ARBITRATION BENCH DECISION AND AWARD

Arbitrator: Douglas Ray

State of Ohio — Grievance No. 27-16-900912-439-01-03

Department DRC — Grievant Fran Reisinger

Union OCSEA/AFSCME — Date of Hearing 12/16/93

Issue(s): Denial of Overtime - Art. 13.07

Appearances:

For the Employer: (Advocate) Joe Shaver

For the Union: (Advocate) Butch Wylie

AWARD:

See attached

This time may be ~~taken~~ paid as compensatory time rather than cash. ~~Paid~~ This would be 48 hrs straight comp. time

DR RDy
BW

Columbus Ohio — Issued at

2/16/93 — Date

Arbitrator's Signature

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Columbus, Ohio **Issued at**

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State of Ohio

and

OCSEA/AFSCME Local 11

Gr. 27-16-(90-09-12)-0431-01-03

(F. Reisinger)

On March 5, 1993, the arbitrator issued a decision upholding the grievance and asking the parties ~~#~~ to attempt to reach agreement on a make whole remedy for lost overtime opportunities. The parties have been unable to reach agreement.

The arbitrator therefore issues the following remedy:

> The Employer is directed to make Grievant whole by paying her for 32 hours of lost overtime at the overtime rate she would have earned in August and September, 1990.

December 16, 1993

Douglas E Ray
Arbitrator

In the Matter of Arbitration Between:

THE STATE OF OHIO
DEPARTMENT OF REHABILITATION AND CORRECTION

and

OCSEA/AFSCME, LOCAL 11, AFL-CIO

Re: Grievances 27-16-(90-09-12)-0439-01-03
(F. Reisinger) and
27-16-(90-09-17)-0443-01-03
(P. Howell)
Marion Correctional Institution

Hearing held February 10, 1993 in Marion, Ohio

Decision issued March 5, 1993

APPEARANCES

State
Margaret S. Lee, Asst. Chief, Labor Relations
Dept. of Rehab. & Corrections

Dick Daubenmire, Second Chair, OCB

Dean Millhone, L.R.O., Marion Corr. Inst.

Union
Butch Wylie, Staff Representative, OCSEA

Bruce Wyngaard, Director of Arbitration, OCSEA

Fran Reisinger, Grievant

Pat Howell, Grievant

Tim Jones, Chapter Rep.

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievants are Correction Officers working at the Marion Correctional Institution (MCI). Grievant R. was hired in 1982 and Grievant H. in 1986. Both are members of a bargaining unit represented by OCSEA/AFSCME, Local 11, which is party to a collective bargaining agreement with the State of Ohio.

In addition to a collective bargaining agreement, the Union and Employer are parties to a November, 1987, agreement governing overtime assignments at MCI. Under the agreement and practices developed by the parties to implement this agreement, the first call for overtime is to be in seniority order and all subsequent overtime is to be made by equalization of hours. Under the procedure developed by the parties, a supervisor needing a person for overtime is to call first the primary roster made up of people on that shift who are on their days off. Then, the supervisor is to call the master roster, starting with the senior employee and then equalizing overtime on a daily basis. The master roster is comprised of employees from other shifts who have signed up for overtime opportunities. A separate roster is kept for each day and each shift. If a contacted employee works or refuses overtime, he or she is charged with 8 hours. If the supervisor is unable to reach the employee called, no charge is made. Each day, officers are to call first those on the appropriate roster with the least hours charged in an effort to equalize. They are to

call all those with 0 hours charged, then all 8's, then all 16's, etc., until they get enough employees to fill the position or positions needed on the particular day and shift.

Although the written agreement states, in effect, that the rosters are to be purged every three months, the parties have agreed to purge rosters every two months. When the rosters are purged, each employee is taken back to zero on each overtime roster. Overtime totals charged are not carried over to the next roster after purging. When persons are added and removed from rosters in mid-period, they carry with them the overtime they are charged with.

Both grievants were assigned to work 4th shift, which runs from 8 am to 4 pm. Before 8/12/90, the 4th shift assignment overlapped with 2d shift which ran from 2 pm to 10 pm. Consequently, both grievants were ineligible to be placed on the 2d shift Master Roster for overtime opportunities except on their regularly scheduled days off when there was no conflict.

On 8/12/90, shift times at MCI were changed to start 2 hours later. Thus, 2d shift changed to a 4 pm to midnight schedule. After the change, there was no longer an overlap between 4th shift and 2d shift and grievants were eligible to be placed on the 2d shift Master Roster for overtime. Both had filled out a canvassing form on 7/23/90 asking to be on the 2d shift overtime list. They were not immediately placed on the overtime schedule for second shift. Although

Grievant R. was on the 2d shift Master Roster for Saturday and Sunday beginning 8-13-90 (her regularly scheduled days off) she was not placed on the roster for Monday - Friday until 9/6/90. Grievant H. was placed on the 2d shift Master roster from 9/12/90 forward.

Grievant R. filed a grievance dated 9/11/90 requesting overtime pay for the 96 hours overtime she claimed she missed during the period she was left off the 2d shift roster. Grievant H. filed a grievance dated 9/14/90 requesting overtime pay for the overtime she missed as a result of being left off the 2d shift roster. On 9/21/90, management directed supervisors that "these 2 officers should be called first every time for 1 month starting 9/21/90" and that any time they were called other than the normal rotation for overtime, it was to be documented as "to equalize" on the overtime schedules.

A list kept by managment as well as phone records indicate that Grievants were called a number of times by supervisors between 9/21/90 and 10/22/90. The records did not indicate on what shift opportunities were available nor for what days grievants would have been asked to work. Records kept by some supervisors indicated only that grievants had been called and not whether they had been reached and, if so, whether they accepted or turned down opportunities. Some of the records that were more specific indicated that the supervisors did not reach grievants on the vast majority of their calls.

The matter was not resolved through operation of the grievance resolution process and an arbitration hearing was held before the undersigned arbitrator on February 10, 1993 in Marion, Ohio. The parties stipulated that the matter was properly before the arbitrator. They also stipulated that, although the two grievances involve the same time frame and issue, each case is to stand or fall on its own merits.

II. ISSUE

The parties were unable to agree as to the exact wording of the issue. After reviewing the submitted issues of the parties, the arbitrator determines the issue to be: Did the Employer violate Section 13.07 and the local agreement with regard to the overtime opportunities Grievants missed when they were temporarily left off the second shift master roster? If so, what shall the remedy be?

III. CONTRACT PROVISIONS

The parties referred to a number of sections of the collective bargaining agreement. Among them are:

Section 13.07, Overtime, which provides in part that "insofar as practicable, overtime shall be equitably distributed 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."

Section 25.03, Arbitration Procedure, which states in part that "the arbitrator shall have no power to add to,

subtract from or modify any of the terms of this Agreement nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement."

IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments at hearing. They are only briefly summarized below.

A. The Union

The Union argues that the State has violated Section 13.07 and owes Grievant R. 96 hours overtime pay and Grievant H. 184 hours overtime pay. The Union argues that the local agreement spells out how Section 13.07 is to be applied and the State did not comply with its provisions. Once the purge period is over, all employees start at 0 hours again and assignments are to go in seniority order. The State's alleged makeup opportunities are claimed to be inadequate in a number of ways and for a number of reasons. First, the Union argues that management pulled the 30 days "out of the blue" and that there way no way to predict how much overtime would be available and what relationship it might have to grievants' losses. Second, the Union argues that the new period is new overtime and that to try to catch up grievants during a new period would cause them to lose their entitlement to the new overtime available in that period. The Union further argues that to try to provide grievants extra overtime opportunities within the next purge period would interfere with the overtime opportunities of

others on the list, noting in particular that persons would have been added to the list who could not be argued to have benefitted from the opportunities caused by leaving grievants off the list in the prior period. Further, the Union notes that an employee is forbidden from working more than 16 hours without an 8 hour break and asserts that attempting to make up substantial overtime in a short period could impose substantial personal hardship.

The Union also notes that management never explained to grievants exactly how it intended to remedy their situation and had no valid records to show how much overtime grievants were entitled to nor how much they were allegedly called for. The Union notes the irregular nature of management records.

The Union argues that only back pay will put grievants in as good a position as they would have been in. The Unions asserts that the arbitrator does have power to award overtime pay for lost overtime opportunities and provided a number of published arbitration decisions to support its argument that overtime pay rather than makeup overtime is the common remedy awarded by arbitrators.

The Union asks that the arbitrator uphold both grievances, award the overtime pay requested and instruct the Employer that it must follow the overtime procedures spelled out in the agreement.

B. The State

The State stresses that the issue here is merely whether grievants were given the opportunity to equalize their lost overtime opportunities. The State argues that they were and asks that the grievances be denied.

The State argues that management acted in good faith and acted within days to place grievants on the roster and to give them an opportunity to equalize. The State argues that management phone logs and call lists demonstrate that supervisors tried to contact grievants for 30 days, during which period a substantial number of calls were made, virtually on a daily basis. This, in management's view, was in accordance with what it argues is an established past practice of equalization as a remedy for errors in assigning overtime. The State argues that the Union was clearly on notice of past equalization practices because of Union involvement in purging the records every two months. The State notes that Union testimony that overtime grievances had been settled for money or for compensatory time were not backed up with any specifics as to cases, names or dates and did not establish any past practice of paying overtime pay.

The State points to Article 13 of the contract and notes that it requires only equitable distribution on a rotation basis by seniority. It does not contain a penalty clause and does not provide for overtime pay without work. The State notes that, under Article 25, an arbitrator's power is limited and asserts that to provide the overtime

pay requested by the Union would violate the contract's prohibition against adding to the contract. The State points to arbitration cases awarding makeup overtime as the appropriate remedy and argues that the Union's cases involved other contracts, not this contract which does not provide a money penalty. The Union asks that the grievances be denied in their entirety.

V. DECISION AND ANALYSIS

In reaching decisions in each of these matters, the arbitrator has first reviewed the collective bargaining agreement, the testimony of witnesses, the exhibits presented at hearing and the arguments of the parties.

A. The Merits

At the outset, the arbitrator notes that there is no evidence that these cases involve deliberate overtime violations. It was apparently by oversight that grievants were left off the rosters when shift times were changed. The arbitrator also notes that management did attempt to call each Grievant numerous times between 9/21 and 10/22 in an effort to make up for the violation. Records kept indicate 34 calls to Grievant R.'s number and 37 calls to Grievant H.'s number. The arbitrator concludes that management did not act in bad faith.

Despite these findings, however, the arbitrator finds that the overtime rights of each grievant were breached and that the telephone efforts of management did not make them

whole for their missed overtime opportunities. The reasons for this ruling follow.

1. With regard to whether the attempts made to call grievants for the 30 days beginning 9/21 cured the problem, records are far too sketchy and do not establish that opportunities were made up. The handwritten notations indicating that calls were made indicate the date of the call but do not indicate for what shift or date the opportunity was on. One of the lists does not even indicate whether the caller got a response.

No effort seems to have been made in advance to determine how many hours each grievant actually lost nor to accomodate that particular number of hours.

The arbitrator believes that providing overtime opportunities within the same purging period and for the same day and shift rosters as those on which overtime is missed can be consistent with the local overtime agreement so long as not done in a way to impose hardship. The process, with its practice of doing all 8's before 16's, etc., seems designed to be self correcting within the purge period. Here, however, there is no evidence that extra opportunities within the purge period did make up grievants' lost opportunities. Exhibit M-1 seems to be a copy of an overtime roster for the last half of September, 1990, on which both grievants' names appeared. Apparently the original is missing as are the original records for the beginning of the 2 month purge period. Although it is

possible to tell which days of the week each page of Exhibit M-1 deals with, the parties disagreed as to which shift it might have covered and whether some names may have been missing. Nonetheless, it is the best record that management could produce in trying to show that grievants received overtime to compensate for the time each was left off the 2d shift master roster.

Although some of the boxes on Exhibit M-1 are marked "to equalize" indicating that a grievant was called for overtime out of the rotation order in an effort to equalize their losses, a close examination of the exhibit reveals that neither grievant seems to have received overtime they would not have otherwise been called for in the last part of September, 1990. The 9/23 roster, for example, lists both as being called on 9/21 for 9/23 overtime. The roster also shows, however, that persons below grievants on the seniority roster and with similar hours of overtime credited were also called for 9/23 overtime. Their boxes did not say "to equalize." While it is true that grievants were called 9/21 and the others appear to have been called 9/23, it appears that grievants would ultimately have received the same overtime opportunity without a special equalization effort. "To equalize" notations for other dates are similar. It appears that even if Exhibit M-1 is a valid second shift roster, it does not establish that grievants received extra overtime during the purge period to compensate for what they lost in the first part of the two

month purge period. Because the record is a copy and not an original, it does not contain the colored ink notations indicating whether an "8" charged was worked or merely offered and declined. Even on days when one of the grievants was charged 8 hours, however, such as September 24 when Grievant R. was charged 8 hours with a "to equalize" notation, it appears that others with similar seniority and similar if not greater levels of overtime were also offered overtime. Thus, the "to equalize" notations on these records do not seem to truly reflect equalization by providing additional opportunities.

2. As to the calls between 10/1 and 10/22, these arose after the purge period was over. There is no proof that grievants worked or were offered hours that they would not otherwise have received. Even if there were, there would be two problems.

3. A problem arises from the 9/21 directive that grievants were to be called first for 1 month starting 9/21/90 and management's second and third step responses that this had cured the problem. The grievances dated 9/11 and 9/14 requested overtime pay and not makeup overtime. For management to attempt to impose settlement on its own terms by giving grievants extra overtime to wipe the slate clean seems somewhat inconsistent with allowing the grievance resolution procedure to determine whether pay or extra overtime was appropriate under the contract. Because there is no proof that grievants actually received

additional overtime, the arbitrator does not have to resolve this matter.

4. A further problem has to do with the appropriateness of makeup overtime beyond the purge period as a remedy for overtime missed in an earlier purge period. As the Union argues, the most common remedy for missed overtime is overtime pay rather than makeup overtime hours. See, e.g., Williamette Industries, 91-2 ARB para. 8443 (Cloke 1990), Virginia Electric, 91-2 ARB para 8507 (Crane 1991) Pay is particularly appropriate here for two reasons. First, makeup overtime in a future overtime purge period would interfere with the seniority and rotation rights to overtime of others on the roster, some of whom were not even on the list during the earlier purge period. It would diminish the opportunities available to them.

Second, the makeup remedy is ineffective in a period when much overtime is being offered because grievants would have been able to work overtime in any event and scheduling makeup overtime for periods when grievants would have been entitled to overtime anyway does not compensate grievants for their losses.

5. Both parties argue that past practice supports their positions. Grievant R. testified that she had been paid before and that others had received pay or compensatory time for missed overtime. State witnesses testified that it was common to provide makeup overtime and introduced as

exhibits copies of slips directing supervisors to give particular people first call for overtime.

The arbitrator finds that neither party has prevailed in showing a binding past practice. The Union's argument lacks specifics such as number of occurrences, dates, persons involved and circumstances.

Similarly, the arbitrator finds that the management testimony does not establish past practice. The handwritten slips directing that overtime be offered were too few to establish a past practice, some were from 1982 and 1983 and others did not bear a year or date. Further, even had a practice been established, the instant case would fall outside it. There is a difference between calling an employee for 8 hours missed or even 16 hours missed and the situation here where grievants missed a number of opportunities over a period of time.

B. The Remedy

As noted above, the arbitrator finds that grievants improperly were deprived of overtime opportunities and that the 30 day "call first" policy did not give them the opportunity to equalize the missed overtime opportunities.

On the issue of remedy, the arbitrator believes that backpay for overtime that grievants would have worked had they been on the list is appropriate. The State has argued that such a remedy is beyond the arbitrator's power and constitutes "adding to" the contract in violation of Article 25. The arbitrator believes, however, that the contract

does give the arbitrator the authority to award overtime pay. While the contract does not explicitly state that the arbitrator has power to award overtime pay, neither does it explicitly require makeup overtime nor give the arbitrator the power to award makeup overtime, the remedy favored by the State. With either, the power to create a make whole remedy is implicit in the arbitration clause.

The remedial authority found, however, is only to make whole, not to punish the Employer or provide a windfall to a grievant that she would not necessarily have earned. A back pay award should be limited to the hours that a person would actually have worked. The arbitrator does not believe that it has been yet established that grievants would have worked all of the hours claimed.

Grievant H. stated at hearing, for example, that if called in advance she would work the overtime but if she were called for overtime the same day she could not always work because of the need to arrange child care. Thus, it will be important to determine which of the hours claimed by Grievant H. would have been worked.

Grievant R. did testify that she was available for the 96 hours claimed. Her testimony was credible and she was careful in going through the records to note the times she did not claim because she was unavailable. Even in her case, however, the records show that management was not always able to contact her to offer available overtime. If

this were true in August and September, 1990, it could have resulted in her working less than the 96 hours claimed.

From the records made available at hearing, the arbitrator cannot estimate the number of hours each grievant would have worked without further guidance. The copies of records admitted do not, for example, indicate by color of ink whether a particular 8 hour charge was for hours worked or hours turned down. The issue was not fully joined at hearing because the State held fast to the position that overtime pay was not appropriate. Only now is it relevant.

Because the arbitrator lacks sufficient information to determine what number of hours each grievant actually would have worked, the arbitrator remands this issue to the parties. The parties are asked to try to agree on a figure for each grievant, taking into account for each overtime opportunity:

1. the likelihood that the grievant would have been reached;
2. the likelihood that the grievant would have accepted the opportunity given the lead time allowed and the day and time of the work scheduled; and
3. whether working the day and shift offered would have put grievant in violation of the rule that a person may not work more than 16 hours straight without an 8 hour break.

VI. AWARD

The grievance of each grievant is sustained. The Employer is directed to make each employee whole by paying each employee for the overtime she would have worked but was

not offered because she was temporarily left off the second shift master roster after the 8/12/90 shift change. The arbitrator will retain jurisdiction for 60 days following issuance of this award in the event that the parties are unable to agree as to the amounts of back pay due.

March 5, 1993

Sylvania, Ohio, County of Lucas

Douglas E. Ray

Douglas E. Ray, Arbitrator