

IN ARBITRATION BEFORE  
MICHAEL E. CAVANAUGH, J.D.

DEPARTMENT OF CORRECTIONS, State )  
of Washington, )  
Employer, ) ARBITRATOR'S  
and ) DECISION AND AWARD  
TEAMSTERS DRIVER, SALES, and )  
WAREHOUSE LOCAL UNION NO. 117, )  
Union )  
(WSP Voluntary Overtime Assignment) )

**For the Union:**

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I. INTRODUCTION

The Union alleges that the Department of Corrections violated the overtime provisions of the parties' Agreement by restricting correctional officers' assignment to voluntary overtime shifts during a lockdown at the Washington State Penitentiary beginning in March 2006. The Department contends that, under the management rights language of the Agreement dealing with "emergencies," it had the right to craft special overtime assignment policies for the duration of the lockdown.

At a hearing held March 23, 2007 in Walla Walla, Washington, the parties had full opportunity to present evidence and argument, including the opportunity to cross-examine each other's witnesses. Simultaneous post-hearing briefs were filed by mail postmarked May 8, 2007, and with my receipt of the briefs a few days later, the record closed. Having carefully considered the evidence and argument, I am now prepared to issue the following Decision and Award.

## II. STATEMENT OF THE ISSUE

The parties agreed that the issue before me should be stated as follows:

Did the employer violate the contract when it set aside the normal maximum overtime limitations due to a lockdown and then assigned voluntary overtime to less senior volunteers who had not exceeded the normal maximum overtime limitations ahead of more senior employees who had exceeded the normal overtime limitations? If so, what is the appropriate remedy?

Although the statement of the issue varies slightly in the parties' briefs, the variation does not appear to be substantive, and I have set forth the issue as it was presented to me in typewritten form at the hearing itself, which both parties agreed was the issue to be decided.

## III. FACTS

The Department operates the Washington State Penitentiary (WSP) in Walla Walla, one of the largest penal institutions in the state and one which houses offenders of all security levels. The Union represents a bargaining unit of correctional officers and sergeants employed at the prison. In March 2006, Superintendent Richard Morgan placed the prison on lockdown as a result of intelligence indicating that a group of prisoners intended to engage in violent assaults, perhaps against staff, to resist new security

measures instituted as a result of increasing incidents of violence between offenders. Morgan Test. As a result of the lockdown, which Superintendent Morgan testified was designed to show the inmates who was in control, prisoners were confined to their cells. Consequently, meals had to be delivered to the cells by staff (instead of having the inmates eat in a dining facility), and inmates had to be escorted to medical and other appointments at a higher level of frequency than would be the case in the absence of lockdown.

The evidence established that the staff was already working a large amount of overtime in early 2006, and the lockdown was expected to require even greater overtime. In addition, the prisoners were upset about having their movements restricted. Therefore, Superintendent Morgan determined that he faced an “emergency” within the meaning of Article 3, Section 3.1(L) that authorizes the Department to “take any and all actions as may be necessary to carry out the mission of the Department in emergency situations.”<sup>1</sup> In order to meet that emergency, the Superintendent determined that he needed to suspend application of the normal rules of voluntary overtime assignment under which an employee is ordinarily not to be compelled *or allowed* to work more than two consecutive days of overtime. Article 17.1(J)(2). Superintendent Morgan believed that the “emergency” situation as a result of the lockdown permitted him to modify the application of Article 17.1(J), and did so by allowing staff to work voluntary overtime more than two consecutive days for the duration of the lockdown, but only so far as

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<sup>1</sup> The Union does not contest the characterization of the lockdown as an “emergency.” As the Department concedes, however, emergency powers – and all the other “management rights” listed in Article 3 – are “subject to the provisions of this agreement and federal and state law.” Article 3.1, introductory paragraph. Dept. of Corrections/Teamsters, Local 117 (Voluntary OT)

necessary to prevent *mandatory* overtime.<sup>2</sup> Based on prior experiences, Morgan expected the staff would pull together as a team at the outset of the lockdown, but that as the situation dragged on, staff would overextend themselves physically and emotionally, either because of their dedication to the institution or because of pressing financial obligations which would make overtime attractive.

The Union's evidence established that under the Superintendent's approach, many employees worked more than two consecutive days of overtime because there were fewer volunteers than available posts. Rather than being able to exercise their seniority to choose the preferred assignments, however, some senior staff member were forced to accept less desirable posts while those with lesser seniority (who had not yet worked two consecutive overtime days) took the assignments perceived as more desirable.<sup>3</sup> At least one officer apparently simply stopped volunteering for overtime under these circumstances because, while he was willing to work overtime for a number of consecutive days, he did not want to be stuck with the most demanding assignments while junior employees manned the more attractive posts. If that attitude was shared by others,<sup>4</sup> the result would be an increase in the level of mandatory overtime, a result the parties agree is undesirable.

#### IV. DECISION

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<sup>2</sup> In the absence of an emergency, staff would sign up on a voluntary overtime list. Specific overtime assignments would then be selected by staff on the basis of their seniority, but only those who had not yet worked two consecutive days of overtime were eligible to volunteer. If assignments remained after the list had been exhausted, the supervisor would issue an "all call" to those on shift. Those volunteers would be allowed to choose assignments of a first come, first served basis. If there were insufficient volunteers to fill all posts, mandatory overtime would be assigned in reverse order of seniority. The parties agree that it is preferable that overtime workers be volunteers, if at all possible, because volunteers are more likely to handle their responsibilities with the right attitude in a volatile environment, limiting potential safety risks.

<sup>3</sup> For example, most officers view the "tower" assignments as desirable and perhaps less demanding than, say, assignment to the maximum security section.

<sup>4</sup> The extent to which other officers felt the same way is unclear on the record before me.

A. The Merits

Neither party presented bargaining history or other extrinsic aids to interpretation of the relevant contract language, so I am left with the language itself:

*Except in an emergency, an employee may not be compelled or allowed to work:*

\* \* \*

More than two (2) consecutive days of overtime. A day of overtime will be considered two (2) hours or more.

Article 17.1(J) (emphasis supplied). Viewed in isolation, this language seems clear.

Normally, an employee cannot be compelled or allowed to work more than two consecutive days of overtime, i.e. both mandatory and voluntary overtime are limited to two consecutive days. The straightforward effect of the introductory phrase, however, seems to reverse the rule, i.e. in an *emergency*, an employee *may* be compelled *or* allowed to work more than two consecutive days of overtime. It is possible, I suppose, to read the “may be allowed to work overtime more than two consecutive days” as permissive, i.e. as a matter of choice for the Superintendent under the “emergency” powers of the management rights language. Given that the normal rule is mandatory, however – by that I mean that in the absence of an emergency, it is clear that it is not a matter of *choice* whether employees may be compelled or allowed to work more than two days of overtime in succession, it is *mandatory* that they may not be – I think it is more reasonable to assume that the parties must have intended that rule in the reverse situation would also be mandatory. Thus, under Article 17.1, in an emergency as defined in the Agreement, the Department has the right to assign mandatory overtime in excess of two consecutive days, and the employees have a *right to work* voluntary overtime more than

two consecutive days. Therefore, I find that the language of Article 17.1(J) supports the Union's position that the Superintendent did not have the right to restrict the assignment of voluntary overtime because in an "emergency," the rules of Article 17.1(J) are simply inapplicable.

The Department's argument to the contrary is that the management rights language gives the Department the right to "take any and all actions as may be necessary to carry out the mission of the Department in emergency situations." Article 3.1(L). But, as the Department concedes, that right is "subject to the provisions of this agreement." *Id.* Given the specific treatment of voluntary overtime in Article 17.1(J), including an express provision that those rules do not apply in cases of "emergencies," I find that the management rights language must give way to the specific language of the overtime article of the Agreement.

While perhaps not necessary to the decision, I also note that the Superintendent had other contractual means to deal with the potential that individual corrections officers would exhaust themselves and present a safety hazard. Article 16.3(C)(1)(i) gives the Department the right to remove an officer from scheduled days or hours if the Employer deems that "the employee [is] unable to perform satisfactorily as a result of excessive overtime hours." While it is not entirely clear to me that this language deals directly with the issue of an employee's right to volunteer for a specific overtime shift or assignment, the principle it establishes is a relevant consideration here, and in any event, the Union concedes that the Department would have the right to deny an overtime assignment on that basis under the safety provisions of Article 13, with or without the language of Article 16.3. Union brief at 14.

I hasten to add that it is clear to me the Superintendent acted with the best of intentions in modifying the overtime assignment procedure during the lockdown, but as Arbitrator I necessarily deal with contractual agreements, not good intentions. Interpreting the contract as written, and without extrinsic interpretive evidence pointing in a different direction, I find that the voluntary overtime assignment policy adopted by the Superintendent during the lockdown violated Article 17.1(J) of the Agreement.

#### B. Remedy

Turning to remedy, the Union argues that I should award back pay to all officers who can establish that they were passed over for an overtime assignment during the lockdown as a result of the Department's failure to give proper effect to the introductory language of Article 17.1(J), i.e. the "except in case of emergency" language. The Department contends, however, that I can only order a remedy for the two individual officers who signed the grievance prior to or at the Step 1 hearing, i.e. Johnson and Estes. Exh. J-2. The Employer's argument in this regard flows from the language of Article 9.1(E)(2)(g) providing that "affected employee(s) must sign the grievance prior to or at the Step 1 hearing." The Union concedes that only Estes and Johnson actually signed the formal grievance, but counters that the grievance and arbitration procedure expressly countenances group grievances filed by the Union on behalf of bargaining unit members, and yet nothing in the Agreement provides that a grievance must be signed by *every* affected employee. Nor, according to the Union, does the Agreement provide that the failure to meet the signature requirement, whatever it is, voids a claim to a specific remedy by those members of the group who have not signed the grievance.

Once again, neither side has offered bargaining history or other extrinsic interpretive aids, so I interpret the language, in context, as written.<sup>5</sup> Clearly, the Agreement contemplates that the Union may initiate group grievances. Article 9.1(B) (“The Union may file grievances on behalf of an employee or on behalf of a group of employees”).<sup>6</sup> As noted above, however, in the section of the Agreement describing the information a grievance *must* include, item (g) provides:

The signature of the affected employee(s), the business representative or shop steward. *The affected employee(s) must sign the grievance prior to or at the Step 1 hearing.*

Exh. J-1 at 14, Article 9.1(E0(2)(g) (emphasis supplied). From these two provisions, taken together, I conclude that while the Union may *initiate* a grievance with the signature of the business representative or a shop steward, whether on behalf of an individual or on behalf of a group of employees, no later than the Step 1 hearing, the grievance must be *signed* by the “affected employees.”

That leaves the question, however, precisely who are the “affected employees” who are required to sign the grievance? Unfortunately, the Agreement does not expressly define the term. The Employer argues, at least implicitly, that an “affected employee” is anyone who would be eligible to receive a remedy if the grievance is granted. That construction seems to me to be unreasonably broad. Some group grievances, for example, will impact every member of the bargaining unit (or readily identifiable sub grouping such as a shift) in precisely the same way. Take, for example, a dispute regarding a change in a shift start time or whether a specific holiday is recognized under the

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<sup>5</sup> The Union makes several arguments based on general arbitral principles reflected in the *Elkouri* text. Union Brief at 16-18. I found the discussion helpful in evaluating the issues in this case, but in the end, it is the quite specific language of this Agreement that must control here.

<sup>6</sup> *See also*, Article 9.1(K) providing that a maximum of three grievants are permitted to attend a grievance meeting during the processing of “group grievances.”



Agreement. In those cases, requiring the Union to gather the signature of each and every “affected employee” would be an empty formality serving no constructive purpose in advancing identification of the precise nature of the contractual dispute and the relevant scope of the considerations pertinent to finding a resolution.<sup>7</sup> In those situations, the signature of the business representative or shop steward may well suffice given the parties’ express recognition of the viability of group grievances.

This dispute is of a different kind, however. Whether an employee was “affected” by the Employer’s violation of the Agreement depends on the specific facts concerning each individual, e.g. did the officer volunteer for overtime? Were there in fact specific occasions on which the officer was denied one or more overtime shifts which would have been available had the shifts been offered on a seniority basis without limiting voluntary overtime to two consecutive shifts? Was the officer qualified for specific available assignments? Had the officer worked so many overtime shifts in a row that it would have been reasonable for the Department to deny a specific overtime assignment? Each of these questions, and no doubt others that would need to be asked, involve individualized factual determinations. What is true of one officer may not well be true for any other. In addition, these kinds of determinations can be made much more reliably at or near the time of the dispute rather than after an arbitrator has ruled on the alleged violation over a year later. Moreover, the identification of these issues early in the grievance and

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<sup>7</sup> See, e.g. the language from Elkouri quoted by the Union (“One purpose of [signature] requirements is to aid the employer in evaluating and responding to the grievance”). Union Brief at 16, Elkouri at 210-11.  
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Arbitration process facilitates constructive labor relations by making clear the extent of the alleged violation and what is necessary to remedy it.<sup>8</sup>

In the absence of such a definition of “affected employee(s),” and in the absence of bargaining history or other indicators of what the parties intended, I must attempt to determine what the parties reasonably should have understood the agreed language to mean. Usually that meaning will parallel the common understanding of a term, either within society as a whole, or in the case of terms of art in the labor relations field, within the realm of labor relations practitioners. In that light, it seems to me that “affected employee” would be commonly understood as an employee who had been injured by the alleged contractual violation, whether judged by lay standards or by the standards of labor relations professionals.

Given the context, then, in which the parties have agreed that certain “information” *must* be included in the grievance before the Employer has an obligation to process it,<sup>9</sup> and given Article 9.1(E)’s apparent purpose of requiring the Union to set forth the alleged scope of the contractual violation in a manner that will assist the Employer in estimating its exposure by identifying the employees claiming to be injured, I find that the signatures of “affected employees” is a necessary prerequisite to an individual remedy in this case.<sup>10</sup> In other words, in adopting the language of Article 9.1(E) and (F), the

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<sup>8</sup> For example, it appears that the Union might argue in this case that Officer Gonzales was deterred from volunteering for overtime because the Superintendent’s approach deprived him of the opportunity to exercise his seniority to select a desirable assignment. Perhaps others would make the same claim. While that is a plausible argument, without a signature or some other procedural requirement, the Employer would have no way of identifying precisely who might fall into that category.

<sup>9</sup> See, section 9.1(F) (“The Employer will not be required to process a grievance until the information required by Subsection 9.1E is provided”).

<sup>10</sup> There may well be cases in which the Union makes substantial efforts to gather the individual signatures of “affected employees,” yet fails for excusable reasons. In such a case, the result might be different. But there is insufficient evidence of that circumstance here.

parties have chosen to make specific forms of information exchange and clarification of claims an integral part of their grievance and arbitration procedure.

Based on these considerations, I find that the individualized remedy here must be limited to the two employees who actually signed the grievance, i.e. Exh. J-2.<sup>11</sup> In reaching that conclusion, I note that the Employer apparently complied with the provisions of Article 9.1(F):

The Employer will not be required to process a grievance until the information required by Subsection 9.1E is provided. *Grievances which do not meet the above conditions, or are otherwise unclear, will be identified by the Employer and referred back to the Union for clarification.* Clarification will be provided, in writing, within five (5) calendar days of receipt of the request for clarification.

Article 9.1(F) (emphasis supplied). The record establishes that the Employer, as contemplated by Article 9.1(F), did refer this grievance back to the Union for signatures of the “affected employees” on March 29, 2006, one week after the grievance was filed. *See*, Exhs. J-2 and J-4. Had the Department not done so, the result might be different.

### C. Conclusion

The grievance is sustained. The two employees who actually signed the grievance, i.e. Exh. J-2, shall receive a make-whole remedy for any missed shifts, that is, shifts for which they signed the voluntary overtime list but were denied an available assignment based on application of the Superintendent’s voluntary overtime policy during the lockdown. I will reserve jurisdiction to resolve any disputes in connection with implementation of the remedy awarded that the parties are unable to resolve on their own.

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<sup>11</sup> I note, however, that all employees will benefit prospectively from clarification of the contractual interaction between the management rights “emergency” language and the specific provisions regarding voluntary overtime. In that sense, it remains a “group grievance.”

**AWARD**

Having carefully considered the evidence and argument, I hereby render the following AWARD:


1. The grievance is sustained; the Department's policy on assignment of voluntary overtime during the lockdown violated Article 17.1(J) of the parties' Agreement;

2. The two affected employees who signed the grievance at Step 1, Estes and Johnson, are entitled to a make-whole remedy for overtime shifts for which they signed the voluntary overtime list but were denied an available assignment based on application of the Superintendent's voluntary overtime policy during the lockdown; under the specific circumstances of this case, employees who did not sign the grievance are not entitled to an individual make-whole remedy;

3. The matter is remanded to the parties for an attempt to agree upon implementation of the remedy awarded to Estes and Johnson; the Arbitrator retains jurisdiction solely for the purpose of resolving any disputes that may arise in connection with implementation of that remedy; either party may invoke this reserved jurisdiction by fax sent or letter postmarked (original to the Arbitrator, copy to the other party) within sixty (60) days of the date of this Award, or with such reasonable extensions as the parties may mutually agree.

4. Pursuant to the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 4<sup>th</sup> day of June, 2007

  
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Michael E. Cavanaugh, J.D.  
Arbitrator