

In the Matter of Arbitration Between:

COUNTY OF ATLANTIC

"Public Employer,"

- and -

FOP LODGE NO. 34

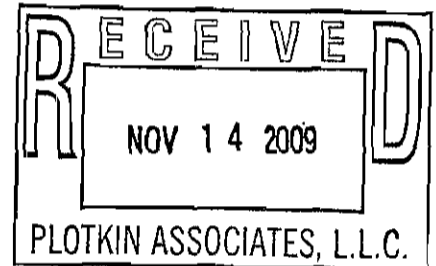
"Union."

Docket No. AR-2008-580
(Work Schedule/Overtime Avoidance)

ORIGINAL
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OPINION
AND
AWARD

Before
James W. Mastriani
Arbitrator



Appearances:

For the County:

Eric M. Bernstein, Esq.
Eric M. Bernstein & Associates, LLC

For the Union:

Myron Plotkin, Consultant
Plotkin Associates, L.L.C.

FOP Lodge No. 34 [the "Union" or "FOP"] filed a grievance with the County of Atlantic [the "County"] alleging that the County violated the collective bargaining agreement when it scheduled officers to work more than five (5) or more consecutive days without two (2) days off and without payment of overtime. The grievance remained unresolved and the Union submitted the dispute to binding arbitration in accordance with the parties' Agreement and the rules of Public Employment Relations Commission. Pursuant to those rules, I was designated to serve as arbitrator.

An arbitration hearing was held in Atlantic City, New Jersey on February 2, 2009. At the hearing, the County and the FOP argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from Former Warden Gary Merline, Warden Sean Thomas and Corrections Officer and FOP President George Hebert. Both parties filed post-hearing briefs, the last of which was received on or about March 21, 2009. The record was closed on that date.

ISSUES

The FOP proposed to frame the issues to be heard and decided as follows:

Did the County of Atlantic and/or its agent(s) violate the Agreement when in or about January of 2008 and continuing thereafter, it scheduled officers to work for

more than five (5) or more consecutive days without two (2) days off?

Did the County of Atlantic and/or its agent(s) violate the Agreement, when in or about January, 2008 and continuing thereafter, it scheduled officers to work for more than five (5) or more consecutive days and failed to compensate them at the overtime rate for those additional days worked in excess of five (5)?

If so, what shall be the remedy?

The County proposed to frame the issues to be heard and decided as follows:

Whether the County violated the Agreement by scheduling officers to work more than five consecutive days.

Whether the County violated the Agreement by failing to compensate officers at the overtime rate for those additional days.

The County also raises the issue of the timeliness of the grievance.

The parties are in substantial agreement as to the nature of the issues to be heard and decided. Both parties identify the issue as involving the scheduling of officers to work more than five (5) consecutive days as well as overtime compensation, if any, for consecutive days worked in excess of five (5). Accordingly, I determine that the issues to be heard and decided shall be framed as follows:

Did the County of Atlantic and/or its agent(s) violate the Agreement when in or about January of 2008 and

continuing thereafter, it scheduled officers to work for more than five (5) or more consecutive days?

Did the County violate the Agreement by failing to compensate officers at the overtime rate for those additional days?

RELEVANT CONTRACT PROVISIONS

PREAMBLE

THIS AGREEMENT, made between the COUNTY OF ATLANTIC, (hereinafter referred to as the "Employer") and the FRATERNAL ORDER OF POLICE, ATLANTIC LODGE #34 and the NEW JERSEY FRATERNAL ORDER OF POLICE LABOR COUNCIL (hereinafter referred to as the "Employee Organization"), represents the complete and final understanding on all negotiable items which were or could have been the subject of negotiations between the parties.

ARTICLE II – GRIEVANCE PROCEDURE

C. Procedure

1. Since it is important that grievances be processed as rapidly as possible, the number of days at each level shall be considered as a maximum. The time limits may however, be extended by mutual agreement. If no response is made by management by the end of the time allotment, it shall be construed to be a denial of the grievance and the FOP may proceed to the next level.

Level One – A grievance may be filed in writing with the Grievance Committee (FOP) within 10 calendar days of occurrence of the grievance. Failure to act within said 10 days shall be deemed to constitute an abandonment of the grievance. The Grievance Committee Chairperson may consult with the appropriate person and shall render a written decision within 10 calendar days after receipt of the grievance.

ARTICLE III – WORK SCHEDULE

- B. The regular starting time of work shifts for an individual Officer(s) shall not be changed without reasonable notice to the affected Officer(s) (notice being at least 30 days). Affected Officers whose shifts are changed may waive all or part of the 30 day notice. For purposes of this section, where an Officer utilizes or requests that the 30 day notice provision apply and does not waive such notice, it shall not be a basis upon which any disciplinary action may be taken against the Officer.
- C. The normal work schedule shall consist of 5 consecutive days of work and 2 consecutive days off, except in emergency situations.
- D. Officers will be given 30 days notice if the County is changing the start and end times of the 3 regular shifts (shifts #1, #2 and #3).

ARTICLE IV – OVERTIME

- A. There shall be overtime payment at one-and-one half time regular pay for all hours worked over 40 hours per week. For overtime purposes, time worked included all hours actually worked, New Year's Day, Thanksgiving and Christmas Day, granted bereavement and administrative leaves. Overtime shall be paid no later than the second pay period after the overtime work is performed.
- B. If overtime is necessary, the Employer shall first attempt to secure volunteers based upon seniority. If unable to secure sufficient volunteers, the Employer shall have the right to assign overtime based upon the mandatory overtime list (also known as the stick list). If an Officer on the stick list refuses overtime, they are subject to disciplinary action. It is understood and agreed that the top three people on the stick list cannot request to go home early. Any officer who volunteers for a minimum of four hours shall move on the stick list. It is understood that both voluntary and mandatory overtime shall be distributed as equitably as possible.
- F. Call Back

If an Employee is called back to work at a time other than his assigned work tour and is called back at a time not

contiguous to the start of his work tour, such Employee shall be guaranteed a minimum of 4 hours compensation at a rate of time and a half. Any Officer who is called in to work during his assigned shift which had been approved as vacation time, administrative leave or compensatory time shall be paid at the overtime rate and will not lose vacation, administrative or compensatory time for the time he was called in.

ARTICLE XIII – MANAGEMENT RIGHTS

- A. Management rights include the following:
 - 6. to develop and assign all work schedules pursuant to the terms of this Agreement.
- B. It is understood and agreed that the County, in its sound discretion, possesses the right, in accordance with applicable laws, to manage all operations, including the direction of the work force and the right to plan, direct and control the operation of all equipment and other property at the Justice Facility, except as limited by this Agreement.

BACKGROUND

The County has established that the workweek for unit employees has been Sunday through Saturday. Article III(C) states that "The normal work schedule shall consist of 5 consecutive days of work and 2 consecutive days off, except in emergency situations." On December 10, 11 and 12, 2007, the County issued notices to its Corrections Officers providing the dates that officers were required to attend annual State-mandated "in-service" courses and training. The State of New Jersey requires three (3) days of "in-service" training per year. The location of the training varies. On occasion it has been held in-house. Training on two (2) of the three (3) dates were scheduled to be held at Tony Canale's Training Center (Canale Center). When the Canale Center selected Mondays

through Wednesdays for this training, the County rearranged the schedules for some officers for a one to two week period to accommodate the training. As a result, some officers worked more than five days consecutively, although all officers received two (2) consecutive days off in each of the two workweeks. One example can be found in the work schedule of Officer John Brown. His schedule was changed to require that he work eight (8) consecutive days from March 12 through March 19, 2008. The eight (8) consecutive days spanned two workweeks and Brown received two (2) consecutive days off during each of the workweeks.

According to then Warden Gary Merline, work schedules were rearranged each year in the same manner to permit officers to attend the N.J. Wardens Conferences, the East Coast Gang Conference and the Basic Academy. Warden Merline also indicated that the scheduling restrictions proposed by the FOP in its proposed interpretation of the contract would make it "difficult," but not "impossible" for certain staff to attend. Warden Sean Thomas acknowledged that scheduling the training was not an emergency. In 2007, the County initially scheduled officers to work more than five (5) consecutive days, but after complaints from the FOP, modified the plan so that officers did not work more than five consecutive days in order to receive training in 2007.

On January 26, 2008, the FOP sent a letter complaining about the training schedule to the County. The County replied on January 29, 2008 indicating its

rationale for the scheduling. On January 31, 2008, the Union filed a formal grievance.

I first address the County's contention that the grievance is untimely because the initial notices advising of training dates was sent to officers on December 10 through 12, 2007 and a formal grievance was not filed until January 31, 2008. The County submits that the grievance was filed beyond the ten day period included in the Agreement for the filing of a grievance. Article II(C)1 of the Agreement provides, "A grievance may be filed in writing with the Grievance Committee (FOP) within 10 calendar days of occurrence of the grievance. Failure to act within said 10 days shall be deemed to constitute an abandonment of the grievance." Although the notices of training dates for 2008 were provided to officers between December 10 and 12, 2007, the work schedules that required certain officers to work more than five consecutive days in a workweek were not issued until at least January of 2008. Thus, I find that the "occurrence" of the event triggering a grievance was the issuance of work schedules providing that officers work more than five consecutive days in a week rather than the notice of training. The FOP then filed a complaint and after receiving a response promptly filed this grievance. Accordingly, I find the grievance is timely and dismiss the County's arbitrability claim.

DISCUSSION

I have thoroughly reviewed and carefully considered the arguments and evidence submitted into the record by the County and the FOP in support of their respective positions on the issues in dispute. The FOP has the burden to prove, by a preponderance of the evidence, that the County violated the Agreement when, under the facts of this case, it scheduled officers to work more than five (5) consecutive days and when it did not make overtime payments for those who did.

The FOP maintains that the manner in which the County scheduled in-service training for 2008 violated the parties' Agreement because it required officers to work more than five (5) consecutive days before they received two (2) days off. Additionally, the FOP maintains that the manner in which the County scheduled this training precluded the payment of overtime for the additional days because the officers received straight time pay for days worked in excess of five (5). The FOP asserts that the contract is clear and unambiguous on the issue of consecutive days of work. The FOP contends that the County violated the Agreement because it required officers to work more than five consecutive days in the absence of an emergency and then failed to pay the officers overtime for the days worked in excess of five (5). The FOP argues that the intent of the collective bargaining agreement to a reasonable person is that in any given seven (7) day period, an officer would be required to work only five (5) consecutive days, absent an emergency. According to the FOP, it follows that if an officer were required to work in excess of five (5) consecutive days, he would

be entitled to overtime pay if he worked in excess of forty (40) hours within a seven (7) day cycle. The FOP maintains that the County's unilateral establishment of a Sunday to Saturday pay period does not impact the contractually negotiated five (5) days on two (2) days off work schedule. The FOP contends that if affected officers had been called in on those days, without the County changing their work schedules to their days off, they would have paid the officers overtime pay. The FOP asserts that the County was aware of its contractual obligation and had attempted to make the same schedule modifications in 2007. Given the County's conduct, the FOP seeks a remedy beyond an admonishment to the County and asks that overtime pay be provided to those employees who worked in excess of five (5) consecutive days without two (2) days off.

The County contends that the grievance is without merit and should be dismissed. Initially, it asserts that no officer worked more than forty (40) hours during the official work week that it established or any Sunday through Saturday time period. The County maintains that officers are entitled to overtime only if they work in excess of forty (40) hours per week. This did not occur because the schedule it set that included training days did not result in any officer working more than forty (40) hours in any workweek. The County maintains that, if it were to follow the FOP's suggested interpretation and reasoning, some officers' workweeks would run Tuesday through Monday while some would run Thursday through Wednesday and so on. Noting that it retains the management

prerogative to set work schedules, the County emphasizes that there is no language in the Agreement to support the FOP's rationale regarding the workweek. The County asserts that the Agreement does not require that it set officers' schedules in a manner that would enhance their opportunity to receive overtime. Likewise, the County maintains that the Agreement does not prohibit it from setting the schedule in a manner which would not cause an officers' entitlement to overtime. The County emphasizes that it has not denied overtime to any officer who has worked in excess of forty hours during the Sunday through Saturday workweek. The County submits that Article IV is clear in providing that officers are entitled to overtime compensation only when they work more than forty hours per week.

The County contends that the FOP's claim that work schedules were changed to avoid paying overtime is without merit. The County emphasizes that officers are required to attend in-service training once per year, that two of the three days of this training were scheduled to take place at the Canale Center training site and that the County does not have control over when officers are scheduled to attend training at the Canale Center.

The County contends that it did not violate the Agreement by requiring officers to work more than five (5) consecutive days. Citing Article III of the parties' Agreement which addresses "work schedule" and Article XIII which covers "management rights," the County maintains that these provisions both

explicitly and implicitly recognize the County's right to change the work schedule as it deems necessary provided that officers receive at least thirty (30) days notice. In this instance, the County asserts that it provided all officers with more than thirty (30) days notice. Additionally, the County cites the provision that the "normal" work schedule shall be no more than five consecutive days and points out that the officers "normal" work schedules have not been changed. Rather, the County maintains that the officers work schedules have been altered for a one or two week period in order to permit them to attend State-mandated annual training. The County contends that it made schedules to maintain adequate coverage and staffing while providing officers with necessary training requirements. The County acknowledges that these temporary modifications in the "normal" work schedule did result in officers working more than five (5) consecutive days during this period, but maintains that it was within its prerogative to do so and that it violated no contract provision.

This dispute centers around whether the rearrangement of officers' normal work schedules to require more than five (5) consecutive days of work in order to accommodate required training was implemented in a manner that violated the Agreement. This arbitrator's authority is derived from the terms of the Agreement and those terms dictate the contract interpretation that is at issue. Article III(C) provides: "The normal work schedule shall consist of five (5) consecutive days of work and two (2) consecutive days off, except in emergency situations." The FOP maintains that Article III(C) requires that officers work five (5) consecutive

days followed by two (2) consecutive days off except in emergency situations and that the County violated this provision by rearranging the normal work schedules of certain officers for a one-to-two week period to accommodate required training. The affected officers worked more than five (5) days consecutively, though no officer worked more than five (5) consecutive days in any workweek and no officer was deprived of two (2) consecutive days off in any workweek. However, some officers worked as many as eight (8) consecutive days spanning two (2) workweeks.

Article III(C) requires that the normal work schedule consist of five (5) consecutive days of work and two (2) consecutive days off, "except in emergency situations." The emergency situation exception, the predicate for a change in the normal work schedule, is not present here. Although Article III(C) does not expressly provide that the five (5) consecutive days of work be followed by two (2) consecutive days off, it is not dispute that the normal work schedule for unit employees has typically followed this pattern during each workweek except under the change the County has made in this type of instance. The County's construction of the Agreement may not be explicitly barred by the language set forth in Article III(C) but it conflicts with the implied limitation present in that language that the normal work schedule not be changed "except in emergency situations." The term "normal" implies that the schedule will be followed week after week and, in fact, it historically has. The common meaning of the language, as supported by the parties' practice, is that in each week, the work schedule will

be comprised of five (5) consecutive days of work followed by two (2) consecutive days off. There is nothing in the language in Article III, Section (C) that can be read to require an officer to work eight (8) consecutive days without conflicting with that officer's "normal work schedule." If such were to be the case, an officer's "normal work schedule" could be unilaterally altered each workweek, so long as that officer receives two (2) consecutive days off. Such result would vary from the intent of the parties and lead to a result not intended and unreasonable. When the County rearranged the "normal work schedule" to accommodate the training schedule established by the Canale Center and thus scheduled some officers to work more than five (5) consecutive days in a row before receiving their two (2) consecutive days off, this deviation must be found to have violated Article III(C). To this extent, the grievance must be sustained. I am not persuaded, as the County has argued, that there has been a past practice to the contrary. The FOP has contested proposed changes such as this in the past and those changes have not occurred.

The FOP also seeks an interpretation of Article III(C) requiring that it be read together with the requirement in Article IV(A) to pay overtime "for all hours worked over 40 hours per week." This would require officers who work more than five (5) consecutive days in a row, or more than 40 hours within a seven (7) day cycle, receive overtime regardless of whether those additional days are in the same workweek. The FOP asserts that the intent of Article III(C) is to require overtime each time an officer works more than five (5) consecutive days in a row.

There is no evidence that would support this interpretation under the facts that are present here. I rely upon the above interpretation of Article III(C) which requires that the normal work schedule be comprised of five (5) consecutive workdays and two (2) consecutive days off. Payment of overtime is required when officers work more than forty (40) hours per week under Article IV(A) or when officers are called in under Article IV(F). Neither circumstance actually occurred in this instance despite the violation of Article III(C). Even if the FOP's claim were supported by the evidence, I conclude that a declaration of its rights to be a sufficient remedy to prevent re-occurrence in the future.

Based on the above, I conclude that the FOP has met its burden to prove that the County violated the Agreement when it rearranged the work schedules of certain officers to require more than five (5) consecutive days of work in order to accommodate required training. I deny the FOP's claim, under the circumstances of this case, that the County violated the Agreement when it did not pay overtime under Article IV(A). Nor do I find that the assignments violated Article IV(F) because the changed work schedules cannot be deemed to have fallen under the call back provision under Article IV(F). I direct no remedy other than the County cease and desist from altering the normal work schedule of unit employees in the manner it did here, in the absence of an emergency.

AWARD


The grievance is timely. The grievance is sustained to the extent that the County violated Article III(C) of the Agreement under the facts of this case when it rearranged the normal work schedules of certain officers to require more than five (5) consecutive days of work. The County shall cease and desist from altering the normal work schedule of unit employees in the manner it did here, in the absence of an emergency.

Dated: November 10, 2009
Sea Girt, New Jersey


James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 10th day of November, 2009, before me personally came and appeared James W. Mastriani 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 same.


GRETCHEN L. BOONE
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/30/2014