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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION,	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 15-02-060518-123-01-09
and	*	
	*	LaNese Powell, Grievant
OHIO DEPARTMENT OF	*	Overtime
PUBLIC SAFETY	*	

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL/CIO:

William A. Anthony, Jr., Staff Representative
OCSEA/Local 11 AFSCME, AFL/CIO
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For the Ohio Department of Public Safety:

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Ohio State Safety Patrol
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Matthew Banal, Labor Counsel
Ohio Office of Collective Bargaining
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Columbus, Ohio 43215

I. HEARING

A hearing on this matter was held at 9:15 a.m. on July 27, 2007, at the offices of the Ohio Civil Service Employees Association in Columbus, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment pursuant to the procedures of their collective bargaining agreement. The parties presented two issues which are set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL/CIO ("Union") were Linda Holmes and the Grievant, LaNese Powell. Testifying for the Ohio Department of Public Safety ("Employer") was Leora Knight. A number of documents were entered into evidence: Joint Exhibits 1-2, Union Exhibits 1-5 and 7-9 and Employer Exhibits 1-6. The oral hearing was concluded at 1:00 p.m. whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

The Ohio Civil Service Employees Association and the Ohio Department of Public Safety are parties to a collective bargaining agreement governing wages, hours and other terms of employment of certain nonexempt employees for the period of 2003-2005. Among these employees is the Grievant, LaNese Powell, who is a Certification/Licensure Examiner 2 and who has ten years experience as a Union steward or other official. On May 6, 2006, she filed a grievance in her own behalf claiming that she had been refused overtime "back in August 2005" and that other employees were trained to do her job and were able to get overtime performing her work. This grievance was denied at Step 1 on the basis that it was not timely filed. At Steps 2 and 3 both the timeliness of the grievance and its merits were addressed without resolution. The case thereafter came for arbitration as aforesaid on a stipulated issue of: *Did the Employer violate the labor agreement by not offering Grievant overtime from October 15, 2005 through April 29, 2006? If so, what shall be the remedy?*

In August of 2005, the Grievant's work unit, Private Investigator/Security Guard Licensing and Registration Unit (PI/SG) was assigned to the Office of Homeland Security in the Department of Commerce but was soon to be transferred to the Revenue Management Unit in the Department of Public Safety. During that autumn the Real/Pro computer system had to be replaced and a legislated registration renewal process needed to be implemented. In addition, there may still have existed a normal seasonal backlog created by summer registrations. Combined, these created a sizeable backlog of work. Thus, in September, Leora Knight who was Assistant Chief in Revenue Management asked three employees in her section to go over to PI/SG and get the system fully functional. With the registration renewals looming October 15, she asked the rest of her section to come in on Saturdays. On or about October 13 the Grievant, whose unit still reported to Homeland Security, sent email to Ms. Knight offering to work overtime for compensatory time every other Saturday. Ms. Knight referred her back to the Grievant's own supervisor, Barbara Schultz, and then explained to Ms. Schultz that Homeland Security had to approve it since "funding for PI/SG is outside our scope." (Employer Ex. 4) The project thereafter continued with Revenue Management staff performing all the overtime on the project (even after PI/SG was officially transferred to it on November 16, 2005) through April 26, 2006. Management records show there were 2,715.36 hours of overtime and compensatory time accrual on the PI/SG project from the pay period ending October 15, 2005 through April 29, 2006 (Union Ex. 3), none of which were worked by any employee regularly assigned to PI/SG. Of this, 815.58 hours were worked on Saturdays. No one but the Grievant filed a grievance and that was not until May 4, 2006.

III. PERTINENT PROVISIONS OF THE CONTRACT

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

13.07 - Overtime

Insofar as practicable, overtime shall be equitably distributed on a rotating basis by seniority among those who normally perform the work. (Joint Ex. 2)

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

25.02 - Grievance Steps

Step One (1) - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

IV. ARGUMENTS OF THE PARTIES

Argument the Union

The Union argues that the evidence establishes that the Employer offered work normally performed by the Grievant and others in her unit to employees in other classifications. It did not equitably distribute this overtime as required by the Collective Bargaining Agreement, it never canvassed employees for their interest in working overtime, it had no overtime roster, it made no attempt to offer this overtime to these employees and it did not consider seniority in distributing this work. Not until the grievance was filed in May of 2006 did it manage overtime correctly.

The Union submits that the Employer's procedural argument is without merit. Article 25.02 allows filing within ten working days of the event. The "event" in this case started in September and ended in April. Once the Grievant became aware that the event as over, she filed within ten days.

The Union asks that the grievance be granted, the Grievant be awarded overtime from October 15, 2005 through April 29, 2006, and that she be made whole.

Argument of the Employer

The Employer argues that the grievance is untimely. The Grievant was aware of the project as early as September and also knew overtime rosters were not being used. She was a steward for six years and processed two other overtime grievances during the pendency of the

project. In October her request to work every other Saturday did not bear fruit and yet she continued to sit on her rights until the project was completed. If the Arbitrator nevertheless finds for the Union, the Grievant is entitled only to overtime worked in the ten working days preceding her grievance. This amounts to the six hours put in by each of those who worked the Saturday preceding the grievance, not the amount they worked while the Grievant sat on her rights.

Even so, the Employer continues, the Grievant is not entitled to any amount because the work that was performed (testing programming changes, etc.) was not what she normally did. As for the use of a roster, although the Employer did not have one at the time, it did canvass Revenue Management employees and equalize overtime amongst them. The Employer concludes that the grievance should be denied in its entirety.

V. OPINION OF THE ARBITRATOR

The threshold matter is whether the grievance should be dismissed on the grounds of being filed too late. Inasmuch as the overtime on the project was worked on a near weekly basis for six and one-half months, this is a continuing-violation case. Each and every day this overtime was worked was an "event" which the Grievant might have grieved within ten days of her knowledge. That is, the occurrence or grievable "event" was not the completed project (as the Grievant thought), but each separate day someone other than she worked the overtime. Unquestionably the Grievant was aware at least by some time in October when her offer to work overtime did not bear fruit. She even admitted that she knew then that she had a grievance but decided not to file until the project was over. This was based on her belief that the "event" was the entire project instead of a day of unoffered overtime or the rejection of her October offer. Despite her knowledge, she sat on her rights for months, deliberately waiting for the project to end. This decision not only runs counter to Section 25.02's mandate that grievances be presented within ten working days of the employee's awareness but also the parties' stated goal of resolving grievances "at the earliest possible time" (Section 25.01, F). Moreover, it had the practical effect of delaying implementation of an overtime roster. However, there is no evidence

of prejudice to the Employer nor that the Grievant intended to waive her right to grieve while the project was active. She was merely mistaken in her belief about what the grievable event was. Her grievance is therefore not dismissed on procedural grounds and she will receive an answer on its merits, but the remedy, if any, must be limited by what occurred during the ten days preceding her grievance. That is, only work performed by others during the ten days preceding the grievance which was work normally performed by Grievant is compensatable.

Turning to the merits, then, the burden of showing that the work performed by others was normally performed by the Grievant falls to the Union. As the Arbitrator understands from the Grievant's own testimony, her normal work was mainly (approximately 50%) processing rap sheets. She also did data entry (on registrations, terminations, send backs, and firearms applications, together somewhat less than 50%), and proctored exams (occasionally). The project work of developing, testing and implementing changes to the processes and programs was clearly outside this domain. Certainly those performing this work had to understand the system as it existed at the time and they learned from those who actually used it, but this is a far cry from doing the Grievant's work. The Grievant even testified that she was able to keep up with her own work and asked for more about one day a week. She also thought the normal summer backlog was gone by October. The backlog after that which the Revenue Management employees were doing was that created by the new legislation, i.e., registration renewals. This necessitated reconstruction of the original registration packets and development of a new process, both outside the Grievant's normal work. Unquestionably the Revenue Management employees were also processing these renewals because of the backlog, but this could not have been the Grievant's "normal work" because registration renewals were new. The Grievant's job description does include processing renewals, but there is no evidence that any of this beyond researching rap sheets, printing and mailing ID cards and declined registration letters was ever a part of her normal work. There was no testimony specifically directed to what they were doing during the ten days prior to the grievance, but since it was the last week of the project, it was

probably processing the last of this registration renewal backlog and perhaps some end-of-project clean-up work. The Arbitrator cannot be sure because there was no testimony specifically directed to what was being done from April 20 through April 29 (the period covered by the grievance). Since the Union has the burden to show by a preponderance of evidence that the Grievant "normally perform[ed] the work" and the Arbitrator can only make an educated guess, the grievance must be denied.

VI. AWARD

The Employer did not violate the labor agreement by not offering the Grievant overtime from October 15, 2005 through April 29, 2006. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 5, 2007

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