In the Matter of the Arbitration
between
Washington State Patrol
and
Washington Public Employees Association

Craig Larsen Callback Pay Grievance

AAA Case No. 75-390-00071-06

Arbitrator's Opinion and Award

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

January 22, 2007

Introduction

A bargaining unit employee, after his work shift, had two duty-related phone calls with on-duty personnel and later submitted a request for callback pay. Washington State Patrol (WSP or State) denied the request, stating that the parties' contract requires an employee to *return to the worksite* to be eligible for callback pay. Washington Public Employees Association (Association) grieved, stating that the contract requires only that an employee *perform work* to be eligible for callback pay. I deny the grievance.

The parties presented their cases in a hearing on November 3, 2006, in Tumwater, Washington. The State was represented by Elizabeth Delay Brown, Assistant Attorney General, 7141 Cleanwater Drive SW, PO Box 40105, Olympia, Washington 98504-0145. The Association was represented by Leslie Liddle, Executive Director, 140 Percival Street NW, Olympia, Washington 98502.

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. During the hearing, the parties referred to a document that was not available at the hearing site. After the hearing, the State provided to the Association a copy of that document, and the Association did not object to its receipt. The State submitted that document with its post-hearing brief. I receive that document as State Exhibit 10. The hearing closed on December 21, 2006, upon receipt of the parties' post-hearing briefs.

The parties agreed that the grievance is substantively and procedurally arbitrable. They 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 that the issue is: Did WSP violate Article 38.16 of the parties' collective bargaining agreement when it refused to pay the penalty of three hours of pay to the grievant when he performed work after departing the work site on August 16, 2005? Because the Association asserts that the State has violated the parties' contract, the Association has the burden of producing evidence that is sufficient to prove its claim.

Witnesses and exhibits. All witnesses testified under oath. The Association offered four exhibits and testimony from one witness (Craig Larsen). WSP offered ten exhibits and testimony from one witness (Marty Knorr). 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. WSP is a police agency. WSP's communications centers provide 9-1-1 emergency communication service 24 hours per day, seven days per week. The Association is the exclusive representative of a bargaining unit of personnel employed by WSP. At all material times, Craig Larsen was a communications officer 3 (CO 3) and a member of the Association's bargaining unit. The CO 3 classification specification accurately provides that such personnel perform "supervisory and operational duties as a shift supervisor of a communications center . . . ." A communication center is run by a station manager or, in the manager's absence, a CO 3 shift supervisor. At times, neither a station manager nor a shift supervisor is on site.

Events. On August 16, 2005, following the end of his regular work shift, Larsen left the work site. About an hour later, he received a duty-related cell phone call from the communications center. Later, he received a second, follow-up, duty-related cell phone call. During those two phone conversations, Larsen performed work by communicating with the communications center by telephone but did not physically return to the center worksite. During that work week, Larsen worked five regular eight-hour shifts. (Larson Tr 27.)

The State did not provide notice to Larsen, prior to his scheduled quitting time, either to return to work after departing the worksite or to change the starting time of his next scheduled work shift.

(Larsen Tr 30.)

Later, Larsen submitted a time sheet stating that he worked code "EM" (emergency callback) overtime at 1:00 a.m. on August 16. (The State's time and activity report system requires that emergency callback be reported as starting and stopping at the same time; Larsen Tr 31.) The State denied Larsen's request for callback pay.

Compensation for off-duty phone calls before the term of the 2005-07 contract. The State and the Association entered a memo of understanding in April 2003 that addressed the compensation payable to CO 3s for off-duty calls in two situations:

> A. If a CO 3 is called while off-duty and they are *not required* to physically report to the communication center the following will apply: [less than five minute call—no compensation; six to 30 minute call—40 minutes of overtime; 31 minutes or longer—40 minutes of overtime to pay for the first 30 minutes of the call and then overtime for the duration of the call beyond the first 30 minutes]. . . .
>
> B. If a CO 3 is called while off-duty and *is required* to physically return to the communications center, they will be paid call-back pay (penalty pay) as outlined in Washington Administrative Code 356-15-110. (Exhibit S-10, emphasis added.)

As of July 1, 2005, Washington Administrative Code 356-15-110 no longer applied to bargaining unit personnel. (Tr 38.)

Prior to July 1, 2005, CO 3s were paid *overtime* when they worked past the end of their work shifts. (Larsen Tr 18.) In other situations, prior to July 1, 2005, Larsen on occasion left the work site, was called back to the site to perform work, and received *callback* pay for that work. (Larsen Tr 42.) However, the parties agree that past practices—practices that existed before July 1, 2005—should not be considered in this arbitration due to the terms of the 2005-07 contract Article 44, "Entire Agreement," quoted below. (Tr 39.)

2005-07 collective bargaining agreement. The parties' 2005-07 collective bargaining agreement, effective at all material times, includes the following provisions (emphasis added):

> **Article 6.1 Definitions**
>
> F. Work Shift: The hours an employee is scheduled to work each workday in a workweek.
>
> 6.3. Overtime-Eligible Employees (Excluding Law Enforcement Employees)
>
> A. Regular Work Schedules. The regular work schedule for overtime-eligible employees shall not be more than 40 hours in a workweek, with starting and

ending times as determined by the requirements of the position and the Employer. . . .

Article 7 Overtime

7.1 Definitions

A. Overtime: Overtime is defined as time that an overtime-eligible employee: 1. *Works in excess of 40 hours per workweek* (excluding law enforcement employees); . . . .

C. For overtime purposes, work is the time actually spent *performing the duties assigned* in addition to time during which an employee is excused from work for holidays, sick leave, vacations or compensatory time.

Article 27 Grievance Procedure

27.2 D. 1. The arbitrator will: a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement; . . . .

Article 38.16 Callback

A. Work Preceding or Following a Scheduled Work Shift. Overtime-eligible shift employees will be notified prior to their scheduled quitting time either to *return to work* after departing the worksite or to change the starting time of their next scheduled work shift.

1. *Lack of such notice for such work will be considered callback and will result in a penalty of three hours of pay* at the basic salary in addition to all other compensation due. This penalty will apply to each call. . . .

Article 44 Entire Agreement

44.1 This Agreement constitutes the entire agreement and any past practice or agreement between the parties, whether written or oral, is null and void, unless specifically preserved in this Agreement.

44.2 *With regard to WACs 356* and 357*, this Agreement preempts all subjects addressed, in whole or in part, by its provisions*.

. . . .

44.4 During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. . . .

The parties did not include the terms of the April 2003 memo in the 2005-07 collective bargaining agreement.

Under the 2005-07 contract, CO 3s are considered overtime eligible employees. (Larsen Tr 19-20.)

Positions of the Parties

Association. Article 38.16 does not specify that an employee must return to the work *site* to receive callback pay; instead, that article simply requires that the employee return to work. After Larsen left work, during the middle of his 40 hour work week, he received a phone call and performed additional work. He adjusted his workweek for the time he spent performing the post-shift work and accordingly did not request overtime.

Instead, Larsen properly requested callback under Article 38.16. The State did not provide the notice to Larsen specified in Article 38.16 A: "Overtime-eligible shift employees will be notified prior to their scheduled quitting time either to return to work after departing the worksite or to change the starting time of their next scheduled work shift." As a result, callback pay is required by the terms of Article 38.16 A.1: "Lack of such notice for such work will be considered callback and will result in a penalty of three hours of pay at the basic salary in addition to all other compensation due. This penalty will apply to each call. . . ."

During the 2005-07 contract negotiations, the State knew about the April 2003 callback memo of understanding but failed to propose alternatives to the callback language of Article 38.16. The State erred in trying to re-write the clear language of the 2003 agreement.

The State's November 2005 response denying the subject grievance improperly relies on past practice—which is prohibited by Article 44, "Entire Agreement," of the 2005-07 contract—by stating that a phone call to an employee's residence after the work shift has ended has never been considered a callback.

Despite knowing the terms of the April 2003 agreement, the State failed to negotiate anything different from the clear language of Article 38.16. Larsen had a scheduled work shift; during his non-work hours, he performed work for the State. Larsen returned to work after departing the work site—by participating in the duty-related phone calls—and thereby performed work for the State. Larsen is entitled to callback pay under Article 38.16.

WSP. Article 38.16 is clear and unambiguous. It requires callback pay for an employee who, post-shift and without specified notice, is required to return to the work *site*. It does not provide callback pay for an employee who simply *performs* work after a shift.

It is inconceivable that a telephone call to an employee, after the employee leaves the worksite, could be considered a "callback." Under that scenario: (1) the maker of a telephone call would have had

to know that they would be making the call, prior to receiver of the call leaving the worksite; and (2) the maker of the call would have had to fail to notify the receiver of the call, before call receiver's scheduled quitting time, that the call was to be made.

Taken in its general and ordinarily accepted meaning, "return to work after departing the worksite" means just that and does not mean "performance of work" after departing the worksite. The 2005-07 contract does not address compensation for phone calls outside of an employee's regular work shift. Those calls are compensated as work performed on a minute-by-minute basis. Larsen was overtime-eligible and did some work after his shift ended and therefore, if otherwise qualified, was eligible to receive overtime for that work. (Tr 8-9.)

Article 27.2 prohibits the arbitrator from adding to or modifying any part of the collective bargaining agreement.

Discussion

Does the contract require the State to pay Larsen callback when he performed work but did not physically return to his regular work site?

Factual and bargaining context. The factual and bargaining context of this dispute provides some guidance in interpreting the contract:

1. Larsen was a CO 3 when he performed the work. The work occurred after Larsen's regular work shift and after he had left the work site. One duty of a CO 3 is to communicate with the work site by phone after leaving the work site;

2. The parties' April 2003 memo of understanding unambiguously addressed the compensation paid to CO 3s (such as Larsen in this case) for off-duty calls when the CO 3 was *not required* to report physically to the work site and when the CO 3 *was required* to report physically to the work site;

3. Washington Administrative Code 356-15-110—which the parties referenced in the April 2003 agreement and provided for callback pay in certain circumstances before July 1, 2005—expired immediately before the effective date of the parties' 2005-07 contract, thereby eliminating that particular mandate for callback pay;

4. During the 2005-07 contract negotiations, the parties did not incorporate the April 2003

agreement (with its reference to the now-expired terms of WAC 356-15-110), or similar terms, in their collective bargaining agreement;

5. 2005-07 contract Article 44.4 provides: "During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining."

The absence of the April 2003 terms or similar language in the 2005-07 contract tends to indicate that the parties agreed not to provide bargaining unit employees with different compensation for off-duty work based simply on whether the work did or did not require an employee to report *physically* to the work site. Part of the Association's argument is based on the absence of any Article 38.16 reference to a physical return to work. (I consider that evidence only as part of the parties' bargaining history; the parties agree that the April 2003 language is not to be construed as the basis for a past practice.) However, in addition to that element of the bargaining history, I consider other factors.

Purpose of the parties when negotiating callback pay. One rule that aids interpretation is that "when the principal purpose that the parties intended to be served by a provision can be ascertained, the purpose is to be given great weight in interpreting the words of the provision." *Elkouri & Elkouri—How Arbitration Works* (BNA 6th ed. 2003) at 461. The words of a collective bargaining agreement should be interpreted in the context of the work place, with consideration of the duties performed by bargaining unit employees, not in the abstract. In this case, for example, Larsen was a CO 3 who could and did perform the work involved in the August 16 calls without physically returning to the worksite.

The parties agreed in Article 38.16 that overtime-eligible shift employees (such as Larsen) "will be notified prior to their scheduled quitting time either to return to work after departing the worksite or to change the starting time of their next scheduled work shift." Further, "[l]ack of such notice for such work will be considered callback and will result in a penalty of three hours of pay at the basic salary in addition to all other compensation due. . . ."

What is the purpose or reason for that notice and penalty? The apparent purpose of notice of callback to an employee is to give the employee the opportunity to make necessary personal arrangements; to prepare to return to the work site; to return to the work site to perform the assignment; and to assure that—after completing the assignment—the employee has the means to return home. The apparent purpose of callback pay (which is to be paid "in addition to all other compensation due," under Article 38.16.A.1) is to penalize the State when it fails to give notice and thereby unduly inconveniences an employee.

When the State requires an employee to return to the work *site*, that order clearly interferes with the employee's off-duty freedom, plans, and commitments. When the State requires an employee to respond to a phone call, *without* returning to the work site, that order may involve a significantly less intrusive, *de minimis* interruption of the employee's non-work time. For example, when the communication center called Larsen after his regular work shift, he immediately began performing work and was able to accomplish that work (talking on the phone and giving direction to the caller) without returning to the work site. Because he was not required to return to the work site, he did not need to make the type of personal arrangements that would be required if he had been required to return to the work site.

With that background, should the language central to this dispute be interpreted to require notice when an employee is required to "return to [performing] work after departing the worksite" (as argued by the Association) or when an employee is required to "return to [performing] work [at the work *site*] after departing the worksite" (as argued by the State)?

The parties, when negotiating Article 38.16, are charged with knowing what work is performed by bargaining unit employees and where that work is performed. Even if the State could have anticipated the need to call Larsen after his shift ended, I conclude that during negotiations the parties knew that no significant purpose would be served—no significant inconvenience to an employee in Larsen's situation would be avoided—by requiring the State to give advance notice to him in the circumstances presented. This line of reasoning leads to an interpretation that the State and the Association negotiated, in Article 38.16, a three-hour penalty only for employees who are directed, without the specified notice, to return to work status at the work *site*. The application of this rule favors the State's proposed interpretation of Article 38.16.

Words used by the parties in Article 38.16. Another established rule to aid in the interpretation of a collective bargaining agreement is that "a word takes on coloration from its association with accompanying words." *Elkouri & Elkouri—How Arbitration Works* (BNA 6th ed. 2003) at 469. Stated differently, a word used in one part of a sentence should be interpreted in light of words used in other parts of the sentence.

2005-07 contract Article 38.16 A addresses a specific situation:

> Work Preceding or Following a Scheduled Work Shift. Overtime-eligible shift employees will be notified prior to their scheduled quitting time either to return to *work* after departing the *worksite* or to change the starting time of their next scheduled work shift. . . . Lack of such notice for such *work* will be considered callback and will result

in a penalty of three hours of pay at the basic salary in addition to all other compensation due. This penalty will apply to each call. . . ." (Emphasis added.)

Should the emphasized language be interpreted as "return to [performing] work after departing the worksite" (as argued by the Association) or as "return to [performing] work [at the work site] after departing the worksite" (as argued by the State)? The Association's proposed interpretation of the quoted language makes the word "work" refer solely to an *activity* (performing work), while the State's proposed interpretation makes the word "work" refer both to an activity (performing work) and a *place* (the work site).

Applying the above interpretation aid this case, the words in one part of the sentence ("return to work") should be interpreted in connection with other words in the same sentence ("after departing the worksite"), and those words clearly refer to a *physical* place. Under this rule, the language is interpreted as: "return to [performing] work [at the work site] after departing the worksite." The application of this rule favors the State's proposed interpretation of Article 38.16.

Conclusion

I interpret 2005-07 contract Article 38.16 A to provide:

Work Preceding or Following a Scheduled Work Shift. Overtime-eligible shift employees will be notified prior to their scheduled quitting time either to return to *performing* work *at the work site* after departing the worksite or to change the starting time of their next scheduled work shift. . . . Lack of such notice for such work *at the work site* will be considered callback and will result in a penalty of three hours of pay at the basic salary in addition to all other compensation due. This penalty will apply to each call. . . ."

Accordingly, I deny the Association's 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