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ATTORNEY GENERAL'S OFFICE
SPOKANE

IN ARBITRATION

BEFORE

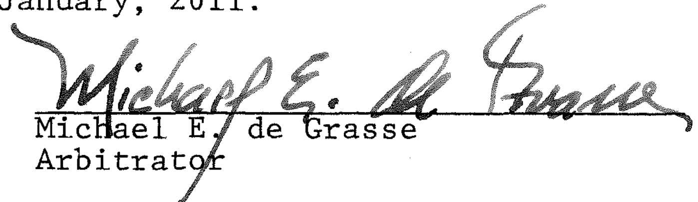
MICHAEL E. de GRASSE, ARBITRATOR

STATE OF WASHINGTON, DEPARTMENT) AAA No.: 75-390-00118-10
OF SOCIAL AND HEALTH SERVICES,)
)
Employer,)
)
and) AWARD OF ARBITRATOR
)
WASHINGTON FEDERATION OF STATE) (Spilker Grievance)
EMPLOYEES,)
)
Union.)

The Employer did not violate the collective bargaining agreement of the parties when it refused to pay the grievant three hours of penalty pay for remaining on duty while awaiting his replacement at the end of an overtime shift voluntarily worked by the grievant on June 13, 2009. Therefore, the grievance is denied.

In accordance with the stipulation of the parties, the arbitrator shall retain jurisdiction of this case for a period of sixty days from the date of this award to resolve any questions concerning its implementation. Within that sixty-day period, either party may give notice of an issue requiring resolution by the arbitrator.

Dated this 6th day of January, 2011.



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STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Employer, and WASHINGTON FEDERATION OF STATE EMPLOYEES, Union.	AAA No.: 75-390-00118-10 OPINION OF ARBITRATOR (Spilker Grievance)

The arbitrator was selected by the parties in accordance with the procedures of the American Arbitration Association and the terms of the collective bargaining agreement.

A hearing was held in Spokane, Washington on November 4, 2010. The Employer was represented by Donna Stambaugh, Senior Counsel/Assistant Attorney General. The Union was represented by Gregory M. Rhodes, Younglove & Coker, of Olympia, Washington.

Testimony was taken under oath or affirmation and exhibits were received. Witnesses were not sequestered.

At the outset of the hearing, the parties stipulated that: (1) the grievance is arbitrable; (2) the grievance is properly before this arbitrator; (3) this arbitrator is authorized to resolve the grievance. The parties also agreed that the arbitrator would retain jurisdiction of this case for a period of 60 days following the award to resolve any controversy concerning its implementation.

The hearing concluded on November 4, 2010. In lieu of oral closing argument, the parties elected to advocate their positions by written posthearing briefs (also denominated written closing argument or written closing statement). The briefs were received in compliance with the parties' schedule. This case was deemed submitted for a decision on December 28, 2010.

An award has been rendered denying the grievance. This opinion is not part of that award. Rather, it is merely the arbitrator's rationale.

ISSUES PRESENTED

The parties did not stipulate concerning the issues. Nevertheless, they are clear:

1. Did the Employer violate the collective bargaining agreement when it refused to pay the grievant three hours of penalty pay for holding over for one-half hour awaiting his replacement at the end of an overtime shift he voluntarily worked on one of his scheduled days off?

2. If so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS

42.19 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 notice for such work will be considered callback and will result in a penalty of three (3) hours of pay at the basic salary in addition to all other compensation due. This penalty will apply to each call.

2. The Employer may cancel a callback notification to work extra hours at any time, but cancellation will not waive the penalty cited in this Section.

These provisions will not apply to the mid-shift interval in a split shift and an employee called back while in standby status.

B. Work on Scheduled Days Off or Holidays
The Employer may assign employees to work on a day off or holiday. Overtime-eligible employees will be notified of such assignment at least prior to the employees' normal quitting times on their second workday preceding the day off or holiday (except Sunday, when it is within the assigned work shift).

1. If the Employer does not give such notice, affected employees will receive a penalty payment of three (3) hours pay at the basic salary in addition to all other compensation due them.

2. The Employer may cancel work assigned on a day off or holiday. However, if the Employer does not notify affected employees of such cancellation at least prior to their normal quitting times on their second workday preceding the day off or holiday work assignment, affected employees will receive a penalty payment of three (3) hours pay at the basic salary.

These provisions will apply to employees on paid leave status.

FACTS AND CONTENTIONS

The grievant, a Psychiatric Security Attendant at Eastern State Hospital, seeks overtime work assignments. Thus, he requested and was assigned to work a shift on Saturday, June 13, 2009. This shift occurred on one of the grievant's scheduled days off. Accordingly, he was paid at the overtime rate for all time on duty on June 13th. At the end of the June 13th shift, the grievant was not relieved, apparently owing to confusion about where the relief employee was to report; the grievant was at

Sacred Heart Medical Center in Spokane with a patient--not at his usual work station on the Eastern State Hospital campus in Cheney. As a result of the relief employee's tardiness, the grievant remained on duty for one-half hour past his expected quitting time.

All agree that the grievant was properly paid for time actually spent on duty on June 13, 2009. All agree that the grievant was obliged to remain on duty until relieved. All agree that the grievant's obligation to remain on duty until relieved was acknowledged on and before June 13, 2009, as an established requirement of the grievant's position. The parties disagree concerning the effect of certain contractual penalty pay provisions as applied to the circumstances of June 13, 2009.

In the Union's view, the grievant was entitled to three hours penalty pay pursuant to Section 42.19.B of the parties' collective bargaining agreement. The Official Grievance Form (Union Ex. 1) specifically charged that the Employer "violated, misapplied, and/or misinterpreted: 42.19(B-1)." The factual basis for the grievance is also set forth in the Official Grievance Form:

> Mr. Spilker was working a prearranged overtime shift on his day off at a remote work location. Near the end of his shift, when no one came to relieve him Mr. Spilker contacted Eastern State Hospital asking about his relief. He was told to stay until

> properly relieved (someone was on the way).
>
> This call and conversation constituted a request for Mr. Spilker to work overtime on his day off and callback pay should have been paid.

At the hearing, the Union also asserted that Section 42.19.A supports its position.

The Union contends that past practice, bargaining history and plain contract language show that the grievance should be sustained with an award requiring the Employer to make the grievant whole. The Union proved past instances where employees engaged as was the grievant on June 13, 2009, received three hours of penalty pay. Bargaining history and a Personnel Appeals Board decision were adduced by the Union in support of its contention. Finally, the Union asserted that the language of Section 42.19.A and 42.19.B, when read together, "supports the established practice." (Union Brief at 6)

Each point advanced by the Union is totally rejected by the Employer. Mainly relying on an analysis of the disputed contract language, the Employer contends that Section 42.19.A and Section 42.19.B allow no penalty pay to the grievant in the circumstances of June 13, 2009. The Union's argument based on past practice involves incidents that the Employer disavows as isolated and a mistaken application of the contractual provisions in question. The Employer urges denial of the grievance which, if sustained,

would, it argues, lead to a result contrary to the parties' purpose and intent.

RATIONALE

Resolving the substantive issues seems to turn on the interpretation and application of Section 42.19.B. That provision was the only section of the parties' agreement cited by the Union in the Offical Grievance Form giving rise to this case. Yet, at the hearing, Union counsel, in colloquy, asserted that Section 42.19.A also applies to the grievant's situation. In its posthearing brief, the Union cited Section 42.19.A as buttressing the Union's preferred reading of Section 42.19.B. Thus, both sections should be considered here.

By its own terms, Section 42.19.A can have no direct application to this case. That section imposes a penalty of three hours pay when the Employer fails to notify an employee prior to the regular scheduled quitting time to: (1) "return to work after departing the worksite;" or (2) "change the starting time of their next scheduled workshift." Neither situation is found in this case. Therefore, the analysis must shift to Section 42.19.B.

The first sentence in Section 42.19.B recognizes the Employer's power to require bargaining unit employees "to work on a day off or holiday." The sentences following the first one in Section 42.19.B limit the Employer's power to assign work on a day off or holiday. Specifically, the Employer must notify affected employees of

the assignment in advance. If the Employer fails to give the required notice, affected employees are entitled to "to a penalty payment of three (3) hours pay at the basic salary in addition to all other compensation due them." Undisputed facts show that the grievant was not an "affected" employee as determined by Section 42.19.B at the end of his shift on June 13, 2009.

Initially, it must be noted that the grievant was not required by the Employer to report for work on a holiday or scheduled day off. The grievant sought the overtime work assignment on June 13th, and reported for work without objection on that morning. The Union does not contend that working the basic shift of June 13, 2009, for which the grievant had volunteered, entitled him to penalty pay. Rather, it is the holdover of one-half hour while awaiting relief that purportedly triggers the penalty that the Union urges should be imposed on the Employer.

The Union admirably advocates for the grievant's benefit, but it misconceives the purpose and plain language of Section 42.19.B. The one-half hour holdover by the grievant was neither involuntary nor without notice. The parties recognized that the grievant was required to remain on duty until relieved. That "assignment" was a job requirement with respect to which no further notice was necessary on June 13, 2009. The grievant in fact knew

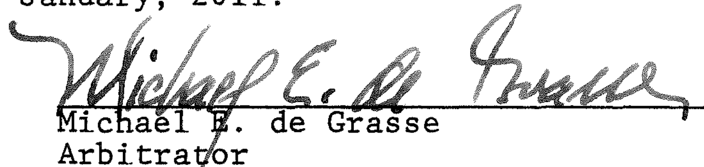
and by law was charged with knowing that he could be required to remain on duty until relieved. Therefore, the one-half hour spent by the grievant on duty awaiting his relief was not work assigned by the Employer on the grievant's scheduled day off without proper notice.

As the substantive issue has been resolved on the basis of clear and unambiguous contract language, there should be no resort to bargaining history or practice. Although bargaining history or past practice may be used to interpret ambiguous contractual provisions, none is found here. The examples of payments by the Employer to employees in circumstances like the grievant's lack the element of mutual acceptance by the parties to modify the clear meaning of Section 42.19.B. Therefore, based on the language of the parties' agreement and the lack of well established and mutual, countervailing practice, the grievance should be denied.

CONCLUSION

On the basis of the evidence and the collective bargaining agreement of the parties, the grievance should be sustained.

Dated this 6th day of January, 2011.



Michael E. de Grasse
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BEFORE

MICHAEL E. de GRASSE, ARBITRATOR

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Employer, and WASHINGTON FEDERATION OF STATE EMPLOYEES, Union.	AAA No.: 75-390-00118-10 AMENDMENT OF OPINION (Spilker Grievance)

The conclusion of the opinion in this case is amended as follows:

The conclusion of the opinion dated January 6, 2011, is amended so that the word "sustained" is replaced by the word "denied."

Dated this 13th day of January, 2011.

Michael E. de Grasse
Arbitrator