

IN THE MATTER OF ARBITRATION BETWEEN

HENNEPIN COUNTY,)	ARBITRATION
)	AWARD
Employer,)	
)	
and)	
)	PREMIUM PAY
)	GRIEVANCE
)	
HENNEPIN COUNTY SHERIFF'S)	
DEPUTIES ASSOCIATION,)	
)	
Union.)	
)	
)	

Arbitrator: Stephen F. Befort

Hearing Date: November 13, 2009

Post-hearing briefs received: November 25, 2009

Date of decision: December 14, 2009

APPEARANCES

For the Union: Gregg Corwin
Meg Luger-Nikolai

For the Employer: Greg Failor

INTRODUCTION

The Hennepin County Sheriff's Deputies Association (Union) is the exclusive representative of a unit of licensed essential employees employed by the County of Hennepin (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by failing to continue paying certain unit employees a 1.5% premium when it modified work scheduling practices from a 6-3

rotation to a 28 day schedule. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer violate the parties' collective bargaining agreement when it unilaterally eliminated a 1.5% wage premium in conjunction with transitioning from a 6-3 fixed schedule to a 28 day schedule premised on seniority bidding?

RELEVANT CONTRACT LANGUAGE

ARTICLE 3 – DEFINITIONS

Section 2.

Notwithstanding the definitions of a full month of service, of the payroll period, or of the full work year or of other periods of work that appear in this Article and in other provisions of this AGREEMENT, the EMPLOYER shall compensate those who are required to work a fixed 6-3 schedule (or a variation thereof, as described in the Decision and Award in the impasse arbitration in Minnesota Bureau of Mediation Services (herein after BMS) Case No. 83-PN-52-A, dated July 13, 1983) by either of the following methods, as the EMPLOYER may choose.

- A. By continuing the past practice of waiving 21 hours of work per year and of calculating contractual benefits, such as, but not limited to, the right to overtime compensation and vacations accumulation, by basing such calculations on a 1,944 hour work year.
- B. By paying each such employee who is required to work a 2,080 hour work year an additional 1.5% of his/her salary, as compensation for being required to work a 6-3 schedule. Employees may at their option apply time worked which would otherwise be paid at time and one-half towards the makeup hours at the straight time rate, except that when makeup hours owed reach 16 hours, such makeup hours shall be applied at the straight time rate to any hours worked which would otherwise be paid at the time and one-half rate.

ARTICLE 10 – WORK SCHEDULES – PREMIUM PAY

Section 3.

Work shifts, work breaks, staffing schedules and the assignment of employees thereto, shall be established by the EMPLOYER.

FACTUAL BACKGROUND

The Union represents licensed essential employees working in the Hennepin County Sheriff's Department. The bargaining unit consists of three classifications: deputy sheriffs, detectives, and crime laboratory technicians.

The 6-3 Schedule

Since the 1970s, the Employer has required employees assigned to work in the Patrol, Water Patrol, and Crime Lab units to work shifts of eight hours per day on a "6-3" schedule. Unit members assigned to the jail also worked on a "6-3" schedule, but in shifts of 8.5 hours per day. Most other unit employees worked a more conventional Monday through Friday schedule.

Under a 6-3 schedule, unit employees worked a fixed rotation of six consecutive work days followed by three consecutive days off. This rotation operated continuously without deviation due to holidays or weekends. As a result of this fixed rotation, each employee on a 6-3 schedule worked two-thirds of all weekend and holiday shifts on an annual basis.

Employees on a 6-3 schedule worked approximately 1,944 hours per year as compared to the 2,080 hours/year worked by employees on a full-time Monday through Friday schedule. During bargaining for a new collective bargaining agreement in 1982, the Employer sought to require the employees on the 6-3 schedule to work additional

hours to make up this difference. After crediting the 6-3 employees for the additional holiday hours they worked, the parties agreed that the make-up time sought by the Employer consisted of 32 hours of additional work time per year. The parties bargained to impasse on this issue, and the matter was submitted to interest arbitration before Arbitrator Thomas Gallagher.

The 1983 Interest Arbitration Award

During the interest arbitration proceeding, the Union took the position that employees working the 6-3 schedule should not be required to make up the 32-hour gap because of the inconvenience associated with such a schedule. In his award, Arbitrator Gallagher summarized the Union's inconvenience argument as follows:

He does not have regular holidays. He receives only one full weekend per month off on average. His schedule is different from the schedule of his family and most of the community.

Gallagher Award at 10. Arbitrator Gallagher ultimately credited this contention, stating "I agree with the Union that the requirement that an employee operate on a 6-3 schedule is an inconvenience to him that deserves extra compensation." Gallagher Award at 12.

In the end, Arbitrator Gallagher directed the Employer to implement either of the following two options in the resulting labor agreement:

- A. By continuing the past practice of waiving thirty-two hours of work per year and of calculating contractual benefits, such as, but not limited to, the right to overtime compensation and vacation accumulation, by basing such calculations on a 1,944 hour work year.
- B. By paying each such employee who is required to work a 2,080 work year an additional 1.5% of his salary, as compensation for being required to work a 6-3 schedule.

Gallagher Award at 14. Arbitrator Gallagher also provided the following explanation of his rationale:

It is my intention that the Award cover all employees on a fixed 6-3 schedule as I have defined it, *i.e.*, it is to cover those who work a continuous schedule at a ratio of two days on and one day off. If the Employer should develop a variation of the fixed schedule that is not exactly in the ratio of two to one (even in the ratio of five days on to two off, if the schedule is fixed), a pro rata adjustment should be made by the parties or, if they cannot agree, by a grievance arbitrator. Although the Union's position on this issue seeks similar treatment for employees on any schedule that is not a Monday through Friday schedule, it is not my intention to provide such relief. The presentation of the evidence on this issue dealt with the fixed 6-3 schedule. Different problems with different arguments for extra compensation would arise in dealing with a schedule of five days work per week, with work required on weekends, but no requirement of work on holidays (a 5-2 schedule, but not Monday through Friday). If the Employer should adopt such a work schedule, the parties should bargain over the question of extra compensation for requiring weekend work.

Gallagher Award at 13.

The parties incorporated Arbitrator Gallagher's ruling in their collective bargaining agreement. *See* Article 3, Section 2. In subsequent years, deputies assigned to the Patrol, Water Patrol, and Crime Lab Units received a 1.5% wage premium as a result of the requirement that they work "make up" hours to close the gap between the hours worked in the course of the 6-3 schedule and the 2,080 hour goal. These unit employees performed the make up hours in a number of ways, including answering late calls at the end of a shift and coming in to perform incidental work for which they might otherwise have been paid overtime.

Implementation of the 28-Day Schedule

On May 24, 2009, the Employer ended its use of the 6-3 schedule in the Sheriff's Office and replaced it with a 28-day schedule. Prior to the implementation of the new schedule, the Employer met and conferred with the various unions whose members would be affected by the new schedule. In addition, the Sheriff's Office asked the County Labor Relations Director whether it was required to pay the 1.5% premium to

employees assigned to work the 28 day schedule. Labor Relations Director Bill Peters, following a review of the terms of the parties' collective bargaining agreement and the Gallagher arbitration award, advised the Sheriff's Office that it was not obligated to provide the 1.5% premium bump under the new scheduling arrangement.

Under the new 28 day schedule, unit employees who previously worked a 6-3 rotation now are scheduled to work 160 hours in a 28 day period. Employees assigned to an 8 hour shift, are scheduled to 20 days on and 8 days off during each 28 day period. To determine off days, employees submit off day requests prior to the posting of the schedule, and a seniority preference is used to determine the final work schedule. Employees assigned to the 28 day schedule may not work more than 8 days in a row if assigned to an 8 hour shift. In addition, employees must work at least one weekend during each 28 day work period

Sgt. Heather Stephens, who is in charge of scheduling employees assigned to the jail, testified that the use of seniority in setting the 28 day schedule has had a disparate effect on the ability of employees to obtain a desired schedule. She testified that those employees in the top one-third of seniority ranking almost always obtained their requested schedule. In contrast, employees in the bottom one-third of seniority frequently were unsuccessful in bidding for desired off days and particularly weekend off days. Employees who ranked in the middle third of seniority were successful in getting most, but not all, of their off day requests honored. As a result of this process, employees in the upper third of seniority who request weekend days off seldom work more than one weekend per month, while employees in the bottom third of seniority seldom receive more than one or two weekend days off during a month.

Deputy Kevin Schwartz also testified that the new 28 day schedule had the effect of scheduling unit employees to work 16 additional days during a year. These extra days occur because the new schedule requires employees to work five out of every seven days (71.4%), while the old schedule required employees to work only six out of every nine days (66.7%). On the other hand, the new schedule does not require employees to perform any make up work.

On July 8, 2009, the Union filed a grievance challenging the Employer's failure to pay unit employees the 1.5% premium under the new 28 day schedule. In addition to the employees assigned to the Patrol, Water Patrol and Crime Lab Units who previously had received the 1.5% premium, the Union asserts that deputies assigned to the jail who are now assigned to work eight hour shifts under the new 28 day schedule also should receive the 1.5% premium. The Employer denied the grievance, and the dispute proceeded to arbitration.

POSITIONS OF THE PARTIES

Union:

The Union contends that the unit employees at issue should continue to receive the 1.5% premium because the new 28 day schedule is a variation of a fixed schedule within the meaning of the parties' collective bargaining agreement. The Union maintains that the new schedule is fixed in nature because it utilizes an unchanging ratio of work days and off days and requires the continuous staffing of work on holidays.

Alternatively, the Union argues that the spirit of the Gallagher award requires that the Employer continue the premium pay arrangement to compensate employees for the inconvenience associated with a non-traditional work schedule. The Union claims that

the new schedule imposes hardships on employees that are at least as great as those experienced under the former 6-3 schedule.

Employer:

The Employer points out that the parties' agreement obligates payment of the 1.5% premium only for work on "a fixed 6-3 schedule . . . or a variation thereof." The Employer asserts that the 28 day schedule is not a variation of a fixed schedule since it does not involve a constant mathematical repetition of work days and off days. In addition, the role of seniority under the new schedule ultimately results in widely differing individual work schedules. The Employer additionally argues that the parties' agreement does not permit the arbitrator to ignore the clear contract language simply because the new schedule may be inconvenient for a subset of unit employees. Instead, the Employer maintains that the Gallagher award contemplates that the parties should address the matter of premium pay under a new schedule through the collective bargaining process.

DISCUSSION AND OPINION

The Contractual Standard

The operative provision of the parties' collective bargaining agreement for the purposes of this grievance is the following portion of Article 3, Section 2:

. . . the EMPLOYER shall compensate those who are required to work a **fixed 6-3 schedule (or a variation thereof,** as described in the Decision and Award in the impasse arbitration in Minnesota Bureau of Mediation Services (herein after BMS) Case No. 83-PN-52-A, dated July 13, 1983) by . . . paying each such employee who is required to work a 2,080 hour work year an additional 1.5% of his/her salary, as compensation for being required to work a 6-3 schedule.

Emphasis added. Thus, the key question is whether the new 28 day schedule is a fixed “6-3 schedule . . . or a variation thereof.”

Variation of a Fixed 6-3 Schedule

The parties agree that the new 28 day schedule is not a fixed 6-3 schedule. The new schedule allocates work days and off days in a 5:2 ratio as opposed to the 6:3 ratio of the former system. Accordingly, the principal inquiry is whether the new schedule is a “variation” of a fixed 6-3 schedule.

The Union contends that the new schedule is “fixed” in nature since it employs a set ratio of on and off days. Within every 28 day cycle, each employee works 20 days and is off 8 days. This ratio continues unchanged throughout the year.

The Union also maintains with reference to Arbitrator Gallagher’s decision that the schedule is fixed to the extent that no employee automatically receives time off for holidays. Like the former 6-3 schedule, the 28 day schedule contemplates a minimum staffing requirement for every day of the year.

The Employer’s responsive argument on this issue is more persuasive. Unlike the 6-3 schedule which utilizes a set progression of 6 days on and 3 days off, work days within the 28 day cycle are scheduled in a myriad of ways that hardly can be characterized as “fixed.” Some employees may work up to eight days in a row before receiving a day off, while others may enjoy an off day after only a day or two of work. The role of seniority bidding under the new system further means that each 28 day schedule is a complex set of moving parts until ultimately constructed in a top-down fashion. The final schedule that results is a jig-saw puzzle rather than a predictable progression of on and off days.

The new schedule's treatment of holiday work assignments also is anything but fixed. Under the former 6-3 schedule, every employee worked two-thirds of all holidays as those holidays landed on the unyielding progression of six days on and three days off. Under the new schedule, in contrast, the process of seniority bidding enables employees with greater seniority to work few holidays and weekends, while those with lower seniority work the considerable majority of holidays and weekends.

In sum, the new 28 day schedule, although it utilizes a set ratio of work and nonwork days, does not assign work days in any sort of predictable pattern. As such, it cannot be construed as a variation of a fixed 6-3 schedule.

The Impact of Inconvenience

The Union alternatively asserts that the 1.5% pay premium should continue because the new 28 day schedule is just as inconvenient for unit members as the former 6-3 schedule. The Union points out that a significant policy rationale underlying Arbitrator Gallagher's award was his finding that "the requirement that an employee operate on a 6-3 schedule is an inconvenience to him that deserves extra compensation." The Union argues that the new schedule also inconveniences unit employees since it requires weekend and holiday work while most family and friends work on a Monday through Friday basis.

One major distinction between the two schedules is in the allocation of weekend and holiday work. Under the former 6-3 schedule, all unit employees shared this burden by working two-thirds of all weekend days and holidays. Under the new schedule, however, this burden is widely dispersed due to the impact of seniority bidding. Employees on the top third of the seniority list incur considerably less inconvenience

under the 28 day schedule as they typically work only one weekend per month and few involuntary holidays. In contrast, employees on the bottom third of the list bear considerably more inconvenience as they seldom are able to bid successfully for days off on weekends or holidays.

The Employer argues that the mere presence of some inconvenience to unit employees under the new schedule is not sufficient to support an award of premium pay. The pertinent contract language, the Employer points out, authorizes an award of premium pay only for employees “who are required to work a 6-3 schedule . . . or a variation thereof.” Indeed, Arbitrator Gallagher’s award expressly stated that if the Employer should adopt a new schedule requiring work on weekends that is not a variation of a 6-3 schedule, “the parties should bargain over the question of extra compensation for requiring weekend work.”

If I were to address only the equities of this grievance, I might be tempted to award premium pay on some sliding scale to those employees on the bottom half of the seniority roster because they incur an inordinate share of inconvenience under the new schedule. But, my role as an arbitrator is to read the parties’ contract rather than to dispense my own brand of industrial justice. *See* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In this instance, the parties’ agreement unambiguously limits premium pay to employees who work a variation of a 6-3 schedule. As a result, I conclude that the language of Article 3, Section 2 does not compel the Employer to provide premium pay for the 28 day schedule which is not a variation of a fixed 6-3 schedule, and that the matter of extra compensation should be addressed through the collective bargaining process.

AWARD

The grievance is denied.

Dated: December 14, 2009

Stephen F. Befort
Arbitrator