

In the Matter of the Arbitration
between
Teamsters Local Union No. 117
and
Washington Department of Corrections

Overtime-exempt Employee Grievance

FMCS Case No. 06-02838-7

Arbitrator's Opinion and Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

January 22, 2007

Grievance and statement of the issues

Introduction. During the term of the parties' 2005-07 collective bargaining agreement, the State did not provide overtime-exempt employees with compensation in addition to their regular salary. The Union grieved, alleging that the State had provided additional compensation to those employees before July 1, 2005 and had unilaterally adjusted the compensation of those employees as of that date. I conclude that the State told the Union in bargaining that the State's proposal would result in a change to the overtime-exempt employees' compensation and that the parties agreed to the proposal. I deny the grievance.

The parties presented their cases in a hearing on October 20, 2006, in Olympia, Washington. The State was represented by Kari Hanson, Assistant Attorney General, PO Box 40145, Olympia WA 98104-0145. The Union was represented by Tracey Thompsen, Attorney, 14675 Interurban Ave., S, Suite 307, Tukwila WA 98168.

The advocates fully and fairly represented their respective parties. The hearing was orderly; the parties had a full opportunity to present evidence and examine and cross-examine witnesses. The hearing closed on December 24, 2006, upon receipt of the parties' post-hearing briefs.

The State did not submit any argument that the grievance is not substantively or procedurally arbitrable. The parties authorized me to retain jurisdiction over the grievance for 90 days following

issuance of my opinion and award, for the purpose of hearing evidence and resolving any dispute regarding any remedy ordered.

Statement of the issues. The parties agreed to the following statement of the issues, subject to my modification of it after reviewing the record and the arguments of the parties: Did the State change the compensation of exempt employees, effective July 1, 2005, in violation of Article 16.5 of the 2005-07 collective bargaining agreement? After studying the record, I note that several underlying issues are:

1. During the negotiation of the 2005-07 contract, did the State provide to the Union mistaken information regarding the pre-July 1, 2005 compensation of overtime-exempt employees? If so, did the State later fail to provide the correct information to the Union?
2. At the conclusion of negotiations, did the State and the Union have a *mutual* mistaken understanding of the pre-July 1, 2005 compensation for overtime-exempt employees or did only the *Union* have a mistaken understanding of that practice? If only the Union had a mistaken understanding, did or should the State have known of that mistake?
3. Should Article 16.5 be rescinded and reformed?

Because the Union asserts that the State has violated the parties' contract, the Union has the burden of producing evidence that is sufficient to prove its claim.

Witnesses and exhibits. All witnesses testified under oath. The parties offered two joint exhibits. The Union offered eight exhibits and testimony from three witnesses (Spencer Thal, Daniel Hahn, Timothy Panek). The State offered eight exhibits and testimony from two witness (Shirley Morstad, Diane Leigh). All of the exhibits were received.

I have thoroughly reviewed all of the evidence that was received, relevant, and material, and I have thoroughly considered the parties' arguments and post-hearing briefs.

Facts

The parties. The State operates corrections institutions. The Union is the exclusive representative of two bargaining units (one supervisory and one non-supervisory) that include about 5500 personnel employed by the State. About 85 bargaining unit employees are employed in overtime-exempt classifications and potentially affected by this arbitration.

2004-05 collective bargaining agreement. Article 16 of the 2004-05 contract was entitled “Hours of Work.” It referred to three categories of employees: scheduled work period classifications, non-scheduled work period classifications, and exception work period classifications. Article 16.8 stated that the hours of work for exception work period classification personnel were generally governed by the provisions of the State Department of Personnel, Compensation Plan Appendix, Merit System Rules Chapter 15.

Before July 1, 2005, Merit System Rule/Washington Administrative Code 356-15-020(2) addressed scheduled, non-scheduled, and exception work period designations. Under section (2)(d), “Exceptions” employees were defined as: “Full-time positions which are exempt from the overtime provisions of the Fair Labor Standards Act” WAC 356-15-030(5) stated: “Exceptions work period employees are not *required* to be compensated beyond their regular monthly rate of pay However, they *may* be compensated or granted exchange time for any of those conditions *if their appointing authority deems it appropriate.*” (Emphasis added.) In addition, that section addressed overtime and compensation time off in lieu of cash. That rule became ineffective as of July 1, 2005.

Before July 1, 2005, and in compliance with the above rules, some “exception work period classification” bargaining unit employees at different DOC institutions received—in addition to regular salary—compensation in the form of standby pay, exchange time, some form of overtime pay for hours worked in excess of 40 hours per week, and standby pay. For example, the State compensated Twin Rivers Unit Nurse Practitioner Timothy Panek about \$15,000 in addition to his regular salary in 2004 (195 hours of overtime and 2117 hours at \$2.50 per hour as standby pay for being on call) and from January through June 2005 (84 hours of overtime and 1380 hours of standby pay). (Tr 58-59.)

July 1, 2005 statutory change. Beginning July 1, 2005, the 2004 Personnel System Reform Act applied to the parties. As of that date, the legislature granted the parties the authority to enter contracts over compensation issues.

2005-07 negotiations. In May 2004, the parties began negotiations for the 2005-07 collective bargaining agreement. One Union goal was to preserve employees’ existing rights and compensation and achieve additional compensation. (Thal Tr 19.) One State goal was to structure pay for overtime-*exempt* and overtime-*eligible* employees in accordance with the Fair Labor Standards Act. (Leigh Tr 80.)

At the same time, negotiations were occurring over the settlement of a lawsuit filed by bargaining unit employees that was referred to as the *Stamey* litigation. That dispute was settled in July 2004; the settlement modified the shift schedules of certain employees.

The State's chief spokesperson in the contract bargaining was Diane Leigh. The Union's chief spokesperson was Spencer Thal, closely assisted by Union Secretary Treasurer John Williams. Thal believes that he and Leigh had a very candid, cooperative, open relationship in bargaining in which she was "not hiding anything." (Tr 24-25, 30.) Leigh agrees with Thal. (Leigh Tr 100.)

For example, during the parties' early negotiations over hours of work and compensation, the State proposed to eliminate the 2004-05 contract distinctions between scheduled, non-scheduled, and exception classifications. In response, the Union also proposed eliminating those terms and addressing work week and overtime issues in other language. In a sidebar discussion, Leigh told Thal that she thought the Union was making a mistake and that the classification titles did have significance, particularly regarding how employees were compensated for overtime. Thal recognized the significance of the issue, and the Union revised its proposal. (Thal Tr 29-30.)

The parties offered conflicting evidence—discussed below—about whether the State told the Union in negotiations that, before July 1, 2005, some overtime-exempt employees had received compensation in addition to their regular salary.

— **July 15, 2004.** In a July 15, 2004 negotiation session, the parties discussed a State proposal regarding employee overtime.

Union testimony. Thal testified that on July 15 Leigh initially said she did not think anyone in the bargaining unit would be affected by the State's proposal (which the State was presenting to all of the unions that represented State employee bargaining units) but later said she would indicate which of the Union's bargaining unit classifications would be affected. When she did provide that information, she reiterated that the State's proposal would have no impact on the employees in the classifications because they were *not* receiving compensation in excess of their regular salary. (Thal Tr 31-32.) Union Business Representative Hahn corroborated Thal's testimony about those statements made by Leigh on July 15. (Hahn Tr 54.)

The Union did not independently investigate the compensation of personnel in the overtime-exempt classifications. The Union took Leigh's statements at face value and did not have anyone on the bargaining team who was in one of the overtime-exempt classifications.

Thal does not believe that Leigh intentionally misled the Union about the compensation received by overtime-exempt employees, because that would have been inconsistent with his experience with her. Instead, he thinks that she misspoke or simply did not know about the additional compensation those employees were receiving.

State testimony. In contrast, State bargaining team member Shirley Morstad testified that on July 15 Leigh told the Union that the State *was* then compensating some overtime-exempt employees for work performed over 40 hours per week. In response to another Union question about which employees were receiving that pay, Morstad testified that Leigh gave the Union a list of the overtime-exempt classifications. (Morstad Tr 75-76.)

Leigh testified that she told Thal that the bargaining unit included personnel who were overtime-exempt. After Thal said that the Union wanted to know who would be affected, Leigh gave him a list of 12 classifications that also showed the number of bargaining unit positions within each classification, a total of 84 positions. (Leigh Tr 86-87; Exhibit S-4.) Further, Leigh testified generally that, during negotiations, she knew how overtime-exempt employees were being compensated at the time and told the Union about that practice. (Leigh Tr 94.) Leigh testified that the payment of overtime to overtime-exempt employees “is really highly unusual [and] only one or two institutions . . . [were] actually paying overtime.” (Leigh Tr 100.) Other institutions, she testified, provided standby pay or exchange time to overtime-exempt personnel.

—**August 30, 2004.** In an August 30, 2004, negotiation session, the parties agreed to the terms that became Article 16.5.

State testimony. Leigh testified that the parties discussed whether the language would change how overtime-exempt employees *accrued* exchange time (thereby indicating mutual awareness that they had *received* exchange time) and how the language would change their working conditions. (Leigh Tr 93 .) Leigh also testified that Union negotiator Williams expressed a concern about whether the State was proposing the same language in negotiations with unions that represented other State employees; Leigh responded that the State was doing so, as to exchange time. (Williams did not testify in the arbitration hearing.)

Leigh testified that she also explained to the Union that the use of exchange time practice varied among the various DOC institutions. (Leigh Tr 93, 98.) The State’s bargaining notes also refer to that explanation during negotiations. (Exhibit S-5.) As to other forms of compensation for overtime-exempt personnel, Leigh testified that she was “real clear” that there was no consistent practice within the DOC: some overtime-exempt employees received exchange time, some received overtime, some received no extra compensation for working over 40 hours, some received standby pay for carrying a pager; and some received eight hours of exchange time for serving as the duty officer for a week. (Leigh Tr 92-93.) The State’s bargaining notes for August 30 do not specifically refer to her making any comments about overtime or standby pay. (Leigh Tr 98.)

Also on August 30, the parties also discussed pay range and cost of living issues. Leigh testified that Union bargaining team member Ryan Engle, a licensed practical nurse at Stafford Creek Correction Center, had stated in the session that in 2004 two classifications of personnel (which are now in the overtime-exempt correctional healthcare specialist classification) were receiving standby compensation in the form of either pay or time off. (Leigh Tr 108-09.) That practice, in Leigh's understanding, was one of the inconsistent forms of overtime-exempt compensation that existed throughout DOC.

Union testimony. The Union did not offer testimony about the August 30 bargaining session.

To resolve the above conflicts in testimony, I consider several factors:

1. I credit the testimony provided by Thal and Hahn that Leigh *initially* informed the Union that the State's proposal would not affect overtime-exempt employees;

2. It appears that Leigh learned *later* that the bargaining unit included overtime-exempt employees and that some did receive additional compensation, which led her to realize that the proposal *would* have an effect on them. For Leigh to disclose that new information to the Union would be consistent with Thal's perception that he and Leigh had a very candid, cooperative, open relationship in bargaining in which Leigh was "not hiding anything." (Tr 24-25, 30);

3. At hearing, Leigh was definite in her testimony that she *did* inform the Union during negotiations that some overtime-exempt employees had received compensation in addition to their regular salary. Her testimony referred to comments she made in negotiations that are referred to in the State's bargaining notes. In contrast, Thal testified that he did not *recall* her making that disclosure, and the Union did not offer into evidence copies of any bargaining notes. I credit Leigh's more definite testimony, as supported by the State's bargaining notes;

4. Morstad clearly corroborated Leigh's testimony that Leigh *did* inform the Union that some overtime-exempt employees had received compensation in addition to their regular salary;

5. Leigh established at hearing that a Union bargaining team member had stated during the August 30 negotiation session that in 2004 certain overtime-exempt personnel at one institution *did* receive standby compensation in addition to their regular salary. The Union did not offer evidence to contradict that testimony. If before August 30 Leigh had *not* told the Union that some overtime-exempt personnel were receiving compensation in addition to regular salary, that disclosure by the Union bargaining team member likely would have led to an intense objection by the Union. In that situation, it would have been reasonable for the Union to argue that Leigh had acted in bad faith by improperly

withholding information (some overtime-exempt employees did receive additional compensation) while simultaneously saying that the State’s proposal would have no effect on bargaining unit employees. Instead, it appears that the individuals at the bargaining table considered the Union bargaining team member’s disclosure to be insignificant, because the members of both bargaining teams *already* knew that some overtime-exempt personnel had received compensation in addition to their regular pay;

6. Leigh established, without contradiction, that on August 30 the parties discussed whether the State’s proposal would change how overtime-exempt employees *accrued* exchange time. By having that discussion, the parties showed a mutual awareness that overtime-exempt employees *had* received exchange time in 2004-05;

7. The State’s proposal for Article 16.5.D was clear and unambiguous: “Overtime-exempt employees are not authorized to receive *any* form of exchange time or overtime compensation, formal or informal.” (Emphasis added.)

Based on the above, I find that during negotiations for the 2005-07 contract: (a) the State initially told the Union that the State’s proposal would not affect overtime-exempt employees; (b) later, the State learned that some overtime-eligible employees were receiving compensation in addition to their regular salary; (c) the State gave the Union that information; (d) the State told the Union that the State’s proposal would result in a change of compensation, beginning July 1, 2005, for those overtime-eligible employees; and (e) given those discussions, the State did not know—and had no reason to know—that the Union did not understand that the State’s proposal would result in a change of compensation for overtime-exempt employees.

2005-07 contract. The Union membership ratified the negotiated 2005-07 collective bargaining agreement. Article 16 of the contract is entitled “Hours of Work.” Article 16.5, entitled “Overtime Exempt Employees,” provides, in part (emphasis added):

Overtime-exempt employees are not covered by federal or state overtime laws. Compensation is based on the premise that overtime-exempt employees are expected to work as many hours as necessary to provide the public services for which they were hired. These employees are accountable for their work product, and for meeting the objectives of the agency. The Employer’s policy for all overtime-exempt employees is as follows: . . .

B. . . . Full-time overtime-exempt employees are expected to work a minimum of forty hours in a workweek

C. The salary paid to overtime-exempt employees is *full compensation* for

all hours worked.

D. Overtime-exempt employees are not authorized to receive any form of *exchange time* or *overtime compensation*, formal or informal.

E. Appointing authorities may approve overtime-exempt employee absences with pay for extraordinary and excessive hours worked, without charging leave. . . .

In contrast, Article 32.18 A. limits standby pay to certain personnel: “An overtime-*eligible* employee is in standby status while waiting to be engaged in work. . . .” (Emphasis added.)

Article 44, “Entire Agreement,” states, in part: “[A]ny past practice or past agreement between the parties—whether written or oral—is null and void, unless specifically preserved in this Agreement. . . .”

Article 9.5, “Authority of the Arbitrator,” states, in part: “The arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this agreement”

State transition to 2005-07 collective bargaining agreement. In anticipation of the July 1, 2005 effective date of the 2005-07 contract, the State notified 2004-05 “exceptions work period” employees that, as of July 1, 2005, they would “continue to be considered overtime-exempt” employees and would not be eligible for “overtime, standby, or callback pay [and] compensatory time and exchange time.” (Exhibit U-4.) The employees referred to as “exceptions work period” personnel in the 2004-05 contract were referred to as “overtime-exempt” employees in the 2005-07 contract.

As of July 1, 2005, the State altered or removed some of the overtime-exempt employees’ work assignments, thereby altering the amount of time they worked beyond a regular 40 hour schedule. (Panek Tr 61.)

Union response. When the State ceased paying compensation beyond salary to the overtime-exempt employees, the Union grieved and filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC). PERC deferred the dispute to this arbitration.

2007-09 collective bargaining agreement. While this dispute has been pending, the parties negotiated another agreement. It provides that, with prior approval of the appointing authority or designee, overtime-exempt employees may accrue exchange time and \$25 per day or portion of day in

standby status.

Positions of the Parties

Union. The parties did not have a meeting of the minds regarding the compensation of overtime-exempt employees. The Union understood from the State that in 2004-05 overtime-exempt employees did *not* receive compensation in addition to their regular salary, so adoption of the State's overtime-exempt employee proposal would not result in a change to the compensation of those employees.

The State and the Union have materially different interpretations of the terms used in Article 16. The Union contends that the words in that article are to be interpreted to preserve the status quo—overtime-exempt employees' compensation is to be unchanged under the 2005-07 contract—while the State contends that the language is to be interpreted so that overtime-exempt employees stop receiving compensation in addition to their regular salary. The appropriate remedy is an order replacing Article 16 of the 2005-07 contract with the parallel provisions of the parties' already-negotiated 2007-09 contract.

Finally, the State committed an unfair labor practice when it unilaterally changed the compensation for overtime-exempt employees without bargaining with the Union.¹

State. Even if a mistake occurred in the negotiations, it was a unilateral mistake by the Union for which no relief is available. The Union argues that the State did not explain that the State's proposal for that article would affect some members of the bargaining unit, causing a mistake to occur. The evidence, however, does not support the Union's position. A preponderance of the evidence shows that the State *did* explain to the Union that a change of compensation for overtime-exempt employees would result from agreement to the State's Article 16.5 proposal.

In addition, Article 44 of the contract provides that any past practice is null and void, unless specifically preserved in the contract. The practice of paying compensation to overtime-exempt employees in addition to their regular salary ended upon the effective date of the 2005-07 contract.

¹I reject this argument without further discussion. The parties have granted me the authority to interpret the 2005-07 contract, not the provisions of the State of Washington public employee collective bargaining law.

Discussion

Before July 1, 2005, the Washington Administrative Code gave State appointing authorities the discretion to provide compensation to overtime-exempt employees, in addition to their regular salaries. As of July 1, 2005, the State asserts that the parties agreed to the terms of Article 16.5 of the 2005-07 collective bargaining agreement, which eliminates that additional compensation.

The Union argues that the parties entered that agreement due to a mistake and that Article 16.5 should be replaced with language from the parties' 2007-09 collective bargaining agreement.

A well-respected labor arbitration treatise states:

The remedy of reformation to correct a *mutual mistake* in a contract is well established and has been consistently recognized by arbitrators. This remedy seeks to revise the text to conform to the mutual intentions of the parties. . . . However, the terms of an agreement will not be subject to reformation merely because at the time of signing the agreement, *one* party did not understand the implications of the provision proposed by the other. . . .

Unilateral mistake—that is, a misunderstanding by *one* of the parties as to the [importance] of a term—rarely constitutes sufficient cause for altering an agreement or otherwise offering relief. . . . Rescission as a remedy for a unilateral mistake is usually available only [1] if the mistake was basic to the agreement, and [2] the other party knew of the other party's mistake and [3] took advantage of it.

Ruben, ed., *Elkouri & Elkouri—How Arbitration Works* (BNA 6th ed. 2003) at 1229-31 (emphasis added).

In one of the arbitration opinions cited by the treatise (and also cited in the State's post-hearing brief), the arbitrator stated: “. . . The rule which has been hammered out through centuries of litigation is that [1] if the alleged ‘mistake’ is on the part of *only one* of the parties to the agreement, and [2] it is not so gross as to indicate to the opposite party that an error has been made, [then] no relief can be accorded the mistaken party.” *Pillowtex Corp.*, 92 LA 321, 325 (Goldstein 1985).

As noted above, I have found that during negotiations for the 2005-07 contract: (a) the State initially told the Union that the State's proposal would not affect overtime-exempt employees; (b) later, the State learned that some overtime-eligible employees were receiving compensation in addition to their regular salary; (c) the State gave the Union that information; (d) the State told the Union that the State's proposal would result in a change of compensation, beginning July 1, 2005, for those overtime-

exempt employees; and (e) given those discussions, the State did not know—and had no reason to know—that the Union did not understand that the State’s proposal would result in a change of compensation for overtime-exempt employees.

If the negotiation of this article involved a mistake, I conclude that it was not a *mutual* mistake. If the Union agreed to Article 16 due to a *unilateral* mistake, that mistake was not so gross or obvious, under the circumstances, as to put the State on notice of the mistake and warrant any remedy.

The Union quotes another respected authority, *The Restatement of Contracts (Second)*, Section 20(1), regarding the effect of a *misunderstanding* that prevents the formation of a contract:

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other; or (b) each party knows or each party has reason to know the meaning attached by the other.

However, it is Section 20(2), as edited below, that describes the parties’ bargaining over the State’s proposed changes to the overtime-exempt employees’ additional compensation:

(2) The manifestations of the parties *are* operative in accordance with the meaning attached to them by [*the State*] if (a) [the State] does *not know* of any different meaning attached by [the Union], and [the Union] *knows* the meaning attached by [the State]; or (b) [the State] *has no reason to know* of any different meaning attached by [the Union], and [the Union] *has reason to know* the meaning attached by [the State]. (Emphasis added.)

The State did not know or have reason to know that the Union had a mistaken understanding of the State’s proposal. However, the Union knew or had reason to know (because of what occurred in negotiations) the State’s understanding of the State’s proposal. Under the circumstances, the Union is bound to the State’s understanding of the State’s proposal.

Conclusion

The Union did not prove that the State had failed, during negotiations of the 2005-07 contract, to provide correct information to the Union regarding the pre-July 1, 2005 compensation of overtime-exempt employees. The language in the parties' 2005-07 contract is not subject to rescission or reformation. The State did not violate the parties' contract. I deny the grievance.

Respectfully submitted,

William Greer
Portland, Oregon

January 22, 2007

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Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

I have carefully reviewed all of the parties' evidence and arguments. I deny the grievance.

Respectfully submitted,

William Greer
Arbitrator

January 22, 2007