
IN THE MATTER OF ARBITRATION)
BETWEEN)
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, LOCAL NO. 117)
UNION)
and)
STATE OF WASHINGTON D. O. C.)
CLALLAM BAY CORRECTIONS)
CENTER)
EMPLOYER)
Re: Overtime Not offered by Seniority)
_____)

DECISION

OF
JOHN R. SWANSON

ARBITRATOR

June 30, 2010

APPEARANCES

TEAMSTERS LOCAL UNION #117 by James V. Smith II, Esquire for and on behalf of Local #117. Union.

WASHINGTON STATE D. O. C. by Angela M. Roberts, Labor Relations Consultant, for and on behalf of Clallam Bay Correction Center, Employer.

OTHERS PRESENT

Michael Beranbaum, Daniel Hahn – Teamsters Local 117
Ronald Fraker, Superintendent CBCC; Edwin Reetz, Gina Monger, Richard Fojue, Earl Richardson, Dannie Ahrens, CBCC-DOC; Heidi Loveall, HR Consultant, DOC.

ISSUE

Did the Employer violate the Collective Bargaining Agreement by assigning a sergeant to ERT training resulting in overtime and denying a more senior sergeant voluntary overtime in violation of Article 17?

If so, what is the appropriate remedy?

BACKGROUND

There had been an ongoing problem regarding conditions under which overtime was assigned. The Union alleged that there were inconsistencies in the application of overtime. In this case at issue overtime was assigned in alleged violation of the Collective Bargaining Agreement (CBA). The parties conducted a pre-arbitration review meeting (PARM) and were unable to resolve the matter. The matter then was submitted to final and binding arbitration

RECORD BEFORE THE ARBITRATOR

1. Joint exhibit #1 Collective Bargaining Agreement by and between The State of Washington and Teamsters Local Union #117 effective July 1, 2007 through June 30, 2009.
2. Joint exhibits #2 through #11 accepted into evidence.
3. Transcript of April 5, 2010 arbitration hearing.
4. Briefs filed by counsel for the parties simultaneously mailed on June 10, 2010.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – UNION RECOGNITION, UNION SECURITY AND DUES DEDUCTION

2.1 Recognition

This agreement covers the employees in the bargaining units described in Appendix A, entitled “Bargaining Units Represented by the Teamsters Local Union No. 117,” but it does not cover any statutorily excluded positions or any positions excluded in Appendix A. Job classifications and/or positions that have been historically included in the bargaining unit, that are created as a result of the expansion of an existing facility which is included within the bargaining unit, will be included in the bargaining unit.

ARTICLE 3 – MANAGEMENT RIGHTS

3.1 Management Rights

It is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law. These rights include, but are not limited to the right to:

- C. Plan, direct, control, and determine the operations or services to be conducted by employees;
- M. Utilize non-permanent and on-call employees;
- N. Schedule days and hours of work and overtime as necessary. (Emphasis added)

ARTICLE 5 – UNION/MANAGEMENT RELATIONS

5.1 Collective Bargaining Obligations

The Employer will satisfy its collective bargaining obligation under law before changing a matter that is a mandatory subject of bargaining. (Emphasis added)

ARTICLE 9 – GRIEVANCE PROCEDURE

9.1 Terms and Requirements

A. **Grievance Definition** – A grievance is an alleged violation of this Collective Bargaining Agreement. Grievances will be processed in accordance with the provisions of the Collective Bargaining Agreement in which the grievance was originally filed.

9.5 Authority of the Arbitrator

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, nor will the arbitrator make any decision that would result in a violation of this Agreement. The arbitrator will be limited in his/her decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it. The arbitrator will not have the authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the Agreement. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant. (Emphasis added)

ARTICLE 12 – PERFORMANCE AND CAREER DEVELOPMENT

12.3 Orientation and In-Service Training

The agency agrees to provide orientation and in-service training, as well as professional development opportunities to employees in accordance with agency policies.

12.4 Specialized Training

The agency agrees to provide state-wide minimum standards of training for specialized assignments or required duties, such as Emergency Response Team, Special Emergency Response Team and other posts, where use of weapons, use of physical force or breathing apparatus are required.

ARTICLE 13 – SAFETY

13.1 Safety Standards and Principles

The Employer and the Union agree that the nature of work performed in correctional facilities by employees is recognized as potentially hazardous. Therefore, the Union and the Employer will cooperate in the endeavor to maintain a safe, healthy and drug and alcohol free work environment. The Employer agrees that no employee should work or be directed to work in a manner or condition that does not comply with safety practices or standards as established by the Agency's Safety and Health Program, Department of Labor and Industries, State of Washington, and other applicable regulatory requirements.

13.2 Employer Responsibilities

Recognizing the inherent risk(s) in a correctional setting, the Employer is obligated to provide a safe workplace and to educate employees in proper safety procedures and use of protective and safety equipment. The Employer is committed to responding to legitimate safety concerns raised by employees. The Employer will comply with federal and state safety standards, including requirements to first aid training, first aid equipment and the use of protective devices and equipment.

ARTICLE 17 – OVERTIME

17.1 Determination and Assignment of Overtime

- A. **Right to Assign:** **The Employer has the right to require an employee to work overtime.** When the Employer determines that overtime is necessary and determines to assign such overtime to a bargaining unit employee, **the Employer will:**
1. Identify the job classification to be assigned the overtime, the number of positions requiring overtime, the specific post assignments and the anticipated duration of the overtime.
 2. **Assign overtime as voluntary or mandatory, as set forth in this Article.**
- C. **Voluntary Sign-up List:**
1. A voluntary overtime sign-up list for each day and each shift for an entire month will be posted by the fifteenth (15th) of the preceding month for each job classification.
 2. Each list will have a column for employee name, time and date of sign up, seniority date, scheduled shift and days off, work extension telephone number, and a column that allows volunteering employees to remove their name from the list.
- D. **Assignment of Voluntary Overtime:**
2. **Prescheduled and daily voluntary overtime assignments will be offered to employees from the voluntary sign-up list based on seniority date.**
 3. **Volunteers may select any position available, but on-duty employees who have signed up for the voluntary overtime list for the next scheduled shift may not refuse an assignment of overtime.**
 4. **In the event that the most senior employee is not on duty and cannot be reached, i.e., no answer,** when assignments are being offered, the next employee in descending seniority order will be contacted. A good faith effort must be made and documented to contact volunteers in a timely manner to ensure they have enough time to arrive at work in advance of the overtime shift.
- E. **All Call: After the voluntary sign-up list has been exhausted and prior to the assignment of mandatory overtime, the Employer will solicit volunteers who are already on duty ("All Call").** If more than one (1) employee responds to an all call, the Employer will offer all available posts on a first-come, first-served basis. If there are still insufficient volunteers after the all call, Management may assign mandatory overtime.
- I. **Ability to Deny Overtime Assignment**
The supervisor responsible for assigning overtime may deny a request by an employee to work voluntary or mandatory overtime, under the following circumstances:
1. The employee does not have the current qualifications or certifications to carry out the duties of the position requiring the overtime; or
 2. For reasons that, if allowed, a violation of this Agreement would occur. (Emphasis added)

L. **On-Call Employees**

The Employer may assign work to on-call employees prior to assigning overtime. (Emphasis added)

17.7 Employers Right to Assign

Nothing in this Article precludes the Employer from utilizing off-duty staff, which requires the payment of call-back or utilizing an individual to complete a specific assignment.

ARTICLE 34 – SENIORITY

34.1 Definition

Seniority for full-time employees will be defined as the employee's length of unbroken state service. Seniority for part-time or on call employees will be based on actual hours worked. Leave without pay of fifteen (15) consecutive calendar days or less will not affect an employee's seniority. When an employee is on leave without pay for more than fifteen (15) consecutive calendar days, the employee's seniority will not be affected when the leave without pay is taken for:

- A. Military leave or United States Public Health Service;
- B. Compensable work-related injury or illness leave;
- C. Government service leave and leave to enter the Peace Corps, not to exceed twenty-seven (27) months;
- D. Educational leave, contingent upon successful completion of the coursework; and/or
- E. Reducing the effects of a layoff.

When an employee is on leave without pay for more than fifteen (15) consecutive calendar days and the absence is not due to one of the reasons listed above, the employee's seniority date will be moved forward in an amount equal to the duration of the leave without pay. Time spent on a temporary layoff in accordance with Article 35, Layoff and Recall, will not be deducted from the calculation of seniority. Employees who are separated from state service due to layoff and are reemployed within two (2) years of their separation date will not be considered to have a break in service. For the purposes of layoffs, a maximum of five (5) years' credit will be added to the seniority of permanent employees who are veterans or to their unmarried widows or widowers, as provided for in RCW 41.06.133 (13). (Emphasis added)

ARTICLE 44 – ENTIRE AGREEMENT

The Agreement expressed herein, in writing, constitutes the entire Agreement between the parties and any past practice or past agreement between the parties that existed prior to July 1, 2005 – whether written or oral – is null and void, unless specifically preserved in this Agreement. With regard to WAS 357, this Agreement preempts all subjects addressed, in whole or in part, by its provisions. This Agreement supersedes specific provisions of agency policies with which it conflicts. 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. Nothing herein will be construed as a waiver of the Union's collective bargaining rights with respect to changes in matters, which are mandatorily negotiated under the law. (Emphasis added)

Conclusions From the Record

1. The 2007-2009 Collective Bargaining Agreement (CBA) between the State of Washington and Teamsters Local No. 117 was in full force and effect at the time of the grievance, June 18, 2009.
2. The dispute involving Danny Ahrens-Overtime not offered according to the CBA is properly before the Arbitrator for final and binding resolution.
3. The dispute involved in this grievance is incorporated primarily in Article 3 and Article 17 of the CBA.
4. The CBA between the parties is very specific and unambiguous as to how overtime is applied and scheduled. There is specific language in the CBA covering the issue in dispute. In this case, it can be taken to mean "clear, exact and unambiguous." The dictionary definitions of the words regarding the usage of the words stress the concept of clarity and precision. It also appears much of the language in the CBA relative to this dispute has been in the CBA for several negotiations.

5. There is no dispute that the assignment of Sergeant Teachout to ERT training created an overtime situation.
6. The critical, compelling testimony in this case is the testimony of Captain Reetz and the Chief negotiator for the Union Representative, Michael Beranbaum.
7. Captain Reetz was the officer who determined how Sgt. Teachout would be assigned for ERT training. His testimony elicits several primary and material facts i.e. **TR 120**: *“We provide training monthly. The training is mandatory. It is specialized training for those team members. They will do defensive tactics, higher levels of defensive tactics. They will use batons for baton training. There’s extra training. The special impact munitions, those are the extra things that – and skills that they have to learn that are above and beyond some of the regular duties as other correctional officers.”*
TR 121: Q: *“So once you have the date selected for the training, how do you schedule team members to go to the training?”*
A: *“First I look at our relief pool and see what we can use that’s in the relief pool. If I don’t have the relief pool available, I look at the on-call, and I use on-call team. Those are the intermittent on-call staff. And then if there’s no on-call staff available, then overtime.”* (Emphasis added)
8. Mr. Bernbaum, Director of Corrections and Law Enforcement for Local #117, who was directly involved in negotiations as Chief Negotiator for the Union, is a knowledgeable, credible witness whose testimony elicits evidentiary facts, primary facts and material facts, i.e. **TR 88**:
Q: *“So the management rights clause gives them – you’ve heard testimony here today about using reliefs, straight-time relief so that they don’t incur overtime. That is a management right, correct?”*
A: *“Correct. And it’s a right that’s also specifically spelled out in the labor agreement.”*
Q: *“Okay. So once management determines overtime is necessary, they have that right to determine that as well?”*
A: *“Yes.”*
Q: *“And that’s in 17.1 (A). Doesn’t it state in this article, “The employer will,” and then it has two things that the employer will do?”*
A: *“Yes”.*
Q: *“The word is ‘may’, is it?”*
A: *“No, it is not.”*
Q: *“You’ve heard testimony from our shop steward that this procedure must be followed in the event of overtime. Is that your understanding as well – that there is a set procedure that must be followed in the assignment of overtime?”*
A: *“Yes.”*
Q: *“Is that how you negotiated this language?”*
A: *“Yes.”*
Q: *“Now, if you look in Subsection 2 on the top of Page 43, doesn’t it say that the employer will ‘assign overtime as voluntary or mandatory’?”*
A: *“Yes, as set forth in this agreement.”*
Q: *“And what does that language mean?”*
A: *“That means that once you determine that there’s going to be overtime, you go to the language and process for assignment of overtime. First you go through D, which is the assignment of voluntary overtime. Then you go through E, which is the all-call process. And then F, which is ultimately the mandatory overtime process.”*
Q: *“This language ‘voluntary or mandatory’, does that mean that management can choose between the two right up front?”*
A: *“No. It means that once they determine there’s a need for overtime and it’s positions that have to be filled, they’re going to go through this process.”* (Emphasis added)

Q: “*And that’s your understanding of the intent of this language as a negotiator?*”

A: “*Yes.*” (Emphasis added)

9. The record in this case does not establish any evidence which requires Sgt. Teachout’s assignment as being necessary for safety or security reasons. This after-the-fact contention is conflicted by the fact that Sgt. Ahrens’ assignment clearly would have alleviated any concerns about security. The Captain’s own testimony that relief pool or on-call people would have been used to fill in if available contradicts any need for ERT members to be available on overtime June 18, 2010.

10. The record is replete with evidence that Article 17 was not followed in the assignment of Sgt. Teachout to ERT training.

ARTICLE 17 – OVERTIME

17.1 Determination and Assignment of Overtime

A *Right to Assign*

*The Employer has the right to require an employee to work overtime. When the Employer determines that overtime is necessary and determines to assign such overtime to a bargaining unit employee, **the Employer will:***

1. Identify the job classification to be assigned the overtime, the number of positions requiring overtime, the specific post assignments and the anticipated duration of the overtime.

*2. **Assign overtime as voluntary or mandatory, as set forth in this Article.*** (Emphasis added)

Captain Reetz’s assignment of Sgt. Teachout violated Article 17.1, A. 1. and 2..

11. If the good Captain wanted to pursue a different method of overtime assignment and he could justify a deviation or change, he had to pursue such need through the appropriate process.

12. It appears by requiring Sgt. Teachout to work in excess of eight (8) hours for training and working his regular shift for a total of sixteen (16) hours on June 18, he has now incurred additional overtime because Sgt. Teachout will have worked in excess of forty (40) hours in his (any)workweek. 17.3, 3.

Discussion

In this case, while it can become extremely complicated by the interpretations of the clear and unambiguous language in the CBA as to the application of overtime pay, there can be no dispute that Captain Reetz did not comply with the parties’ agreement and management’s commitment as to how they will assign necessary overtime specifically detailed in Article 17.

The line between stability and safety has been somewhat blurred by certain testimony in the case, that is, between practices that are required for safety and security purposes and those that are not. This distinction must be drawn by the Arbitrator on the basis of the CBA and evaluation of the record.

It should be clear to everyone involved in contract negotiations that in the interpretation of the CBA when

clear language of the contract points in one direction and the argued practice points in another, the Arbitrator is required to base his decision on the clear, unambiguous language in the Agreement, language that clearly outlines the steps applicable when overtime is available. It is particularly important to note that the bargaining parties explored and agreed to a lengthy and detailed Article regarding the assignment of overtime as well as how it can be avoided. Captain Reetz appears to be a dedicated, capable officer. If he is concerned that the specific overtime and scheduling language in the CBA compromises the security and safety of CBCC and desires to change agreed-upon Articles, he has to comply with Article 5 – 5.1 and Article 44 and then pursue such proposed changes as mandatory subjects to be bargained by the appropriate, designated parties.

Decision and Award

1. The Union's grievance is sustained as it relates to CBCC.
2. The grievant, Danny Aherns, will be awarded such make-whole remedy as appropriate in accordance with Article 17 – 17.8 of the CBA.
3. The Arbitrator will retain jurisdiction over this issue for sixty (60) days from the parties' receipt of this decision.

Respectfully, _____
John R. Swanson, Arbitrator

DATED: June 30, 2010