

IN THE MATTER OF ARBITRATION

BETWEEN THE

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Ohio Department of
Corrections and
Rehabilitation OCB

Employer

Grievance No: G87-0096
Grievant: Dennis Cowell, et. al.

Hearing Date: 8-30-90

Closing Date: 9-12-90

Award Date: 10-22-90

#508

Union Advocates: John Feldmeier & John Porter

Employer Advocates: Rachel L. Livengood & Bruce E. Brown

In addition to the Advocates named above and the Grievant, the following persons attended the hearing: Nicholas G. Menedis, ODRC representative (Witness), Eric Dahlberg, ODRC-ORC Warden (Witness), Robert Brown (Witness), Joe Clark (Witness), William Everson (Witness), and Jim Paani, OCSEA staff representative.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is

rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission.

The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. Contract
2. Grievance Trail
3. Position Description of R. Brown (This position description is representative of the position description of all of the grievants in this case)
4. List of employees that worked on November 10, 1986 and November 11, 1986
5. Employee notarized statements
6. Escape Frequency Memo
7. Incident Report
8. OAC 5120-9-23
9. Employee Standards of Conduct

Stipulated Fact

1. The grievance is the result of an escape which took place on November 10, 1986.

UNION'S ISSUE

Did the State of Ohio violate Section 13.15 of the Collective Bargaining Agreement by improperly paying the

employees of the Ohio State Reformatory for worked performed on November 10 and 11, 1986? If so, what shall the remedy be?

EMPLOYER'S ISSUE

Is a prisoner escape in the Department of Rehabilitation and Corrections an "emergency" as defined in Article 13.15 of the contract?

Contract Sections

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

§ 13.05 - Reassignments (in part)

B. An emergency reassignment may be required. An emergency is defined as an infrequent, unexpected, rare occurrence; not an everyday event. In no event shall an emergency reassignment of any employee exceed eight (8) work days. Emergency reassignments shall be on a seniority basis within the classification needed within the work area most able to provide the emergency coverage. Should no employee desire the reassignment, the least senior qualified employee shall be reassigned first.

§ 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be called for overtime outside of their regular hours shall have a residence telephone and shall provide their phone numbers to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designee has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designee shall have the right to require the least senior employee(s) who normally performs the work to perform said overtime. The overtime policy shall not apply

to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable time, if so requested.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute rest period between the shift and the overtime or as soon as operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the employee will be credited as if he/she had refused the overtime.

An employee who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime. Emergency Overtime.

In the event of an emergency as defined in Section 13.15 notwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency requirements, regardless of the overtime distribution.

§ 13.08 - Call-Back Pay

Employees who are called to report to work and do report outside their regularly-scheduled shift will be paid a minimum of four (4) hours at the straight rate of pay or actual hours worked at the overtime rate, whichever is greater. Call-back pay at straight time is excluded from the overtime calculation.

An employee called back to take care of an emergency shall not be required to work for the entire four (4) hour period by being assigned non-emergency work.

§ 13.15 - Emergency Leave

Employees directed not to report to work or sent home due to weather conditions or another emergency shall be granted leave with pay for their scheduled work hours during the duration of the emergency. Employees required to report to work or required to stay at work during such emergency shall receive pay at time and one-half (1 1/2) for hours worked during the emergency. Any overtime worked during an emergency shall be paid at double time.

An emergency shall be considered to exist when declared by the Employer, for the county, area or facility where an employee lives or works.

For the purpose of this Section, an emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee.

Essential employees shall be required to work during emergencies. Essential employees who do not report as required during an emergency must show cause that they were prevented from reporting because of the emergency.

FACTS

On November 10, 1986, three convicted felons scaled the walls of the Ohio State Reformatory and escaped. The escape was discovered between 9:00 and 10 p.m. The second shift at ORC worked routinely from 2 p.m. to 10 p.m. When the escape was discovered, the whole second shift was held over, including at least one Correctional Officer (CO) who had worked the 1st shift as overtime. The prison official apparently in charge of the efforts to capture the inmates was Lieutenant Frank. According to unrebutted testimony, Lieutenant Frank repeatedly referred to the situation as an "emergency" and framed his orders in terms of an "emergency situation." (See Joint Exhibit 5 which contains 20 affidavits which support this testimony.)

The second shift CO's who were held over were paid time and one-half. When "overtime" was assigned for the 3rd shift November 10th through November 11th, the whole second shift was used, and the over-time roster was not followed.

Correctional Officers have the following duties per their Position Description (Joint Exhibit 3).

%	Job Duties in order of Importance
60	Supervises inmates on 2nd shift at the Ohio State reformatory, during meals, showering, religious and recreational activities and sleeping areas, including dormitories and cell blocks.
20	Searches inmates and vehicles entering or leaving this institution for contraband or <u>escapes</u> .
15	Patrols building, inside yard, hallways, cell blocks, and checks locks, doors, cells and other facilities, <u>prevent escapes</u> , fires, and correct any safety hazards.
05	Escorts inmates to and from hospitals, medical offices funerals and other areas. Performs other related duties as required by shift supervisor.

Under the Standards of Employee Conduct, Employees are given notice of the following standards: (Joint Exhibit 10).

Responsiveness

- A. Inattention to duty in a correctional environment can result in escapes, assaults and other incidents. Therefore, employees are required to remain fully alert and attentive during duty hours.
- B. Because failure to respond to an emergency may jeopardize security of the institution as well as the lives of staff or inmates, it is mandatory that employees respond immediately

and effectively to all **emergency** situations. For purposes of this document, "institution" means any facility operated by the Ohio Department of Rehabilitation and Correction for the purpose of housing inmates, parolees, probationers, or furloughs.

- C. Employees are to obey the orders of their superiors at all times. In an **emergency situation, carrying out the orders of those in command is imperative** in order to ensure the security of the institution.

Since 1950, 1245 escapes have occurred, an average of 32 escapes per year. The number of escapes have consistently declined. Since 1970, 374 escapes have been made or about 19 per year. Since 1980, 61 escapes have happened or on average 7 per year.

Union's Position

The Employer, through its actions and words, led employees to believe an emergency existed on November 10, 1986.

Testimony revealed that Lieutenant Dave Franks, a management official, stated that the escape was an "emergency." In a similar case involving ODOT employees, Arbitrator Harry Graham held that where a management official makes references to an emergency "reasonable people could well expect that he carried the authority to commit the State." (Joint Exhibit 10 at 10).

The statements made by Lieutenant Franks constituted a declaration of an emergency by the Employer.

The Employer also declared an emergency by ignoring the overtime distribution procedures under the Contract. The Employer may disregard the overtime distribution policy, only after the Employer has determined that an emergency exists under Section 13.15. The Employer's disregard for the overtime lists in assigning overtime for escape detail was an admission by the Employer that an emergency existed as defined by Section 13.15.

The Employer's argument that the escape on November 10 and 11 was reasonably foreseeable and thus, not an emergency under Section 13.15, is without merit.

The testimony of Eugene Brundige regarding the interpretation of Section 13.15 in light of the Office of Collective Bargaining's negotiation notes is irrelevant to this case. First, these notes are not incorporated into the 1986-1989 Collective Bargaining Agreement and thus, the parties are not bound by their language. Second, escapes were not discussed in negotiations. Third, although the notes cite "Riot in prison is not emergency," an escape is a completely different situation. A riot in a prison is an internal matter requiring correctional officers to restore security to the institution - something provided for in CO's position description. An escape, on the other hand, is an external situation that is outside the scope of the employee's position description.

As revealed in the cross examination of Mr. Brundige, correction officers are required to follow the orders of all supervisors regardless of their rank. Rule 3C of the Standards of Employee Conduct for OSR (Joint Exhibit 9) imposes a stiff penalty for employees who fail to follow orders during an emergency situation. The severity of the penalty coupled with the Lieutenant's representation of the situation as an emergency is evidence that the employees had a reasonable good faith belief that an emergency did in fact exist.

Employer's Position

Escapes by prisoners confined to correctional facilities are not an unusual event. The state wishes to focus on the broader issue: "Is a prisoner escape in the Department of Rehabilitation and Corrections an emergency as defined in Article 13.15 of the Contract?". Such an event "in and of itself" does not constitute an emergency.

The Union has focused on the more narrow issue in an attempt to chip away at the language of the contract with these particular set of facts.

The Employer admits that if in fact it erred in the instant case, it erred only as to the requirements of Article 13.07.

The Union cites a recent award by Arbitrator Harry Graham in an attempt to support its contention, "that employees are entitled to rely upon the representations of their supervisors

when words of emergency are used to describe conditions within the work place". "Estoppel" as defined in Black's Law Dictionary means "that party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly . . . " Estoppel has two essential elements: conduct, (here the conduct of the Employer) and reliance to its detriment (here, the employees reliance). First, what was the conduct of the Employer:

1. It negotiated the sole and exclusive authority to declare a weather emergency and to pay its employees who were required to work, a premium rate pursuant to section 13.15 and Arbitrator Graham acknowledged this authority in the Daily decision (see attached);
2. It then delegated the declaration under 13.15 to the Department of Highway Safety and communicated this delegation to both the union and the employees.
3. The management representative alleged by the Union to have used the word "emergency" was a lieutenant. If this word was used, it was used to describe an operational situation which is clearly "foreseeable" to the place of employment.

The Employer did not waive its right merely because the term "emergency" was used by a first line supervisor, a lieutenant, after the State had set up an elaborate system for notice and declaration of emergencies. Mr. Eugene Brundige, Chief testified that he gave examples at negotiations of situations

that the State considered to be "reasonably foreseeable to the place of employment or position description of the employee". One of the examples given by Mr. Brundige was a prison riot. Secondly, the "detrimental reliance" by the employees was neither reasonable nor detrimental. No reasonable reliance could have been placed on the fact that a first line supervisor used the word "emergency" in response to an operational need. How did these employees suffer detriment? They received an overtime rate.

The theory of estoppel has no place in this arena. The legislature of the State of Ohio empowered the Office of Collective Bargaining to negotiate with the unions. If credence is to be given to the Union's argument, first line supervisors could negotiate or give something that was not negotiated in bargaining. One must distinguish between the facts in this case and those in the Daily decision. The Daily case centered around a snow storm in which a District Deputy Director announced on the internal radio communication system that an "emergency" existed. Mr. Brundige testified that the counterpart of an ODOT District Deputy Director in the Department of Rehabilitation and Corrections is a Warden. Both of these positions are appointing authority positions.

Arbitrator Graham stated that "the unusual time at which the event occurred plus the magnitude of the snowfall" put that situation "beyond the realm of reasonable contemplation". Over

1200 escapes at the Ohio State Reformatory have occurred in the last 39 years; the State to views those incidents as "reasonably foreseeable to the place of employment".

Discussion

The contract section to be interpreted is 1315. This section directs that employees who are "required to stay at work during such an emergency shall receive" double pay for overtime. "Such" an emergency apparently refers to the first sentence of 13.15 which speaks of "weather conditions or another emergency". Thus, an emergency is not limited to a weather condition situation. The second paragraph states that an emergency "shall be considered to exist when declared by the Employer, for the . . . facility [at which] an employee . . . works."

The third paragraph defines emergency for the purpose of this section", i.e. § 13.15 (or when an employee who works overtime gets double pay.) "An emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment."

Thus, the contract creates a term of art. While the word "emergency" is used in other Sections (See: 13.05), a special meaning is specified in this section. The job of the Arbitrator is to interpret the Contract. She may not add to the contract or subtract from the contract; however, where the words are subject to two plausible meanings, interpretation is the job of the arbitrator.

The first question is whether a prison escape is "normal or reasonably foreseeable to the place of employment and/or position description of the employee." The arbitrator finds that the employer has carried its burden on this issue. An escape is normal to prisons (prisons are places where by definition its occupants desire to escape) i.e., the place of employment, and escape is a situation reasonably foreseeable under the position description of a Correctional Officer. The position description specifically mentions "prevention of escapes" twice (Joint Exhibit 3). Moreover, the statistics show that escapes while less frequent than in previous years, are still common. Thus under the contract an escape is not an emergency under 1315.

In addition to "defining" emergency, the contract designates the Employer as the "declarer" of such emergencies. Logically, the Employer did not want every employee deciding what was "unforeseeable" or "normal". The section does not state who in the management change of command can declare an emergency. In this case, the Employer argues that a first line supervisor is not the appropriate person. The only person cited as appropriate was the warden.

The Union argues that the correctional officers reasonably relied on the statements of the first line supervisor. However, the Employer maintains that the first line supervisor had no actual authority to declare an emergency. The arbitrator finds that the Supervisor had apparent authority and that his actions were ratified by his superiors. Under the rules of conduct,

(Joint Exhibit 10) the employees are specifically enjoined with regard to "responsiveness" as to escapes. In fact, the employees are required to respond ("mandatory") and responding to command is labeled "imperative" in "emergency" situations. Lieutenant Frank said the escape was an "emergency" and overruled all protests. Everyone on the second shift was held over violating routine overtime rules. The lieutenant apparently repeated the word "emergency" innumerable times; it was no "slip of the tongue". The lieutenant was under the contract using the word incorrectly. The arbitrator finds the Employer estopped to deny this declaration. The Employer had the responsibility to train its Chain-of-Command to handle "escapes" which the employer itself claims are "normal and reasonably foreseeable. The Employer claims that estoppel has no place in contract arbitration. This conclusion is in error for two reasons: 1) Arbitrations are by common practice aimed at "fairness" (estoppel is at the basis of equity - the law of fairness). 2) Estoppel is a venerable contract doctrine used by arbitrators when justice demands.

Moreover, the Arbitrator finds that the lieutenant's superiors "ratified" his authority. Overtime rules can only be violated when a § 13.15 emergency exists. By failing to make the Employees whole for the contract violation, the Employer ratified the lieutenant's words.

Award

Grievance is granted. All relevant employees who were worked overtime are to be made whole by being paid double time for that overtime. The arbitrator retains jurisdiction until an agreement is reached as to persons affected and amounts due.

October 23, 1990

Date

Rhonda R. Rivera

Rhonda R. Rivera