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July 3, 2007

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**Re: County of Atlantic
-and-
FOP Lodge 34
Docket No. 2007-463
(G. Hebert/Letter of Reprimand)**

Gentlemen:

Enclosed please find two copies of the opinion and award in this matter.

My fee for services is as follows

Hearing date (May 1, 2007)	\$1,600.00
Study/writing (One day)	1,600.00
Travel expenses	<u>86.00</u>
Total	\$3,286.00

Each party's share: \$1,643.00.

It was my pleasure to work with you on this case.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Arbitration	*	
Between	*	
County of Atlantic	*	Docket No. AR-2007-463
		George Hebert – Letter of Reprimand
-and-	*	
Fraternal Order of Police	*	
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OPINION AND AWARD

I held a hearing in this matter on May 1, 2007 at the Atlantic County Library in Galloway Township, New Jersey. The County was represented by Eric M. Bernstein, Esq.; the FOP was represented by Myron Plotkin, Consultant. Both parties filed post-hearing briefs. These were received by June 18, 2007, thereby marking the close of the hearing.

Issue

The issue to be decided is as follows:

Did the FOP abandon the grievance? If not, did the County violate the negotiated agreement between the parties when it gave Mr. Hebert a letter of reprimand? If so, what shall be the remedy?

Background

There are two issues: a procedural issue and a substantive issue. The facts relevant to the procedural issue are set forth below.

The parties' January 1, 2003 through December 31, 2006 agreement includes a grievance procedure at Article II. (Exhibit J-1) Its stated purpose is to secure at the lowest possible level an equitable solution to problems which affect terms and conditions

of employment. (Section A 1) A "grievance" is defined as a claim "based on the violation of this Agreement." (Section B 1) There are time limits for processing grievances. A grievance is filed at Level One with the Grievance Committee of the FOP within ten calendar days of its occurrence. The Grievance Committee Chair may consult with the appropriate person and is to render a written decision within ten calendar days. If it is not settled at that level, the grievance may be filed at Level Two with the Warden or his designee who is to render a written determination within ten days following receipt of the grievance. If it is not settled at this level, it may be filed at Level Three with the Department Head or his designee who is to render a written determination within ten calendar days. If it still has not been settled and if the FOP determines that it is meritorious, the FOP may submit the grievance to binding arbitration. The arbitrator is bound by the provisions of the agreement and "shall not have the authority to add to, modify, detract from or alter in any the specific and express provisions of this agreement or any amendment or supplement thereto." (Section C) The contract requires that, "All grievances and responses thereto shall be set forth in writing and shall include an explanation." (Section F)

On November 9, 2006, the County issued a reprimand to George Hebert, a County correction officer and the President of FOP Lodge 34. The specification states that, "A Compliance Unit investigation discovered that on August 12 and 13, 2006 employee filed false overtime slips totaling .30 of an hour." (Exhibit J-6) On November 11, 2006, Hebert filed a grievance. The grievance report form includes a section entitled "Article and Section of Contract Violation, Past Practice, Fair Treatment, and the Law." In that section, Hebert wrote:

Management's violation of rules or responsibilities: Officer George Hebert stands aggrieved by the action(s) of the County and/or its agent(s) by the issuance of a formal reprimand dated November 9, 2006 and received on November 11, 2006 regarding an alleged false filing of

overtime slips. Such action constitutes disciplinary action without just cause.

There is another section of the form which calls for the following: "STATEMENT OF GRIEVANCE (Give Times, Dates, Who, What, When, Where, Why, How) Be Specific." In that section, Hebert wrote: "See above. The remedy sought is the expungement/ removal from any and all personnel or other files maintained by the County and/or its agent(s) and the destruction of all such copies of said reprimand."

The FOP Grievance Chair signed the grievance on November 15, 2005. It was received by Warden Gary Meline on November 17, 2006. He wrote to Hebert on November 20, 2006 stating that, "Upon review of the grievance it does not state what you are actually grieving. There also is no statement of facts as to the specifics of your grievance. It is hard to address a grievance when no facts or information is provided." He concluded by asking Hebert to, "Please complete the grievance and provide the facts or at least the actions you are grieving and I will gladly address your issue(s)."

The FOP moved the matter to Rick Mulvihill, Head of the Public Safety Department. By memo dated November 27, 2006, Mulvihill responded as follows:

I can understand why the Warden (Division Director) answered in this matter that he did as the form does not state a basis for a grievance, just that it happened. Since the Warden did not answer the issues, since none were submitted, I am asking that the grievance be resubmitted to the Warden for his review and provide his answer before I respond.

Thereafter, there was correspondence between Plotkin and James Ferguson, County Counsel, regarding several grievances including this one. As to this grievance, Ferguson wrote the following:

The Warden informs me that a full investigation was completed on this matter. The information passed along to me indicates that the pod officer stated that he relieved Officer Hebert on time and that Officer Hebert could give no reason for the overtime. Based upon the fact that he was relieved on time and had no reason to be working

later than scheduled, the overtime was rescinded and disciplinary action was filed. Also, the Warden informs me that the grievance was initially handed in with no specifics listed as to the nature of the grievance. The Department Head, Mr. Mulvihill, sent the grievance back on November 27, 2006 and administration has not received anything on it from that point forward. The Warden takes the position that the grievance has been abandoned.

The substantive issue concerns two overtime slips submitted by Hebert for August 12 and 13, 2006. Hebert was out on disability from December 31, 2005 through August 11, 2006. August 12, 2006 was his first day back at work. On both August 12, and 13, 2006, Hebert completed overtime slips certifying that he was involuntarily held over a total of ten minutes on August 12, 2006 and a total of eight minutes on August 13, 2006. The attendance reports for those two days show that Hebert, whose shift was 7:15 a.m. to 15:30 p.m., punched out at 15:40 on August 12, 2006 and at 15:35 on August 13, 2006. The daily schedules for those two days show that he was on overtime for ten minutes on August 12, 2006 and for eight minutes on August 13, 2006.

Captain James Murphy was an operations lieutenant in August 2006. He oversaw day-to-day operations including scheduling. He said that an issue arose regarding Hebert's overtime slips. He said that Lt. Giberson noted on the slip that overtime was not necessary. He said that he then researched to see if overtime had been necessary and determined that it had not been. He said he interviewed the relief officers and asked if there had been any incident which would justify overtime and was told there had not been. He forwarded his conclusion to Captain Sean Thomas in a memo dated August 23, 2006. Murphy testified that the Warden decided to send the matter to the Prosecutor's Office.

The new shift reported at 15:15 p.m. for muster, a process which takes several minutes during which the shift commander passes along information which the on-coming shift needs to have. When muster is over, the officers go to their assignments

and talk to the officers they are relieving. Inmates are counted or accounted for. Certain supplies and materials are transferred and checked to be sure that they are working. Matlack said that this could take until after 3:30 p.m. at times. The officer punches out when this has been completed.

The matter was investigated by Eric Matlack, an officer in the Internal Affairs Unit. Matlack conducted an investigation and prepared a report which was submitted in evidence in this case. (Exhibit C-1)

Matlack described the procedure which is followed for overtime. He said that the employee writes out a slip requesting overtime. He said that some officers swipe out first and then complete the slip. The shift commander then signs off and forwards it to those above him.

Hebert testified that if the time runs past fifteen minutes after the relieving officer arrives, he swipes out, fills out an overtime slip, it is approved, and he gets paid for the time. He said that he had done this countless times and had never been denied overtime. He said that in the past prior approval to stay past the end of his normal shift to complete the shift change had not been required and there had been no memo or anything else which indicated that the overtime procedure had been changed.

According to Hebert, he put in for overtime on August 12 and 13, 2006 and was paid for the time.¹ His pay stub for the pay period indicates that he was paid for twenty minutes of overtime at straight time. (Exhibit FOP-1)

A printout for Hebert from the Operations Department for August 2006 shows that he had "approved" overtime of ten minutes on August 12, 2006 and of eight minutes on August 13, 2006. (Exhibit FOP-2)

¹ The County provided time reporting adjustment documents dated November 9, 2006 which call for the overtime for August 12, and 13, 2006 to be recouped. The Warden did not know if the overtime had been taken back. Hebert said it had not been.

Hebert denied that he had been disciplined previously. The County provided a batch of disciplinary documents. (Exhibit C-4) These show that Hebert received a counseling in August 1996, a second counseling in February 1997, a third counseling in June 1998, a reprimand in October 1999, a fourth counseling in August 2000, and a reprimand in May 2004.²

Article III, Work Schedules, provides that officers work a five day, 40 hour week and, in addition, must report for roll call fifteen minutes before the start of their shift. Article IV, Overtime, provides for overtime payment at time and one-half for all hours worked over 40 hours in a week.

Position of the County

The County contends that the FOP abandoned this grievance when it failed to respond to both the Warden and the Director who both asked that specifics be provided. It cites Article II, Section F which requires that grievances include an explanation. While conceding that Hebert technically complied with the contract provisions at each step, it contends that he did not comply with the spirit and in so doing, he frustrated the purpose which is to settle grievances at the lowest possible step. Both the Warden and the Director replied to him that they did not understand what he was grieving and they asked for an explanation but Hebert and the FOP failed to comply so the grievance simply proceeded up the steps. County Counsel advised the FOP that the grievance was considered to have been abandoned as a result of the FOP's failure to provide an explanation but the FOP persisted. The County cited judicial authority for the proposition that a union must follow the grievance procedure and that its failure to do so was a failure to exhaust that procedure and barred judicial treatment of the matter.

² He also received a reprimand in February 2007 which post-dates this matter.

Tying to the substantive issue, the County contends that Hebert falsified overtime slips when he claimed overtime for August 12 and 13, 2006. First, it notes that it has the right to impose discipline under the law and that includes "minor" discipline such as was given in this case. As set forth in the Administrative Code, the bases for which an employee may be disciplined are "conduct unbecoming a public employee" and "other sufficient cause." (N.J.A.C. 4A:2-2.3)

The County notes that Article XIX of the agreement sets forth a long list of employee rights which must be followed as a prelude to disciplinary action but contends that each of the contractual provisions was followed in this case. The Article specifically recognizes the right of the Warden to initiate discipline. (Section B 14) Hebert was given a Notice of Investigation, in writing, as required, and Hebert signed this. Hebert was interviewed on October 12, 2006 and was accompanied, as he requested, by counsel. There was a thorough investigation. Thereafter, the letter of reprimand was issued to Hebert.

In the investigation, all involved parties were interviewed. It was determined that there were no reports or incidents which would have required overtime on the two days in question. Hebert was relieved on time on both dates, as reflected in video cameras.

There is no evidence to support the claim of the FOP that Hebert was disciplined because of his union activities. He was disciplined solely because there was no basis for overtime which he claimed on the two dates. Thus, he submitted false overtime slips. The penalty imposed was very minor, given what he did, as other cases cited by the County indicate. Most employers would have imposed a much greater amount of discipline, it is argued.

Thus, the County contends that the reprimand was properly issued and violated no provision of the agreement or the law. There was a thorough investigation. Hebert was accorded all contractual rights. He submitted false overtime slips and was properly

disciplined. Indeed, the discipline was lenient. Accordingly, the County asks that the grievance be denied.

Position of the FOP

The FOP asserts that the County failed to comply with the standards of just cause in disciplining Hebert. He has been accused of falsifying overtime slips and while employees can be disciplined for this, it must be shown that they did so with an intent to defraud the employer. The County has the burden of proof. It notes that the amount of time at issue is miniscule and asserts that no employee would risk discipline and criminal charges for such a small potential gain.

Hebert made no effort to cover up his actions. He did exactly what he had done on numerous other occasions. He was not required to seek advance approval to remain a few minutes beyond the scheduled end of his shift nor has the County claimed that prior approval was required or that any policy has been issued regarding the shift change procedure. As the document from the Operations Department indicates, his overtime was approved by the administration.

The Union notes that there is no first hand evidence that Hebert did anything wrong. No witness with such knowledge testified. The County relied entirely on hearsay evidence in the form of a report compiled by Matlack as well as the hearsay testimony of Murphy. It failed to call as witnesses the officers who relieved Hebert and those who were involved in the investigation and on whom it relied in reaching its conclusions. It would have been easy to produce these witnesses but the County failed to do so. The FOP suggests that if the County had called these witnesses, their testimony would not have supported the position of the County.

Whether or not Hebert had been disciplined in the past has nothing to do with this case. While he had been disciplined in the past for minor incidents for which he had

either been counseled or reprimanded, none of those situations involved false claims for overtime. His disciplinary record has no bearing on this case and on whether he falsified overtime slips in August 2006.

The FOP contends that the real reason that Hebert was disciplined was because of his role as a vocal president of the FOP who kept his members informed of their rights. Thus, he put two memos on the FOP website regarding overtime. (Exhibits FOP-3 and 4) What is said to be most telling is that the County almost immediately sent this matter, which involves a total of 18 minutes over two days, to the County Prosecutor for possible criminal action. This is said to say a lot about the relationship between these parties. The FOP notes that the County Prosecutor took no action and returned the matter to the County. The intent, argues the FOP, was to send a message to the FOP that it would retaliate against and intimidate employees.

While the County claims that Hebert falsified two overtime slips, the FOP points out that the document prepared by the County's own Operations Department shows that the overtime for the two days was approved. (Exhibit FOP-2) This document undermines the claim of the County, particularly when it has produced no witnesses with first hand knowledge of the surrounding events.

The FOP asserts that in a case such as this, when the charge is dishonesty, the burden of proof on the County is even higher than in other cases. The County treated this as a criminal matter when it referred it to the Prosecutor and this means that the County has to meet a higher standard of proof that Hebert knowingly and willfully engaged in dishonesty with an intent to steal. There is simply no proof of this and the fact that Hebert acted openly undermines this claim. He turned in his overtime slips as he had done in the past. There is no motive, given the small amount of time at issue.

The FOP argues that the County failed to meet its burden of proof and asks that the grievance be sustained. It asks that the reprimand be rescinded and that all

references to this discipline be expunged from all records. It also asks that the County be directed to cease and desist from taking discriminatory or disciplinary action against Hebert based on his protected activities as the President of the FOP.

Discussion

The County has argued that this grievance was "abandoned." This is based on the fact that the Warden and Director both asked Hebert and the FOP to provide the specifics of the grievance. While I recognize that the contract requires that grievances include an "explanation," this requirement was satisfied. It was the County which issued the reprimand so it obviously knew why it was reprimanding Hebert. That reprimand, which was issued on November 9, 2006, states that, "A Compliance Unit investigation discovered that on August 12 and 13, 2006 employee filed false overtime slips totaling .30 of an hour." It is this action which Hebert and the FOP grieved.

The grievance which Hebert filed states: "Officer George Hebert stands aggrieved by the action(s) of the County and/or its agent(s) by the issuance of a formal reprimand dated November 9, 2006 and received on November 11 regarding an alleged false filing of overtime slips." This "explanation" fulfills the contractual responsibility of Hebert and the FOP.

It is obvious that the grievance concerns the reprimand and that the reprimand, which was issued by the County in the first place, was for an alleged falsification of overtime slips. Indeed, in his December 18, 2006 letter to Plotkin, County Counsel stated that, "The Warden informs me that a full investigation was completed in this matter." The County can hardly claim that it did not know what this grievance was about if it was able to conduct a full investigation. It was not "abandoned" by the FOP. I shall decide the case on the merits.

This is a disciplinary matter and the County bears the burden of proof. It is undisputed that the County has the right to impose minor discipline. This right is recognized not only in the statute (N.J.S.A. 34:13A-24) but also at Article XIX, Section B 14 of the parties' agreement.

While the parties' collective bargaining agreement does not itself contain a "just cause" requirement, the parties agree that a letter of reprimand is "minor discipline." The Administrative Code at N.J.A.C. 4A:2.2.3 provides the basis for which employees may be disciplined and this includes "conduct unbecoming a public employee" and "other sufficient cause." Thus, the question is whether Hebert engaged in conduct unbecoming a public employee, as set forth on the November 9, 2006 reprimand. "Sufficient cause" is required for discipline.

Hebert's workday was 7:15 a.m. to 15:30 p.m. on August 12 and 13, 2006. He was entitled to additional pay if he worked beyond those times. He submitted overtime slips claiming an additional ten minutes of pay on August 12, 2006 and an additional eight minutes of pay on August 13, 2006. There is no claim by the County that he would not have been entitled to extra pay for this time if he worked that time.

The County questioned the need for this extra work and conducted an investigation. Indeed, it referred the matter to the County Prosecutor for possible criminal prosecution. The County Prosecutor did not charge Hebert and returned the matter to the County. Thus, it appears that in the judgment of the Prosecutor, the matter did not rise to the level of a criminal offense and/or that the County could not prove the charges against Hebert.

While I understand that the County and Matlack did conduct an investigation of this matter and that Matlack concluded that Hebert had falsified the two overtime slips, that determination is not sufficient to meet the County's burden of proof in this arbitration proceeding. This is a de novo proceeding. The County must prove, by at least by a

preponderance of the evidence, that Hebert did falsify overtime slips. It did not do so. It relied exclusively on the testimony of Murphy and the investigation report of Matlack.

The County did not provide the testimony of the officers who relieved Hebert on the two days in question nor did it otherwise prove that overtime was not necessary on those two days. There was no first hand evidence to support the charges.

Countering the County's position are several things. The report prepared by the Operations Department shows that the overtime for the two days was approved. (Exhibit FOP-2) Hebert testified that he did just what he had done on numerous prior occasions in putting in for overtime and had never been told that this was not the proper procedure. He testified without contradiction that no prior approval was required for such overtime.

There is no evidence that the County acted against Hebert as a result of his exercise of statutorily protected rights. Additionally, Hebert's prior disciplinary record has no bearing on the outcome of this case which turns simply on whether the County has proved that he falsified overtime slips.

The County failed to meet its burden of proving that Hebert engaged in conduct unbecoming a public employee by falsifying overtime slips on the two dates. The grievance will be sustained and the County will be directed to rescind the reprimand and to remove all references to it from Hebert's records.

AWARD

The grievance is sustained. The FOP did not abandon the grievance. The County did violate the negotiated agreement between the parties when it gave Mr. Hebert a letter of reprimand. As a remedy, it is directed to rescind the reprimand and to remove all references to that reprimand from Hebert's records.

Dated: July 3, 2007
Princeton, NJ

Jeff B Tener
Jeffrey B. Tener
Arbitrator

State of New Jersey)
County of Mercer) ss.:

On this 3rd day of July, 2007, before me personally came and appeared JEFFREY B. TENER to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Gloria L. Tener
GLORIA L. TENER
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES OCT. 19, 2009