that time is not reimbursable.

The second reference is under Section VI, Alternate Duty, subsection 8:

8) Appointments for medical care including physical therapy will be scheduled outside the employees' work schedule when possible including days off and will be coordinated with the R.N. Medical Coordinator and the Case Manager. Employees may not make or change any appointments without the authorization of one of the above.

The new policy manual was distributed on February 26, 2004. The Union filed a grievance on March 2, 2004 claiming that past practice has been violated by the language change. The Union's objection to the new language is that "to the extent possible" has been omitted. The Union contends that under the old language the Sheriff's Officers (S/O's) had the right, within reason, to schedule physical therapy appointments during the time they were on duty, and they were paid for the time. Joseph Tuohy, PBA president, testified that there has been a change in the practice, and the S/O's presently must use leave time for therapy appointments scheduled during working hours at their request. The Union asks that, physical therapy sessions be scheduled at times jointly agreed upon by the employee and the supervisor, and that best efforts should be put forward to ensure that appointments take place on County time.

The County maintains that there has been no change in the practice; that the language changes only clarify the procedure that was in practice in the prior policy. The County claims physical therapy sessions always have been scheduled during the S/O's own time. When it was impossible to schedule the therapy during non-working hours, the County scheduled the appointment during working hours and paid the officer for the time spent in therapy. However, if an S/O requested that the therapy be scheduled during working hours, then the appropriate amount of either pay or leave time was deducted. The old policy did not specify that leave time could be used for therapy sessions taking place during regularly scheduled work hours. The new one does. The County sees this as the only change in the policy language and maintains that the deletion of the words "to the extent possible" does not change the meaning of the language because that phrasing is implicit in all contracts.

## OPINION

The parties are asking for a determination as to whether the language of the new policy changes the terms and conditions of employment and/or violates the past practice of the parties. No evidence of an S/O being adversely affected by the language change was presented at the hearing because the language in the new policy was grieved as soon as the Union became aware of it, and no officer had been affected by it at that time.

I have examined the language of the two policies, and I cannot find that the revisions change the meaning of the language for scheduling physical therapy sessions. The language of the 1997 policy, "In the event that you have returned to duty but require physical therapy, it will be scheduled to the extent possible, so as not to interfere with work operation," is clear. Scheduling appointments during an S/O's regular work schedule would interfere with the work operation. There was no argument that it would not. Obviously, if an officer is absent from duty, there is some change in the work operation. "To the extent possible" recognizes that sometimes it may be necessary to schedule appointments during working hours. There was agreement that the County paid the officers for therapy time when the County scheduled it during working hours. Nothing in the 1997 language states or implies that the County will attempt to schedule appointments to accommodate officers who request that therapy be scheduled during working hours. Compensation for therapy during on-duty time is not mentioned. However, the Collective Bargaining Agreement guarantees that members receive a certain amount of pay for sick, personal and vacation leave, and an S/O could have used that for any unpaid, on-duty, therapy time.

The language of the 2004 policy emphasizes the right to use paid leave time for physical therapy sessions scheduled during working hours even though the right already existed. The County still requires that therapy sessions be scheduled so as to not interfere with the work operation, i.e., "outside their work hours." The language in dispute in the 1997 policy is nearly identical in meaning to the language of Section VI (8) in the 2004 policy. The 1997 language states "to the extent possible," and the Section VI (8) 2004 language states, "when possible." There is nothing in the language of either policy that gives the officers the right to have physical therapy sessions scheduled, by personal request, on paid, on-duty time.

This dispute arises from the practice. Even though the language is clear, the Union claims that the practice was to give the S/O's the opportunity to schedule physical therapy sessions during their regularly scheduled working hours. It may be that some therapy sessions were scheduled at an officer's request with no payroll deduction for the time, but no examples of that were given.

Clear contract language takes precedence over past practice in most cases. An exception can be a situation in which both parties have ignored the contract language and agreed to utilize a different practice over a reasonable period of time. However, such a practice is expected to meet the same conditions as one existing where there is no written agreement. That is, the practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."<sup>1</sup>

In this dispute, there is no evidence that any of the above conditions existed. The County has not acknowledged that anyone had therapy, by personal request, on paid, on-

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<sup>1</sup> *Celanese Corp. of Am.*, 24 LA 168, 172 (Justin 1954)

duty time, and there is no evidence that anyone did. The second part of a detailed explanation of the grievance (Exhibit J-2, P. 2) reads:

Physical Therapy scheduling has been a staggering difference when it comes to Sheriff's Officers. S/O's have always been ordered that any Phys. Therapy had to be done on their own time. (emphasis added) Evidently this was NOT the policy in place. Other Sheriff's employees have been allowed to go on County time.

The last paragraph of the grievance explanation (Exhibit J-2, P.3) states:

Ergo, this new addition should be repealed. S/O's should be allowed to attend physical therapy as other employees have in the past. Physical Therapy should be scheduled as times jointly agreed on by employee and Supervisor. Both sides work amicably to assure appointments do not interfere with work operation. Best efforts should be put forward to ensure that appointments take place on County time.

The above language suggests that both sides understood the practice was that the therapy sessions were scheduled for off-duty time. The PBA president testified that the S/O's had their physical therapy sessions scheduled, at their request, for paid, on-duty time. However, he first testified that the therapy was always scheduled for off-duty time.

The Union appears to be asking for the same options that they believe other units have, but that the S/O's ever had them has not been proved. There is no basis in either the language of the policies or in the descriptions of the practices to prove that the officers are entitled to such options. Any change in the language giving the S/O's the right to have their appointments scheduled during regular working hours should be bargained.

I agree with the County's position. The language of both policies makes it clear that the S/O's physical therapy sessions are to be scheduled on off-duty time whenever it is possible for the County to do so. I do not find evidence of a past practice of scheduling

sessions for paid, on-duty time at an officer's request. Therefore, the grievance is denied. The parties have requested that I retain jurisdiction for a period of two years from the date of this award, and I have agreed to do so.

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**AWARD**

The grievance is denied. There was no violation of Article 24, Section 1 of the Collective Bargaining Agreement. The arbitrator, at the request of both parties, agrees to retain jurisdiction for a period of two years from the date of this award.

By: Jacqueline A. Imhoff  
Jacqueline A. Imhoff  
Arbitrator

State of New Jersey  
County of Essex

Sworn to and affirmed before me on October 30, 2004.

Roy K. Imhoff  
Roy K. Imhoff  
Notary Public of New Jersey  
My commission expires May 13, 2006