

IN THE MATTER OF ARBITRATION BETWEEN

Law Enforcement Labor Services, Inc., Local No. 33)	BMS Case No. 07– PA– 0461
)	
“Union” or “LELS”)	Issue: Holiday Premium Pay
)	
and)	Hearing Site: St. Cloud, MN
)	
)	Hearing Date: March 20, 2008
)	
The City of St. Cloud, Police Department, St. Cloud, MN)	Briefing Date: April 11, 2008
)	
“Employer” or “City”)	Award Date: May 15, 2008
)	
)	Mario F. Bognanno, Labor Arbitrator

JURISDICTION

The above-captioned matter was heard on March 20, 2008 in St. Cloud, Minnesota pursuant to Article VIII of the parties’ 2006–2008 Memorandum of Understanding (hereafter Collective Bargaining Agreement, CBA). (Union Exhibit 1) The parties appeared through their designated representatives. By stipulation the parties waived the 30–day decisional period that is referenced in the CBA, Section 8.1 e) 2. Each party was afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. Post-hearing briefs were exchanged on April 11, 2008 and thereafter this matter was taken under advisement

APPEARANCES

For the Employer

Gary Gustafson	Assistant City Attorney
Laura Stiegel	Accounting Clerk, SCPD

Dede B. Gaetz

Human Resources Director

Sue Stawarski

Assistant Chief, Police Department

For the Union

Marylee Abrams

General Counsel

Dan Greenwald

Police Officer and Grievant

I. BACKGROUND AND FACTS

The Union and Employer are Law Enforcement Labor Services, Inc., Local No. 33 and City of St. Cloud, Police Department, St. Cloud, Minnesota, respectively. The Union and Employer are parties to a CBA covering police officers but, excluding police sergeants, that is effective through December 31, 2008. (Union Exhibit 1)

The facts giving rise to the instant dispute are not contested. Under Section 15.1 in the CBA, Labor Day is a paid holiday and, coincidentally, Labor Day is also “move-in day” for on-campus student housing residents at St. Cloud State University, St. Cloud, MN. Further, on or about this same day, off-campus housing residents are also returning to the University. In recent years, the fall term’s onslaught of student has prompted parties, some quite large and noisy, even riotous, and some have resulted in underage drinking, disorderly conduct, DUI, littering, public urination and so forth. Thus, in recent years the Police Department has seen fit to increase police presence in the City on Labor Day/move-in day by mandating that most of its police officers work on the Labor Day holiday and that they work overtime hours, *inter alia*.

Specifically, in 2006 and 2007 most of the City's police officers were required to acknowledge in writing that they had received Special Order 06-38 and Special Order 07-30, respectively. Said Special Orders identified the police officers and the "unique" 12-hour shift each was assigned to work on the Labor Days in question. (Union Exhibits 3, 4, 6, 7, 11 and 12; and Employer Exhibits 6 and 9) These 12-hours shifts are characterized as being "unique" because Section 11.2 in the CBA defines the "basic work day" as either an 8- or 10-hour shift. Moreover, Section 12.1 provides that police officers who are assigned to work 8- and 10-hour shifts shall receive overtime compensation at the rate of one and one-half times their regular rates of pay for all hours in excess of 8 and 10 hours per day, respectively.

The fighting issue in this case has to do with the pay police officers received for working the 2006 and 2007 Labor Day holidays, the computation of which necessitated interpreting the holiday and overtime pay provisions in the CBA. On both of the 2006 and 2007 Labor Days, the Employer computed the appropriate daily rates of pay as follows: **Eight Hour Shift** – Police officers who worked an 8-hour shift were paid 8 hours of holiday pay plus time and one-half for the 12 hours worked on the holiday for a combined total of 26 hours at straight time pay; and **Ten Hour Shift** – Police officers who worked a 10-hour shift were paid 10 hours of holiday pay plus time and one-half for the 12 hours worked on the holiday for a combined total of 28 hours at straight time pay. (Union Exhibits 8 and 9) In contradiction, the Union alleges that the daily rates in question should have been computed as follows: **Eight Hour Shift** – Police officers who worked

an 8–hour shift should have been paid 10 hours of holiday pay plus time and one-half for the 12 hours worked on the holiday plus time and one-half for 4 hours of overtime for a combined total of 34 hours at straight time hours; and **Ten Hour Shift** – Police officers who worked a 10–hour shift should have been paid 10 hours of holiday pay plus time and one-half for the 12 hours worked on the holiday plus time and one-half for 2 hours of overtime for a combined total of 31 hours at straight time pay. (Union Exhibits 8 and 9).

The Union filed a grievance challenging the Employer’s method of computing pay for the 2006 (and later the 2007) Labor Day holiday in the fall of that year. On September 18, 2006, the City denied the grievance. The parties were unable to resolve this grievance and on November 9, 2006, the matter was appealed to the instant arbitration. (Joint Exhibit 1) At the arbitration hearing the Union requested as remedies 8 and 3 hours of straight time pay for police officers who worked the 8–hour shift and 10–hour shift for each of the 2006 and 2007 Labor Days, respectively.

II. STATEMENT OF THE ISSUE

The undersigned framed the issue in this case as follows:

Did the Employer violate Article 15 (Holiday) and/or Article 12 (Overtime) in the CBA during 2006 and 2007 when it scheduled police officers to work a special 12-hour holiday shift? If so, what is an appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

Article XI – Work Schedule

11.2 Work Day and Work Week. The basic work week for sworn peace officers shall be an average of 40 hours; the basic work day for officers working an eight-

hour shift shall be eight consecutive working hours, and the basic work day for officers working a ten-hour shift shall be ten consecutive working hours.

Article XII–Overtime

12.1 Overtime. All employees shall be compensated at the rate of one and one-half times the regular rate of pay for all time worked in excess of their designated basic work week or work day. Police officers assigned to a ten-hour work day shall be compensated at the rate of one and one-half times the regular rate of pay for all hours in excess of ten (10) hours per day or in excess of an average forty (40) hour week, but not for both. Police officers assigned to an eight-hour work day shall be compensated at the rate of one and one-half times the regular rate of pay for all time in excess of forty (40) hours per week, or eight (8) hours per day, but not for both. Overtime as defined herein shall be paid on the basis of all hours compensated.

* * *

Holiday hours worked or not, and approved paid leaves, including , but not limited to vacation and sick leave, shall be considered as work time for the purpose of computing overtime.

* * *

In case of emergency, the department head may require an employee to work overtime, even though the employee may have indicated that he/she does not wish to work overtime. Failure of an employee to work overtime when required in the case of emergency shall subject the employee to disciplinary actions, unless there are extenuating circumstances. The department head shall at all times be prepared to justify all overtime allowed, starting date, hours worked, and reasons for overtime work.

12.3 Holiday Hours. See Section 15.2.

Article XV–Holidays

15.1 Holiday Pay. The employees will receive twelve (12) paid holidays which shall be as follows:

* * *

Labor Day

1st Monday in September

* * *

15.2 Work on Holidays

A. Officers assigned to 8-hour shift schedule:

Sworn Peace Officer shall be paid by the City time and one half for all hours worked on a holiday in addition to his/her regular holiday pay.

B. Officers assigned to 10-hour shift schedule:

1) Employees not working on a holiday will receive ten (10) hours (straight time) of holiday pay.

2) Employees working on a holiday will receive:

a) Employees shall be considered to have worked the holiday when they have worked five (5) or more consecutive hours during the day designated as a holiday. The holiday will commence at midnight and end at 2359 hours. Only one (1) holiday benefit will be paid per employee working that holiday.

b) Employees shall be paid for each hour worked on a holiday at a rate equal to 1.5 times the straight time rate in addition to the ten (10) hours of (straight time) holiday pay.

c) All hours worked in excess of ten (10) on a holiday shall be paid at 1.5 times the straight time rate.

(Union Exhibit 1)

IV. THE UNION'S POSITION

The Union initially notes that on Labor Day 2006 and 2007 several unit members were required to work on special 12-hour shifts, and it further notes that although several provisions in the CBA reference 8- and 10-hour shifts, there is no mention of a 12-hour shift. (Specifically, see Section 11.2.) Moreover, the Union points out that Section 12.1 in the CBA expressly states that "All employees shall be compensated at the rate of one and one-half times the regular rate of pay for all time worked in excess of their designated basic work week or work day..."

(Emphasis added.) Consequently, the Union contends that the police officers who

were normally assigned to work 8- and 10-hour shifts on the days in question should have received 4 (= 12 – 8) and 2 (= 12 – 10) hours of overtime premium pay, respectively.

However, the Union concludes, the officers did not receive said overtime payments because the Employer did not consider the 12-hour shifts that were worked on Labor Day 2006 and 2007 as “time worked” for the purpose of computing overtime, in violation of the CBA. In addition to the time and one-half pay for the 4 hours of overtime, the Union maintains that the police officers who normally worked an 8-hour shift also should have received an additional 2 hours of holiday pay.

Next, the Union argues that the CBA does not prohibit the “pyramiding” of pay for the same hours worked, as does Union Exhibit 10, that is, the 2006–2008 Memorandum of Understanding between the City of St. Cloud and LELS, Local No. 281, Police Sergeants. Specifically, Article 12.7 in that contract states:

No Duplication of Overtime and Other Premium Pay. For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded, or paid twice for the same hours worked.

(Union Exhibit 10) Hence, the Union concludes, the negotiated interplay between Article XV (Holiday) and Article XII (Overtime) (i.e., the payment of time and one-half for both holiday hours and overlapping overtime hours) cannot be ignored. To underscore this point, the Union notes that Section 12.3 (Overtime) in the CBA states, “See Section 15.2”, which has the effect of fusing the contract’s overtime and holiday benefits.

Further, the Union responds to the Employer's past practice observation that the Union did not grieve the fact that 12-hour shift assignments were made on Labor Day/move-in day in 2004. First, the Union notes that this matter was not raised during grievance negotiations; second, that it was unaware of any compensation problems that arose as a result of said assignments; and third, that the Employer's own exhibit, namely, Employer Exhibit 7, the 2004 Special Order No. 04-28, undermines the Employer's anti-overtime/anti-pyramiding case in two critical respects, as noted below:

Effective at 0700 hours September 6th through 0700 hours September 7th the Patrol Division will move to a 12-hour schedule for the day. A copy of the shifts and personnel assigned to those shifts are attached. In the event that the circumstances allow for a reduction in the number of resources, officers will be released from their overtime assignment obligation and allowed to go home after ten (10) hours.

(Employer Exhibit 7, page 1; emphasis added)

For those assigned to a shift longer than their normal hours, it should be noted that this would be considered overtime. In the event that the circumstances allow for a reduction in the number of resources, personnel will be released from their overtime assignment and allowed to go home earlier than scheduled.

(Employer Exhibit 7, page 5; emphasis added)

Finally, for the above-stated reasons, the Union urges that the grievance be sustained.

V. THE EMPLOYER'S POSITION

The Employer begins by observing that the Union is neither challenging the City's right to mandate overtime nor contending that the CBA contains "stacking, compounding or pyramiding" premium pay language. Rather, the Employer contends that the only issue separating the parties in this case pertains to the way

the City calculated the pay of police officers who worked 12-hour shifts on Labor Day in both 2006 and 2007.

In this regard, the Employer argues that the Union's proposed calculations are incorrect in two (2) respects. First, Section 15.2 (i.e., the holiday work provision) differentiates between employees who work 8- and 10-hour shifts: a differentiation that was ignored by the Union. Section 15.2 A., covering 8-hour shift police officers, provides (a) time and one-half pay for all hours worked on a holiday in addition to (b) regular holiday pay. The Employer paid said officers (a) time and one-half for the 12 hours they worked, and in addition paid (b) 8 hours of regular holiday pay. The Union argues that these officers should have received 10 not 8 hours of regular holiday pay, which controverts the controlling contract language.

Second, the Employer asserts that the Union wrongly contends that the CBA requires that holiday and overtime pay should be compounded for all hours worked in excess of the stipulated length of a police officer's regularly scheduled shift. Under this contention, the Employer points out, police officers assigned to 8-hour shifts and working 12 hours would receive time and one-half pay for both 12 hours of holiday pay plus 4 hours of overtime, which amounts to paying the officers twice, at time and one-half, for working the same 4 hours. The same holds true for police officers who work 10-hour shifts except that, as the Employer notes, the compounding at time and one-half applies to 2 hours, instead of 4 hours. This, the Employer urges, is pyramiding, and the Union cannot cite contractual authority in support of same.

Next, the Employer argues that merely because compounding is prohibited under the Police Sergeants' contracts does not somehow imply that it is acceptable under the instant contract. In support of this position, the Employer cites arbitration case precedence and points to the 2004 Labor Day/move-in day past practice, at which time police officer pay was calculated under language that was identical to the current CBA's holiday/overtime language, and the issue was neither grieved nor the subject of subsequent collective bargaining negotiations.

Finally, for the reasons discussed above, the Employer requests the dismissal of the grievance in this case.

VI. DISCUSSION AND ANALYSIS

The Arbitrator's analysis of the parties' divergent positions, as presented above, suggests two (2) fundamental questions that need to be answered in order to decide this case. The first question has to do with interpreting the terms "regular holiday pay" appearing in Section 15.2 A. of the CBA and it may be phrased as follows: "Should police officers who worked 8-hour shifts on Labor Day 2006 and 2007 have been paid 8 or 10 hours of "regular holiday pay?" On both occasions the Employer provided these officers 8 hours of holiday pay, computed at straight time rates; whereas, the Union contends that they should have been paid for 10 hours at straight time holiday pay because "they did the same work", to quote the testimony of Dan Greenwald, Police Officer.

The answer to this question is that 8-hour shift officers should have been paid 8 hours of "regular holiday pay": an answer discerned from the language in Section 15.2. Section 15.2, Work on Holidays, states in relevant part:

A. Officers assigned to 8-hour shift schedule:

Sworn Peace Officers shall be paid by the City time and one-half for all hours worked on a holiday in addition to his/her regular holiday pay.

B. Officers assigned to 10-hour shift schedule:

1) Employees not working on a holiday will receive ten (10) hours (straight time) of holiday pay.

2) Employees working on a holiday will receive:

* * *

b) Employees shall be paid for each hour worked on a holiday at a rate equal to .15 times the straight time rate in addition to the ten (10) hours of (straight time) holiday pay.

c) All hours worked in excess of ten (10) on a holiday shall be paid at 1.5 times the straight time rate.

* * *

(Union Exhibit 1; emphasis added) It is unambiguously clear that when negotiating Section 15.2, the parties mutually agreed that police officer pay for work on holidays would be based on their assigned shift schedules. The parties' use of the A. Officers assigned to 8-hour shift schedule and B. Officers assigned to 10-hour shift schedule subtitled paragraphs in Section 15.2 seem to eliminate any alternative interpretations. Thus, per Section 15.2 A. police officers assigned to 8-hour shift schedules are to be paid their "regular holiday pay" whether the paid holiday is worked or not. This begs the question: "How is this amount to be calculated?" In the case of police officers who are assigned to 10-hour shift schedules, the plain meaning of Section 15.2 B. 1) and Section 15.2 B. 2) b) is that they will receive 10 hours of straight time "holiday pay" for holidays, whether worked or not.. Whereas, for employees working 8-hour shift schedules, the

language in Section 15.2 A. is not nearly as definitive. However, the fact that therein the parties chose to modify the terms “holiday pay” with the word “regular” is instructive. The first definition of this word as it appears in the Random House Dictionary of the English Language, The Unabridged Edition (1981) is “1. usual; normal; customary: *to put something in its regular place*”. Obviously, the length of the “regular” (i.e., usual, normal or customary) work day for police officers assigned to 8-hour shift schedules is, by definition, 8 hours. Therefore, to a reasonably intelligent person, the “regular holiday pay” computation for officers assigned to 8-hour shift schedules should be 8 hours of work multiplied by their straight time pay rates. (See: Employer Exhibit 4)

Therefore, under the above construction of applicable contract language, the Employer correctly paid 8-hour shift police officers for 8 hours of work at straight time pay rates on Labor Day/move-in day in 2006 and 2007 and, consequently, this aspect of the Union’s grievance is dismissed.

With respect to the “compounding” or “pyramiding” aspect of this case, the second question demanding an answer may be phrased, “Should a police officer receive premium pay for overtime hours worked on a holiday?” The Employer argues that employees who work holidays are being compensated at time and one-half their straight time pay rates for all hours worked, including overtime hours and, thus, to compensate them at time and one-half a second time, for the overtime hours, is pyramiding, which flies in the face of arbitral precedence. In addition, the Employer observes that the pyramiding issue has never been

discussed at the bargaining table, and it claims that the absence of CBA language prohibiting the pyramiding of premium pay does not authorize it.

The Employer's position regarding the holiday overtime hours question is not persuasive for a number of reasons. First, it is the case that in the absence of language that permits the compounding or pyramiding of premium pay, arbitrators have found for the employer, as the City argues. However, it is also the case that arbitrators have also found in favor of unions under similar circumstances.¹

Second, Section 15.2 in the contract provides that all hours worked on the Labor Day holiday will be paid at a rate of time and one-half and Section 12.1 provides that hours worked in excess of 8 or 10 hours per day, as the case may be, shall be paid at a rate of time and one-half. These contractual provisions cannot be ignored and their simultaneous enforcement is required, at least provisionally, chiefly because the contract does not explicitly prohibit pyramiding of premium pay and because the City's contract with its police sergeants explicitly does.

Ultimately, however, for three (3) reasons this provisional conclusion is unconditionally adopted as part of the undersigned's opinion in this case. First, with respect to officers assigned to 10-hour shift schedules, Section 15.2 B. 2) c) states that "All hours worked in excess of ten (10) on a holiday shall be paid at 1.5 times the straight time rate." This language, which is nested in the heart of Article XV, Holidays, mimics language that is also found in Article XII, Overtime, Section

¹ Early cases from personal files of the Arbitrator include some examples: *L. A. Jewish Community Council*, 11 LA 869; *General Tire & Rubber Co.*, 71 LA 813; *Phelps Dodge Refining Corp.*, 9 LA 474; and *Northwest Protective Services, Inc.*, 65 LA 930.)

12.1, suggesting that perhaps pyramiding may be contractually permissible. Indeed, the quoted language and the language in Section 15.2 B 2) b), taken together, does imply that pyramiding is permitted, at least for employees assigned to 10-hour shift schedules. Second, when considering the instant question in light of the entire Agreement, the undersigned is struck by Article 12.3 which simply states: "**Holiday Hours**. See Section 15.2." (Union Exhibit 1) Clearly, the intent of this provision is to connect the Article XII overtime work and pay benefits with the Article XV holiday work and pay benefits, as the Union contends.

Third, the Employer's appeal to the parties' 2004 past practice is not persuasive. Apparently on the 2004 Labor Day/move-in day, the Employer assigned 12-hour shifts to some police officers that were at variance from their regular shift schedules, the implication being that at that time, as with the Labor Days/move-in days in 2006 and 2007, overtime premium payments were neither made nor grieved. However, from the documented record evidence, it cannot be discerned whether officers who worked this holiday also worked hours in excess of their regular 8- or 10-hour shift schedules and were not paid overtime rates for the overtime hours worked. (Employer Exhibit 7) Also, the testimony by Sue Stawarski, Assistant Chief, does not expressly establish that pyramiding did not occur in 2004. Indeed, the following excerpt from the text of the 2004 Special Order No. 10-28 suggests that the City may have contemplated that it was required to make both holiday and overtime premium payments for police officers who logged overtime hours:

For those assigned to a shift longer than their normal hours, it should be noted that this would be considered overtime. In the event that the

circumstances allow for a reduction in the number of resources, personnel will be released from their overtime assignment and allowed to go home earlier than scheduled.

(Employer Exhibit 7) Further, this excerpt suggests that the police officers in question may not have worked premium overtime hours on Labor Day/move-in day in 2004, obviating controversy. This possible occurrence is consistent with the testimony of Mr. Greenwald who stated that he was unaware of any Labor Day 2004 problems and that he was not made aware of any officer who was incorrectly paid.

Based on the foregoing analysis, the question “Should a police officer receive premium pay for overtime hours worked on a holiday?” must be answered in the affirmative, sustaining the position assumed by the Union in this case.

VII. AWARD

For the reasons discussed above, it is hereby concluded that the Employer properly interpreted and applied the language in Section 15.2 when it compensated the police officers with 8-hour shift schedules who worked the Labor Day/move-in day in 2006 and 2007 at time and one-half for 12 hours work worked and, in addition, compensated them for 8 hours of “regular holiday pay”.

Next, it is concluded that the Employer improperly interpreted and applied the language in Section 12.1 when it denied premium overtime pay to police officers who worked 12-hour shifts on the days in question in excess of 8- or 10-hour shifts, as the case may be, which was the length of their regularly scheduled assigned shifts.

As remedy, the Employer is ordered to compensate all police officers who were normally scheduled to work an 8-hour shift on Labor Day in 2006 and 2007 at 4 hours of time and one-half overtime pay per year. Similarly, all police officers who were normally scheduled to work a 10-hour shift on Labor Day in 2006 and 2007 shall be compensated at 2 hours of time and one-half overtime pay per year.

Issued and ordered from Tucson,
Arizona, this 15th day of May,
2008

Mario F. Bognanno, Labor
Arbitrator