

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

LAW ENFORCEMENT LABOR SERVICES

Re: Overtime / Training

-and-

B.M.S. No. 07-PA-1084¹

**THE CITY of ROSEVILLE
ROSEVILLE, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Employer: Terrence Foy, Attorney

For the Union: Mark W. Gehan, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article VII, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A series of formal complaints were submitted by the Union on behalf of members of the bargaining unit beginning in April of 2007, and continuing through the following year. Eventually they were

¹ By agreement of the parties, this case applies to some fifteen separate grievances that were filed from April 2007, through the middle of last year, and appealed to binding arbitration. They are Bureau of Mediation Services Case Numbers: 07 PA 1084, 08 PA 0090, 08 PA 1089, 08 PA 1362, 09 PA 0447, 09 PA 0445, 09 PA 0448, 09 PA 0444, 09 PA 0446, 09 PA 0443, 08 PA 1336, 09 PA 0237, 08 PA 1335, 08 PA 1389, and 08 PA 1290.

combined and appealed to binding arbitration when the parties were unable to resolve these matters to their mutual satisfaction during discussions at the intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in Roseville on April 15, 2009. At that time the parties were afforded the opportunity to present position statements, testimony and supportive documentation. Upon the conclusion of the proceedings, each side indicated a preference for submitting written summary statements. They were received on May 26, 2009, at which time the hearing was deemed officially closed.

The parties have stipulated that all matters in dispute are properly before the Arbitrator for resolution based on their merits, and while they were unable to agree to a precise statement of the issue, the following is believed to constitute a fair description of the matter to be resolved.

The Issue-

Did the Employer violate provisions of the parties' Master Agreement when it required the Grievants to participate in non-POST mandatory training exercises on one of their scheduled days off but did not

compensate them for the change either monetarily or with comp time? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The Grievants are all licensed peace officers who are members of the City of Roseville's Police Department (hereafter "City", "Employer" or "Administration"). In this capacity, they are represented by Law Enforcement Labor Services, Inc. ("Union" or "LELS") who, together with the Administration, has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for the some fifty sworn officers that comprise the bargaining unit.

Beginning in March of 2007, and continuing through 2008, each of the Grievants was asked to participate in a mandatory training activity on one or more of their scheduled days off. The majority of these exercises involved training, while some of them included required K-9 or "SWAT" Team exercises. The officers however, were not paid overtime for the additional hours spent in training (which was deemed to be "mandatory") on their scheduled day(s) off. Nor were they given comp time as consideration. This represented a change in procedures brought about by the budget constraints that the Department experienced in 2004, and continuing

thereafter when state aids to the City were reduced significantly (Union's Exs. 3 & 4; City Exs. 4 & 5).

The record shows that each November, members of the bargaining unit submit their schedule requests for the following calendar year, bidding for vacation days and days off which are generally awarded based upon their seniority. The schedule is then published for the year (Union's Exs. 5, 6 & 7). Prior to 2008, officers were scheduled for 8½ hour days, working six consecutive days and then having three off (*id.*). Last year however, the Department went to 12 and 10 hour days, whereby the officers would work either four or three days consecutively and then receive four or three days off (Union's Ex. 7).

When the Grievants began to be notified that their request for overtime would no longer be paid by the Department when directed to take mandatory training on their scheduled day(s) off, or otherwise grant them comp time in lieu of overtime pay, they began to file a series of formal written complaints which were thereafter processed through the grievance mechanism provided in the Master Contract. Eventually, when the parties were unsuccessful in arriving at a mutual resolution of the dispute, the grievances were consolidated for appeal to binding arbitration.

Relevant Contract Provisions-

Article V
Employer Authority

5.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; and...to select direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial functions not specifically limited by this AGREEMENT.

* * *

Article IX
Seniority

* * *

9.5 Senior employees will be given shift preference after eighteen (18) months of continuous full time employment.

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Article XIII
Compensatory Time

13.1 Employees will be compensated at one and one-half (1½) times the employees regular base pay rate for hours attending any department approved training or department meeting which are in excess of the employee's regular schedule.

* * *

Article XIV
Overtime

14.1 Employees will be compensated at one and one-half (1½) times the employee's regular base pay rate for hours worked in excess of the employee's regularly scheduled shift. Changes of shifts do not qualify an employee for overtime under this Article.

* * *

Memorandum of Understanding

The 2006-07 contract language regarding time and one-half for training is to be interpreted as follows:

- 1) The terms "regular schedule" means the usual 6 days on, 3 off schedule.
- 2) The training must be "in excess of the employee's regular schedule." In other words, if an employee is sent to training in lieu of working his/her regular shift, that time will not be compensated at time and one-half. It will only count towards the employee's required 48 hour shift.
- 3) The employee has the choice of cash or compensatory time on all overtime earned under the provisions of the contract (up to the maximum of 60 hours), including training time and holidays.

Positions of the Parties-

The **UNIOIN** takes the position in this matter that the City has violated the terms and conditions of the parties' Collective Bargaining Agreement (including the Memorandum of Understanding) as well as established past practice, when they unilaterally discontinued payment of overtime and/or comp time to police officers who were required to attend mandatory

training activities including K-9 and SWAT Team exercises, beginning in 2007. In support of their claim, LELS contends that Article 13.1 of the Agreement specifically calls for additional compensation to members of the bargaining unit who attend such a required activity, when it is in excess of the employee's "regular schedule." Per the clear language in the appended Memorandum of Understanding, the regular schedule is defined as "6 days on, 3 days off."² The Union notes that toward the end of each year, the Grievants bid on their "regular schedule for the following year based upon their seniority. This is then codified and published as the "regular schedule" in order that each officer is able to plan their lives outside of work. By unilaterally changing this schedule to accommodate mandatory training or exercises, without paying overtime, the Department has effectively violated the assurances bargained for in Article IX. Further they maintain that the Administration's actions have upset the personal lives of the Grievants who rely upon the published schedule for planning purposes. The Union charges that if the Employer wants or needs to interrupt the officer's regular schedule they must compensate him/her according to the overtime provisions of the Contract. Finally, they argue that the well established practice has consistently been to pay overtime or comp time in the event

² As previously noted, the regular work schedule was altered by mutual agreement in 2008 to 12 and 10 hour shifts with either three or four days off.

an officer is called out on his/her day off. For all these reasons then they ask that the grievances be sustained and the affected officers be made whole.

Conversely, the **CITY** takes the position that there has been no violation of the parties' Master Agreement, or past practice, by the actions taken relative to scheduling mandatory training for the Grievants. In support, the Administration argues that in 2004 the City and all of its various departments, incurred severe budget cuts as a result of the State's mandated reduction in funding. Accordingly, it became necessary to alter the manner in which mandatory training would be implemented. As police work is performed on a 24/7 basis, it is not always possible to offer the training in issue on an officer's normal work day. Accordingly, in light of the significant monetary constraints the Employer has experienced since 2004, it became necessary to issue a memorandum in 2007 which alerted the officers to the fact that training would be treated as "a scheduled work day" and not subject to overtime compensation. Rather, per the language in Article V of the Labor Agreement, management retains the right to modify their organizational structure and establish work schedules. When a Grievant is required to attend a training exercise on his/her day off, they are then directed to take a different day off in order that they retain the 2080 hourly threshold, thereby retaining their normal work year. With regard to

the Memorandum of Understanding, the Employer argues that it demonstrates no meeting of the minds and therefore is inapplicable to the instant grievance. Indeed, the six on, three off schedule does not even exist anymore. Additionally, the Department urges that the past practice of the parties supports their position. Since 2004, no overtime or comp time has been extended to the Grievants who are required to take training on their scheduled days off. What the Union is effectively attempting here is to gain through arbitration, that which they were unsuccessful in obtaining at the bargaining table. Accordingly, for all these reasons, they ask that the grievances be denied in their entirety.

Analysis of the Evidence-

An examination of the record reveals a number of salient facts surrounding this dispute that bear directly upon the outcome. More particularly, the evidence establishes the following:

- That beginning in 2003, the City (along with most other municipalities in the state) experienced a significant decline in state aid, necessitating a reduction in their budget that reached across all departments – including law enforcement.
- Two types of training for members of the bargaining unit have been identified. One is required by the Police Officers Standards and Training Board (“POST”) which is directly related to the maintenance of a peace officer’s license. The other is

“mandatory training” – that which is deemed necessary by the Chief of Police to fill a particular need within the Department, or to otherwise meet its goals and objectives.

- POST mandated training has continued to be compensated, just as it has in the past, at time and one-half (paid monetarily or in the form of comp time) for the law enforcement personnel employed by the City, if it does not fall on an officer’s previously scheduled work day. This type of training and method of payment is not in issue here.
- Prior to the events leading to the submission of the grievances by various members of the bargaining unit, any training – either POST or that mandated by the Administration - which fell on an officer’s regularly scheduled day off, would be compensated at the rate of time and one-half.
- Captain Rick Mathwig issued a Memorandum in October of 2007, which announced a change in the foregoing practice whereby any mandatory training instituted by the Department would, “...not be subject to overtime compensation.” Further, if it fell on an officer’s scheduled day off then the employee’s work schedule was to be altered “as soon as practical, to accommodate the training as a scheduled work day” (Union’s Ex. 2; City’s Ex. 6).
- Historically, each fall the Department has its officers bid on their work schedules for the following year. The bidding is based on seniority pursuant to Article IX (“Seniority”) of the Parties’ Labor Agreement.
- It is not possible to schedule all mandatory training so that it does not fall on an officer’s previously scheduled day off.
- The Memorandum of Understanding found in the current Master Contract, *supra*, expresses the parties’ agreement that an employee is not eligible for overtime if he/she is sent to training during a shift they are already scheduled to work.

In light of the foregoing evidence, the issue here can be fairly pared to the essential question: can the Administration unilaterally modify the Grievants' scheduled days off to accommodate mandatory training, providing them a different day off in lieu of the training specified, rather than paying them overtime?

Following a careful review of the relevant testimony and supportive documentation, along with the written summary arguments submitted, I conclude that the answer is "no."

At the outset it is noted that the Employer has apparently misinterpreted the position taken by the Union in this matter. The evidence does not indicate anywhere that the Grievants are asking for overtime compensation *and* a different day off in lieu of when non-POST training is mandated by the Department. Rather, they seek compensatory time or overtime pay at the rate of time and one-half for the inconvenience of taking the training on a day they had already not been scheduled to work, as had been the practice in the past, and in the same manner POST mandated training is still being handled.

In no small measure, the Employer relies on the provisions found in Article V ("Employer Authority," *supra*) in defense of their decision, noting that, among other things, it reserves with the Administration the right to

operate and manage the City, including its manpower and (among others) to establish work schedules. This same provision however (as well as the one found in the subsequent section of the same Article) includes the standard caveat to their reserved prerogatives, i.e. unless modified or limited by the wording in the Agreement itself.

Both Articles XIII and XIV address the subject of overtime. The former (in Section 13.1) sets out the rate of time and one-half for, "...hours attending any department approved training.....which are in excess of the employee's *regular schedule*" (emphasis added). Section 14.1 similarly applies the common time and one-half payment method for "...hours worked in excess of the employee's *regularly scheduled shift*" (emphasis added). The terms "regular schedule" and "regularly scheduled shift" as referenced in the Contract, are not synonymous.

Roberts Dictionary of Industrial Relations, BNA Books, 4th ed., defines the term "shift" to be a "period of work during the 24 hour day..." (at p. 713). Language found in the parties' Agreement in Article III appears to be consistent with this definition. There, it explains (in Section 3.10) that the term "shift" means "a consecutive work period including rest breaks and a lunch break."

The testimony elicited at the hearing, as well as LELS Exhibits 5, 6 & 7,

demonstrate that an employees "regular schedule" is the one bid on toward the end of each year for the succeeding year. Within the resulting published schedule are reference to the shifts: A, B & C. Further guidance is found in *Webster's Unabridged Dictionary* which defines the word "schedule" to be: "a plan or procedure usually written, for a proposed objective with reference to the sequence of and time allotted for each item or operation necessary to its completion; a list or a table" (at. p. 1276). It is clear from the foregoing that contained within the published work "schedule" for the Department, are the various shifts established to man it on a 24/7 basis. I would agree then with the Union that the term "shift" refers to the portions of a day any officer works.

The City maintains that Section 14.1 excludes overtime eligibility for any officer who has his/her shift changed, and since a different day off is provided in lieu of the mandated training day, it follows that the Grievants are not entitled to overtime. I must respectfully disagree with the Employer's position however. Read in its entirety, 14.1 excludes premium pay from "hours worked" for an employee who simply has his/her *shift* altered. It does not address the critical question involved here regarding eligibility for overtime when an officer attends "...any department approved training...which (is) in excess of the employee's *regular schedule*" (emphasis

added). That is covered in Section 13.1.

The Memorandum of Understanding negotiated by the parties provides further clarity. First it defines the term “regular schedule” to be the number of days an officer has to work and has off within a given time period. This explanation tracks the dictionary definition previously referenced. The memo also explains that overtime eligibility only happens when the training is “in excess of the employee’s regular schedule,” noting that any training that occurs during his/her regular shift “will not be compensated at time and one-half,” thus making a distinction between the two critical terms. Finally, it calls for a choice of comp time or premium pay for “all overtime earned....including *training* time...” (emphasis added). Again, the position taken here by the Union appears to be most consistent with the negotiated language in the Memorandum of Understanding.³

There is no dispute but that the Employer sought to change an existing practice as evidenced by Captain Mathwig’s memorandum distributed to “all sworn personnel.” Similarly there can be no question that the practice as it existed previously, is most consistent with the position taken here by the

³ The Administration contends that the Memorandum of Understanding does not apply to the instant grievance, as it was a response to a situation in 1999 where an employee was sent to training in lieu of working his regular shift. At the hearing however, the grievant in that matter, Officer Mike Holtmeier, distinguished that dispute from the instant one explaining that his complaint involved a “double shift” without payment of overtime. Moreover, ignoring the Memorandum negates the reference to “regular schedule” both in the Contract and in the Memorandum itself, as well as the previously accepted past practice of the parties.

Grievants. Moreover, it was a method of compensation acknowledged by the Administration. In a memo to the City's Administrator, responding to the Council's proposed budget reductions, Police Chief Sletner referenced training attended by sworn personnel during the time they were not scheduled for work as being a part of "....the realities of police department overtime compensation." Significantly, the Chief noted further, "some of our officers must attend training on their off-duty time, *which will result in overtime compensation*" (Union's Ex. 4; City's Ex. 4; emphasis added).

The preponderant evidence convinces me that the City cannot unilaterally alter the Grievants' work schedules for Department mandated training in this instance. While the need to control costs – particularly in the current economy – is most understandable, it does not follow that relevant terms of a collective bargaining agreement can be ignored, or that a well-established past practice can unilaterally be altered relying solely on managerial rights. Under other circumstances, it might not be considered an unreasonable exercise of those prerogatives. However, in this instance, the language in the parties' Master Agreement, their executed Memorandum of Understanding appended to the Contract, and the previously practiced method of payment, all demonstrate that other steps need to be taken prior to its abrogation.

A significant line of arbitral thought holds that an established "practice" may not be subject to unilateral termination during the term of a labor agreement. However, it may thereafter be ended upon the expiration of the parties' contract, if sufficient notice is given to the other side that management will not be carrying the practice over into the new term. *Arch of Illinois*, 84 LA 185; *Jafco Inc.*, 82 LA 283. In *Jafco*, the neutral held that an employer may not "stand silent" relative to an established practice regarding premium pay to certain members of the bargaining unit, and later unilaterally change the practice. Had management, in that instance, notified the union during bargaining of its intent to discontinue the practice, the arbitrator noted, then the result would have been different. (*id.* at p. 286).

The City has argued that the practice was altered in 2004. Consequently the Union knew, or should have known at the time, that the method of compensation for non-POST, Department-mandated training on a scheduled day off was being changed. Yet they failed to object or raise the issue at the bargaining table. However, I find insufficient evidence to support the claim. To the contrary, the various memoranda authored by Chief Sletner, Captain Mathwig and the Employer's Human Resources Manager (Administration's Ex. 15), as well as the lack of any

documented denial of overtime when an employee was required to take mandatory training on their scheduled day off prior to 2007 (Employer's Ex. 13), all indicate that the manner in which overtime was paid did not change until that year.

Award-

Based upon the foregoing analysis, I find that the Union's grievances are sustained and that Department-mandated training on an officer's scheduled day off continue to be treated in the same manner as POST-mandated training. Any change in this methodology must be addressed at the bargaining table. Accordingly, the City is directed forthwith to compensate any Grievant who has already been required to attend Department-mandated training on his or her scheduled day off, and who did not have their schedule altered providing another day off in lieu of the training, to be compensated at the overtime rate of time and one-half, with payment either in the form of a monetary reimbursement or comp time. Going forward however, all such training required on a bargaining unit member's scheduled day off shall be treated in a manner consistent with the past practice of the parties.

I will retain jurisdiction in this matter for the sole purpose of resolving

any issues that may arise in connection with the implementation of the remedy ordered here.

Respectfully submitted this 18th day of June, 2009.

Jay C. Fogelberg, Neutral Arbitrator