In the Matter of the Arbitration

Between Washington Federation of State Employees, AFSCME, AFL-CIO ("Federation"), on behalf of grievants Anthony Corbett and Sanjeev Bhalerao,

and

the State of Washington ("State").

Findings, Discussion and Award.

Case Numbers:	American Arbitration Association case No. 75 390 00203 06 and 00204 06. Arbitrator's case No. H51.
Representing the Federation:	Gregory M Rhodes, Esq., and Younglove Lyman & Coker, PLLC, P.O. Box 7846, Olympia, WA 98507.
Representing the State:	Mitchel R. Sachs, Asst. Attorney General, P.O. Box 40145, Olympia, WA 98504-0145.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the Attorney General's offices in Olympia, Washington on November 20, 2006.
Witnesses for the Federation:	Anthony Corbett, Sanjeev Bhalerao, and Greg Devereuz.
Witness for the State:	Ann Mitchell, Steve McLain, and Dane Lutz.
Post-hearing argument received:	From both parties on January 15, 2007.
Date of this Award:	February 2, 2007.

The parties disagree about whether their 2005-2007 collective bargaining agreement requires standby pay for overtime exempt employees who are assigned standby duties. They could not agree on an exact statement of the issue presented in arbitration; but they agree that I have the authority to formulate that issue in light of the entire record. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. The parties filed timely post-hearing briefs.

FACTS

How the grievance arose. The underlying facts are neither complex nor contested. Both of the grievants are overtime exempt employees of the Washington State Ferries; and both of them are assigned rotating standby duties. When on standby, the grievants are required to be able to respond by phone to a call within fifteen minutes and to be able to respond in person within an hour. Before the 2005-2007 collective bargaining agreement went into effect, there was, apparently, no contractual language controlling the issue of standby pay for exempt employees. But there was an administrative rule ("WAC") which allowed the State to pay for time in standby status, and both of the grievants were always paid for their standby time. As soon as the new contract went into effect—on July 1, 2005—the State disapproved of their standby pay requests. There is no dispute that the grievants' non-represented superiors and peers—i.e. those not covered by the 2005-2007 contract with the Federation—continue to receive standby pay as before.

As far as this record shows, when the State stopped standby pay to the grievants and their organizational peers, some of those peers talked their way out of the bargaining unit—into "supervisory" positions—so that the Agency could once again pay them for standby time.

Bargaining history. Before the effective date of the current collective bargaining agreement, there was wide variation in State agency policies and practices with respect to overtime and standby pay. There were also some limitations to what areas State employee unions *could* bargain and what areas had to be left to the State Personnel Department and to the Personnel Resources Board.[1] The WAC which governed the grievants' compensation at that time allowed, but did not require, the State Ferries to pay them for standby duties.

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1. The 2005-2007 contract's zipper clause specifically recognizes that WAC chapters 356 and 357 are preempted by the new collective bargaining agreement.

This case involves the intersection of the parties' bargain about standby pay and their bargain about overtime eligibility. Before the current contract, the State's workforce was divided into three different groups for purposes of overtime administration: those with a scheduled workweek, those with a "non-scheduled"—or alternate or flexible—workweek, and "exception" employees. The Federation's initial proposal for the "Hours of Work and Work Schedules" article of the current, 2005-2007 contract was couched in those terms. But the State proposed to shift to the traditional FLSA two-part distinction between overtime-eligible employees and overtime-exempt employees. Along with that new approach, the State proposed subsections addressing the work schedules for overtime-eligible law enforcement employees—who fall under special FLSA rules—and, for overtime-eligible employees generally (including their meal periods and rest periods).[2] The organization proposed by the State eventually made its way into Section 6.3 of the 2005-2007 contract, along with much if not all of the State's initially proposed language. The final contract language addresses Hours of Work in Article 6; and 6.8 addresses the hours of work for overtime-exempt employees:

> 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. * * *
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> * * * * *
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> B. Overtime-exempt employees are expected to work as many hours as necessary to accomplish their assignments or fulfill their responsibilities and must respond to directions from management to complete work assignments by specific deadlines. Overtime-exempt employees may be required to work specific hours to provide services, when deemed necessary by the Employer.
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> C. The salary paid to overtime-exempt employees is full compensation for all hours worked.

The parties began bargaining over that Hours of Work article late in February, 2004. The Federation's first counter proposal was made in mid-July; and it reflected the State's proposed separation of the workforce into the two traditional categories of overtime-eligible and overtime-exempt. Like the State's initial proposal—and like the final contract—the Federation's initial counter included a section on "Rest, Meal and Clean-up Periods for Overtime-Eligible

2. Meal periods and rest periods, of course, are specified in the FLSA rules for overtime-eligible employees.

Employees" (thus proposing to add "cleanup periods" to the State's list). And, like the State's initial proposal, the Federation's first counter included a subsection which addressed the hours of work for overtime-exempt employees. That subsection included some of the key phrases from the initial State proposal, viz. "Overtime-exempt employees are expected to work as many hours as necessary to accomplish their assignments or fulfill their responsibilities," and "Overtime-exempt employees may be required to work specific hours to provide services, when deemed necessary by the Employer."

The parties were bargaining economics at a separate table, and they had just begun discussing the wage and pay article of the new contract when the Federation submitted that first counterproposal for the Hours of Work article. The compensation negotiations began on July 2, 2004. The Federation's initial compensation proposal included this sweeping language on standby pay:

> **Stand-By Pay.** Employees required to restrict their off-duty activities in order to be immediately available for duty when called, will be compensated for the time spent in standby status. Rate of compensation for standby status will be implemented as follows:
>
> A. Compensation will be three (3) times the standby rate that was effective on June 30, 2004...
> B. In addition to the pay received while on standby, an employee called to work will be paid at his/her regular salary for all hours worked.

The State's initial proposal for the wage and pay article did not come until September 2, 2004. The standby subsection of that proposal was much more detailed and much more restrictive:

> **Standby**
>
> A. An overtime eligible employee is in standby status while waiting to be engaged to work by the Employer and both of the following conditions exist:
>
> 1. The employee is required to be present at a specified location or is immediately available to be contacted. The location may be the employee's home or other specific location, but not a work site away from home. * * *
>
> 2. The agency requires the employee to be prepared to report immediately for work if the need arises, although the need might not arise.
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> B. Standby status will not be concurrent with work time.

C. When the nature of a work assignment confines an employee during off duty hours and the confinement is a normal condition of work in the employees' position, standby compensation is not required merely because the employee is confined.

D. Employees on standby status will be compensated at a rate of seven percent (7%) of their hourly base salary for time spent in standby status.

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The Federation's first compensation counterproposal accepted the State's language except for subsection C, which the Federation proposed to delete. The Federation counterproposal also included a standby rate of 10% rather than 7%. That counter was submitted on the same day that the parties exchanged their final series of counters on the Hours of Work article. Both subsection C and the 7% standby rate appear in the final version of the compensation article, which was agreed to four days after the Hours of Work article was agreed to.

DISCUSSION

The parties agreed that I have the authority to formulate the exact issue in light of the entire record. On that basis, it is pretty clear that the issue presented in arbitration is: Did the State violate the collective bargaining agreement, and particularly Section 44.22D, when it refused to provide standby pay for the grievants on the grounds that they were overtime-exempt employees; and, if so, what is the appropriate remedy?

In a nutshell, the State argues that standby pay for overtime-eligible employees is addressed in detail, that the absence of any reference to standby pay for overtime-exempt employees shows that the parties did not contemplate such "additional compensation," and that an arbitrator is forbidden to add such a provision to a contract after the parties agreed to a contract without it. The Federation, on the other hand, argues that the literal language of Section 42.22D requires standby pay of 7.5% for "employees in standby status," that standby pay is not for "hours worked," and that Article 2 prohibits the State from denying standby pay to bargaining unit employees for performing the same functions that it makes standby payments for to nonrepresented employees.

The Federation points to the language of Section 44.22D. Article 44 is the contract's general "Compensation" article. The language of subsection 22 comes directly from the State's initial proposal and is set out on pages 4-5, above. Subsection A begins this part of the contract by specifying that "An overtime-eligible employee is in standby status . . ." The narrow question of interpretation is whether the parties understood that qualification—i.e., "an overtime-eligible employee"—to apply to the entire section, including subsection D which requires a 7% payment for time spent on standby. If they did, then the contract is certainly silent on the issue of standby pay for overtime-exempt employees.

Section 44.22 may suggest that the parties bargained over standby status *only* for overtime-eligible employees. At best, from the Federation's point of view, that section could be interpreted as neutral on that score, not leaning significantly either way. At worst, it presents the obvious question, Why would the parties have bargained carefully for conditions for standby pay for overtime-eligible employees (in subsections Al and A2) while they agreed to standby pay for overtime exempt employees without any similar conditions? In other words, it the parties understood that standby pay applied only to overtime-eligible employees, then the structure of Section 44.22 makes sense, and if they understood that standby pay also applied to overtime-exempt employees, then the structure of Section 44.22 is puzzling.

When we move beyond analysis of the written agreement and consider the record of bargaining history, the Federations's case really does not improve. If there were clear evidence of the parties' shared understanding that overtime-exempt employees would be eligible for standby pay, then I would certainly agree with the Federation that the language of the contract is uncertain enough to allow. that conclusion. But there is precious little evidence to support such a claim.

The "shared understanding" (or "meeting of the minds") question can always be broken down into three parts: What did the first party understand; what did the second party understand; and what *should* they have understood from their exchanges during negotiations? In this case, there is no dispute at all in the record that the State understood that standby pay was going to be restricted to overtime-eligible employees. To be more precise, there is no dispute that the State never even considered the possibility of extending standby pay to overtime-exempt employees. That issue just never crossed the collective mind of-the State negotiators. On the other hand, there *is* a substantial dispute about whether or not the issue ever crossed the collective mind of the *Federation* negotiators. There is no dispute that that Federation bargaining team did include overtime-exempt

employees, but it did *not* include any overtime-exempt employees from IT services, which is where most of the unit's overtime-exempt standby employees are to be found. Moreover, the Federation's lead negotiator, who is now a State employee, testified that the Federation team did not understand the standby provision to apply to overtime-exempt employees and that it came as a "big surprise" to find out just how many overtime exempt employees in the State's workforce are actually assigned to standby duty. The Federation has the burden of proof in this case, of course, and the record falls short of showing that these parties had the required shared understanding that there would be standby pay for overtime-exempt employees.

Finally, when we turn to what the parties actually said across the table on this topic, we find essentially nothing. In some cases, a defending party may argue ever so sincerely that it never contemplated the interpretation urged by the other side, but it may be clear from the evidence of what was actually said at the table that that party *should* have contemplated that interpretation, whether it did or did not do so. In the case at hand, however, there is no dispute that the parties never specifically discussed the topic of standby pay for overtime-exempt employees at all. On the contrary, it is pretty clear that neither of the bargaining teams actually realized that there were a significant number of bargaining unit employees in the somewhat odd category of overtime-exempt standby-required. The State pressed the reorganization of the contract in the simplified terms of overtime-eligible and overtime-exempt employees; the parties specifically bargained over standby pay for overtime-eligible employees; and neither party particularly realized that there was also a significant number of overtime-exempt employees who were commonly assigned standby status, so there was no discussion of or bargain over those employees. As the State points out, I have no authority to add such a provision to the contract, no matter how deserving of standby pay the State's overtime-exempt employees might be. An grievance arbitrator's job is to enforce the contract the parties actually made.

The Federation also argues that the State's interpretation of this collective bargaining agreement amounts to discrimination against employees who have been chosen to be represented by a union, since the State continues to provide standby pay for non-represented employees. But there are many, many benefits of being in a represented bargaining unit, and it is not informative to compare benefits between units one by one rather than in the entirety. That is why unions and employers alike always cost out the *total* economic costs and benefits of a proposed contract, rather than addressing particular benefit costs one by one. It is

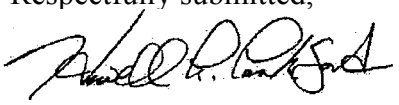
also why the NLRB has traditionally been quite unreceptive to the sort of claim of anti-union discrimination which the Federation suggests here.

In short, the burden of proof is on the Federation in this contract interpretation dispute. And the issue before me is not whether the parties *should have* agreed to standby benefits for overtime-exempt employees. In fact, the record shows that the parties agreed between themselves to fix that omission in the subsequent contract.[3] In the contract language at issue, considered all by itself, there is nothing that makes the Federation's interpretation any more likely than the State's. And, when we look beyond the "four corners of the document" in search of evidence of the required shared understanding of the parties, the record does not get any better. The grievance must be dismissed.

AWARD

The State did not violate the collective bargaining agreement, and particularly Section 44.22D, when it refused standby pay for the grievants. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford
Arbitrator

3. The record also shows that the Federation took credit for that gain in the summary of the new contract which the Federation provided for its members.