

IN THE MATTER OF ARBITRATION OF BETWEEN

Minnesota Teamsters Public & Law Enforcement Employees Union, Local No. 320)	BMS Case No. 09-PA-0912
)	Issue: FTO Overtime Pay
“Union”)	Site: Bemidji, MN
)	Hearing Date: 02-04-10
and)	Brief Date: 02-26-10
)	Award Date: 03-23-10
County of Beltrami, Minnesota)	Mario F. Bognanno,
“County” or “Employer”)	Labor Arbitrator

JURISDICTION

Pursuant to Article 5 in the parties’ 2009-2010 Collective Bargaining Agreement (CBA), on February 4, 2010 the above-captioned matter was heard in Bemidji, Minnesota. (Joint Exhibit 1) The parties, appeared through their designated representatives, waived the 30-day decisional timeline provision in Article 5.3 B, and stipulated that the issue in dispute was properly before the Arbitrator for a final and binding determination. 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 filed on or about February 26, 2010, and thereafter the matter was taken under advisement.

APPEARANCES

For the Union:

Paula R. Johnston General Counsel

Merl King	IBT, Local No. 320 Business Agent
Jarrett Walton	Grievant & Deputy Sheriff
Sam Lundquist	Steward, IBT, Local No. 320
Steve Rankin	Deputy Sheriff

For the County:

Linda Tran	Beltrami County, Director of Human Resources
Mike Bakke	Beltrami County, Chief Deputy Sheriff
Keith Winger	Beltrami County, Sheriff, Retired
Tom Lyons	Beltrami County, Chief Deputy Sheriff, Retired

I. BACKGROUND

Beltrami County (“County” or “Employer”) and the Minnesota Teamsters Public & Law Enforcement Employees Union, Local No. 320 (“Union”) are parties to a 2009-2010 CBA that was executed in January 2009, covering licensed employees in the Beltrami County Sheriff’s Department, including Deputy Sheriffs. (Joint Exhibit 1) Generally speaking the fighting issue in this case deals with compensating deputies who perform Field Training Officer (“FTO”) shift work:¹ An issue that is not expressly addressed in the CBA.

From the County’s perspective, Chief Deputy Tom Lyons, now retired, testified that in 1999, when he joined County employment, deputies who were assigned FTO shifts were permitted to work overtime to complete FTO paperwork and, as compensation, they received time and one-half time in pay or comp time the overtime actually worked. To reiterate, Mr. Lyons stated that to be compensated for FTO work, the County’s policy was that the deputies in question

¹ A “FTO shift” is defined as a scheduled shift staffed by a Deputy Sheriff who provides on-the-job training to a newly recruited, probationary deputy. The former FTO deputy is one who has attended a FTO School to learn field training methods.

must have actually worked the overtime; that he communicated this policy to the relevant parties; and that the policy was enforced. Sheriff Keith Winger, now retired, essentially affirmed Mr. Lyons' testimony. He also stated that he did not know, as the Union asserts, that deputies were receiving one hour of time and one-half pay or comp time for working FTO shifts even though the claimed overtime was not actually worked.

From the Union's perspective, Deputy Sheriff Steve Rankin testified that from 1998 through 2006 he worked as a FTO; that compensation for working a FTO shift was one hour of pay at time and one-half, or one and one-half hours of compensation time earned; and that said compensation was not premised on the requirement that a FTO actually work one hour of overtime. Further, Mr. Rankin testified that over the ensuing years he routinely claimed one hour of overtime every time he was assigned to work a FTO shift; that, with his supervisors' knowledge, he never actually worked the claimed overtime on the indicated FTO shifts; and that he was never denied the one hour of overtime pay *per* FTO shift worked. Moreover, he testified that he and Sergeant Steve Page attended FTO School together in 1998 and that Mr. Page, with confirmation from then Chief Deputy Lyons, instructed him in how FTO shifts and related FTO compensation should be reported on the County's timesheets.² Finally, with reference to Mr. Rankin's biweekly timesheets from October 26, 2006 to February 1, 2007, the latter stated that among the supervisors who signed his timesheets were Messrs.

² Without contradiction, Chief Deputy Lyons testified that his tenure with the County commenced on May 10, 1999.

Page and Lyons and current Chief Deputy Mike Bakke. (Union Exhibit 7)

Moreover, Union witness Deputy Sheriff Jarrett Walton, the Grievant, testified that he attended a forty-hour FTO School in 2005, and since that time he has routinely added one hour of overtime to his biweekly time sheet or one and one-half hours of earned compensation time for each FTO shift that he was assigned to work and that this was his practice even though he did not actually work the overtime hour.

As instructed by Sergeant Page at the time, Mr. Walton testified that when completing his biweekly timesheet, he would report his actual "Shift Start Time," but not his actual "Shift End Time." As for the latter, Mr. Walton testified that whenever he was assigned to work a FTO shift, he would add one hour to his actual "Shift End Time," even though he did not actually work one hour beyond his regularly scheduled shift's end-time. Mr. Walton further stated that he would record his shift's regularly scheduled hours in the timesheet's "Total Hours Worked" column and record one hour in the timesheet's "Overtime 1.5" column or one and one-half hours in the time sheet's "Comp Time Earned" column whenever he was assigned FTO duty.³ In so many words, Mr. Walton testified that

³To summarize, Mr. Walton completed his timesheets in such a manner that the "Total Hours Worked" column plus the "Overtime 1.5" column (or "Comp Time Earned" column) would equal the difference between the "Shift End Time" and the "Shift Start Time" columns. Deputy Sheriff Rankin also testified that he completed his timesheets in a similar manner. Also see Union Exhibits 3 – 12. In contradiction, the County maintains that the "Shift Start Time" and "Shift End Time" columns on the timesheet should reflect the employee's regularly scheduled start and stop times, and that the "Total Hours Worked" column should include the regularly scheduled hours minus scheduled hours not worked (due to holiday, vacation day, sick leave, comp time taken and other) and/or regularly scheduled hours plus time worked beyond scheduled hours (e.g., actual FTO time worked at time and one-half or "Comp Time Earned").

the one hour of time and one-half of overtime pay or compensatory time earned he received for each assigned FTO shift was essentially a “bonus” for having performed FTO services and not payment for actually working an additional overtime hour.

Against this background, Marilyn Nelson, then the Beltrami County Personnel Director, sent a September 3, 1998, memorandum to the Sheriff DeeWayne Rognstad and to all Sheriff’s Department supervisors pertaining to “Overtime and Timesheets.” Therein she stated, in part:

Please ensure that all overtime hours claimed on timesheets reflect actual hours that are worked. The Personnel Rules, Section VI, D, 1, C, clearly states: “An employee may be subject to disciplinary action up to and including dismissal for making false claims of hours worked or leave hours taken.” If supervisors order or condone this practice, they can and should be held responsible.

(Employer Exhibit 7, emphasis added)

In response to this memorandum and because the Sheriff’s Department was experiencing pressing 2009 budgetary constraints, including the fact that its overtime budget was “always in deficit,” Chief Deputy Mike Bakke began reviewing the Department’s overtime records. Mr. Bakke testified that he was unable to fully reconcile overtime hour payments with overtime hours claimed on employee timesheets; that the scheduling of overtime could be managed in a more fiscally responsible manner; and that corrective steps needed to be taken.

Thus, on January 7, 2009, Mr. Bakke sent an e-mail message to the Sheriff’s Department’s investigators, another to its sergeants and a third to “All Sworn” departmental personnel. In part, he advised Investigators that henceforth

overtime was disallowed "... without prior approval from either (sic) the Chief Deputy, the Sheriff or a Sgt., if you cannot reach either me or Phil. The only exception to this rule will be call outs or court testimony on your scheduled days off." (Employer Exhibit 3) To sergeants, he wrote in part: "Essentially, I don't want any employees working OT [overtime] unless they get prior approval, with the exception of call-outs and court testimony. ... Essentially, the command and supervisory staff will decide if OT is warranted from now on." (Employer Exhibit 4)

The e-mail Mr. Bakke sent to "All Sworn" personnel stated the following:

As you all know, we are anticipating cash flow problems that could impact the way we operate. Because of this reality, Sheriff Hodapp, myself and the four Sergeants are going to be closely monitoring overtime. With the exception of call-outs, scheduled court testimony on scheduled off-duty time you must receive prior approval before working any overtime. Obviously, common sense will be used regarding shift extensions as Deputies get involved in situations that do not permit them to get prior approval for OT. Essentially, we want employees [to] make every effort to manage their time wisely, complete their work during the scheduled shift and go home. Please feel free to contact me or stop by my office if you need clarifications.

(Employer Exhibit 5)

Returning to Grievant Walton's situation, the latter testified that he submitted an overtime requisition covering the January 1, 2009 to January 14, 2009 biweekly pay period, as he had done innumerable times since completing FTO School, and the requisition was paid. (Union Exhibit 12, page 1) Moreover, this requisition included 2 hours of time and one-half overtime for working FTO shifts on January 12, 2009 and January 13, 2009—shifts on which he did not actually work any overtime. Mr. Walton further testified that the requisition approval followed a telephone conversation between Sergeant Winger and Chief

Deputy Bakke. Last, Mr. Bakke's signature appears on the supervisor signature line of Mr. Walton's time sheet for this biweekly period.⁴

However, in the immediately following biweekly pay period—January 15, 2009 to January 28, 2009—Mr. Walton again submitted an overtime requisition on which he claimed one hour of FTO overtime for January 19, 20, 23, 24, 25, 26 and 27, 2009, plus 10 hour of “Leach Lake Saturday” and “Court Hearing” overtime. (Union Exhibits 1 and 12, page 2) On January 28, 2009, the County rejected payment of the requested seven FTO overtime hours because they were not actually worked. (Union Exhibit 1 & Employer Exhibits 1 and 2) Mr. Walton took umbrage with this explanation since, as he testified, his supervisors knew that the FTO overtime hours he was claiming were not overtime hours he actually worked.

On January 23, 2009, Chief Deputy Bakke and Sergeant Page exchanged six e-mail messages of relevance to the instant dispute.

1. At 10:32 AM, Mr. Page wrote:

It has been past practice that field training officers receive one hour of OT for every shift they are field training a Deputy due to the extra paperwork and other duties they are responsible for. Our (sic) we operating business as usual for that?

⁴ Also in evidence are Mr. Walton's timesheets for the eleven two-week pay periods beginning on March 13, 2006 and ending on September 14, 2006. All of these time sheets were filled out in the manner Mr. Walton described in his testimony. Further, nearly all of these timesheets identifies one or more dates on which Mr. Walton claimed one hour of overtime when assigned to work a FTO shift. (Union Exhibits 3 and 6) This pattern is repeated on two of Mr. Walton's timesheets for September 2007 (Union Exhibit 10) and on six of his 2008 timesheets. The Union also put in the record similar sets of 2006 timesheets for Deputy Sheriffs Lee Anderson (Union Exhibit 4), Scott Wherley (Union Exhibit 5), Steve Rankin (Union Exhibits 6 and 7) and Jason Riggs (Union Exhibits 6 and 7) who were also paid one hour of overtime for each FTO shift assigned. Similar sets of 2007 and 2008 timesheets for several of these FTOs are also in evidence and they too were completed in the manner described by Mr. Walton and they show one hour of overtime for each FTO shift assignment. (Union Exhibits 7 – 11),

2. At 10:53 AM, Mr. Bakke replied:

While I don't want to take away the incentive to FTO, in order to be consistent with k-9 and everyone else they will only get OT if they have to extend their shift in order to complete paperwork, which is fine by me if they can't get the paperwork done during their regular shift. Field Training a new deputy is assigned work and they actually have to work OT in order to get paid OT.

3. At 11:22 AM, Mr. Page replied:

While I agree with the big picture of reducing OT I'm not sure that being a field training officer is or can be a mandatory assignment for a Deputy and thus that's why there has been the little OT incentive. I think if it would come to making it mandatory for a Deputy to be a (sic) FT officers the quality of training would be greatly affected. The K-9 handlers are still actually compensated since they only work 10 hour shifts while getting paid for 11.5. I do understand that this time is supposed to be when they are caring for their animals but in all reality that time isn't anything that can be monitored. I think the argument is very similar for both a K-9 handler and a FT officer that both have extra duties to do whether they are performing them on duty or off and both positions are ones that the Deputy has elected or chose to do. I think we need to be very careful about giving a K-9 handler special privileges and yet treating a FT officer the same as the next Deputy while they are performing their extra duties.

4. At 11:50 AM, Mr. Bakke replied:

With the k-9 we are doing the minimum that labor law precedent requires us to do and we still hear about it from the union. I hear you, though. FTO's have serious responsibilities and we want to treat them right, because it is hard work. For many years in the SO, there were in-house pay agreements that were really extra-contractual pay increases that weren't based on actually hours worked. The k-9's are a prime example of that. There are other examples as well. Keith let Brian claim OT for unspecified Admin duties after Mark left Investigations. I put a stop to that because he wasn't doing anything that couldn't be accomplished during his shift. I have also taken away approximately \$7,000 in guaranteed OT that each K-9 officer was taking in per year. The whole point is in order to get an hour of OT they have to work an hour of OT or they could come off the road early to do their paperwork, but I will double check with HR and Kay M. to ensure that I am not in the wrong here. Maybe there is another way to compensate them within the existing rules and contract...I will think on it.

5. At 12:23 PM, Mr. Page replied:

Ok...thanks I appreciate you looking into this.

6. At 2:31 PM, Mr. Bakke replied:

Steve,

As I originally thought, to claim an hour of OT without actually working it would be akin to falsifying a timesheet. Like everyone else FTO's need to seek approval to work OT. I understand the thought though...they work harder, therefore they get paid more. The reality is they are in (sic) bargaining unit bound by a labor agreement and so are we. They all get paid the same regardless of productivity...

Mike

(Employer Exhibit 6, emphasis added)

On February 2, 2009, the Union filed a grievance on behalf of Mr. Walton charging, *inter alia*, that the County was violating the CBA's Article 10 and an established FTO pay practice. The grievance also claims that this practice has been in place for eleven years. Finally, the grievance asks that Mr. Walton be compensated for the seven unpaid FTO shifts in question and that the County be directed to cease and desist from further violating the established FTO pay practice. (Joint Exhibit 2)

At Step 1 in the grievance procedure, Chief Deputy Bakke wrote a three-part response to the Union's grievance. First, he noted that Article 10.5 in the CBA clearly states that only hours worked beyond an employee's scheduled shift may be compensated at time and one-half and, in this case, the Grievant did not actually work overtime hours while on the FTO shifts in question. Second, Mr. Bakke states:

While there may have been what can be termed as extra-contractual in-house pay agreements in previous administrations. This administration believes ... [U]less overtime is actually worked ... to claim overtime compensation on one's timesheet when overtime has not been worked is timesheet falsification.

(Joint Exhibit 3) Last, Mr. Bakke recommended that henceforth if FTOs need to work overtime to complete FTO paperwork they may do so with the approval of their supervisors.

Sheriff Phil Hodapp wrote the County's Step 2 answer to the grievance. It states in part:

... I also explained that permitting the past practice of authorizing the falsification of timesheets and claiming of hours not worked in order to provide additional pay to FTO's was illegal. Even though it has been a past practice in this department this practice was no longer going to take place.

(Joint Exhibit 4, emphasis added)

Lastly, the County's pre-arbitration or Step 3 answer to the Union's grievance was drafted by Tony Murphy, Beltrami County Administrator. Again, he denied the grievance on the grounds that the County did not violate any of the CBA's terms in the instant matter. (Joint Exhibit 5) Thereafter, the Union advanced the grievance to arbitration for final resolution.

II. STATEMENT OF THE ISSUE

The parties stipulated to the following statement of the issue:

Did the County violate past practice by refusing to pay Field Training Officer compensation to the Grievant. If so, what should be the remedy?

III. RELEVANT CBA PROVISIONS AND BELTRAMI COUNTY PERSONNEL RULES

A. CBA Provisions

Article 10.4 Employees who work in excess of their regularly scheduled shift in a day, shall, if requested by the Sheriff or his/her designate, maintain records of time and duty involved and report such.

Article 10.5 All hours worked beyond an employee's scheduled shift shall be compensated at a rate of one and one-half (1½) times the regular rate. The employee shall receive paid overtime unless the employee requests and the department head authorizes compensatory time off.

Article 21.1 It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Employer in all its various aspects, including, but not limited to, the right ...; to make and enforce rules and regulations; ...

(Joint Exhibit 1, emphasis added)

B. Beltrami County Personnel Rules

Article 6.5.6 An employee may be subject to disciplinary action up to and including dismissal for making false claims of hours worked or leave hours taken.

(Employer Exhibit 8, emphasis added)

IV. UNION'S POSITION

The Union argues that although compensation for FTO shift work is not covered under the CBA, it is regulated by a controlling past practice. The Union maintains that for more than a decade deputies assigned FTO shifts have been compensated for one hour of overtime pay or comp time for each FTO shift, without having been required to actually work the hour of overtime. Pointing to Union Exhibits 3 through 12, the Union argues that all of the 150 or so timesheets, covering the County's last eight newly hired deputies, show that each FTO shift assigned was clearly and consistently compensated with exactly one hour of

overtime pay;⁵ and that Sergeant Page knew about the past practice and implicitly agreed to it every time that he signed a timesheet and, in this regard, Chief Deputy Bakke acknowledged in his January 23, 2009 e-mail to Mr. Page that historically the Sheriff's Office has made overtime payments to deputies without actually requiring the overtime hours to have been worked—proof of implied acceptability. Citing arbitration precedent, the Union showed that when the clarity, consistency and acceptability tests of a long-standing practice are met, said past practice is rightly elevated to the status of enforceable contractual language.

Next, the Union observes that on January 28, 2009, the County wrongly refused to compensate the Grievant for seven hours of FTO shift work. This refusal, the Union charges, clearly varies from the parties' proven FTO pay practice; and, further, this variance is a violation of the parties' "whole" CBA since it did not result from a negotiated agreement with the Union.

Further, turning to the issue of the falsification and/or illegality of the proven FTO pay practice, the Union argues that deputies were instructed by the County to add one hour in the "Shift End Time" column of their timesheets whenever assigned to work a FTO shift. Moreover, the deputies in question never claimed to have worked beyond their regularly scheduled shifts nor did they intend to falsify their timesheets. Even more critically, the Union avers, the County knew that FTOs received the equivalent of one hour of overtime pay or comp time for each

⁵ If, as the County claims, the Employer instructed FTOs to report overtime for time work beyond their regularly scheduled shifts, why is it that said deputies have uniformly claimed exactly one hour at the overtime rate for every FTO shift worked? When asked about this obvious pattern, Chief Deputy Lyons tacitly admitted that he relied on the "chain of command" to monitor such

of their FTO shift assignments and it knew that the referenced one hour of overtime was never worked.

Finally, for the above reasons, the Union requests that the Grievant be made whole for the seven FTO shift assignments he worked without FTO compensation in January 2009; that the Grievant and all other similarly affected FTOs be made whole for subsequent FTO shift assignments for which they did not receive FTO pay; and that the County be ordered to resume the FTO pay practice.

V. COUNTY'S POSITION

Initially, the County relies on Article 10.4 of the CBA, which sets forth the requirement that employees must maintain records of overtime worked and related overtime duties. (Joint Exhibit 1) However, in this instance, the County argues that the Deputy Sheriff FTOs and, in particular, Mr. Walton, were improperly completing their timesheets by adding one hour to the "Shift End Time" column of their timesheets whenever they were assigned to work FTO shifts—a clear CBA violation.

Further, the County points out that Article 10.5 of the CBA requires the Employer to compensate deputies at the rate of time and one-half times their regular rate of pay for "[A]ll hours worked beyond an employee's scheduled shift..." (Joint Exhibit 1) Yet, the County argues, its FTOs were claiming one hour of overtime when assigned to work a FTO shift and when, in fact, they did not work the overtime hour—a clear CBA violation. In this regard, the County notes

that Mr. Walton admitted that he did not work any overtime on the seven days that he was assigned FTO shifts during the second pay period of January 2009. Accordingly, the County concludes, it rightly refused Mr. Walton's FTO pay request. For this reason, the County argues, the grievance in this case should be denied.

Still further, citing Article 6.5.6 of its Rules, the County points out that "An employee may be subject to disciplinary action up to and including dismissal for making false claims of hours worked or leave hours taken." (Employer Exhibit 8) Clearly, the County urges, the FTOs and, in particular, Mr. Walton, were in violation of this Rule inasmuch as they were claiming to have worked overtime hours that were not actually worked.

Next, the County contends that the Union's reliance on Sergeant Steve Page as the party who instructed the Grievant and perhaps others to claim one hour of overtime for each FTO shift worked is misplaced. Mr. Page, the County observes, has never been authorized to set policy for the Sheriff's Department. In this regard, Chief Deputy Lyons articulated the County's FTO pay policy and, simply stated, it is that FTOs were allowed to work overtime and to be paid overtime, if needed, to complete FTO paperwork, and that it has never been the County's policy to allow FTOs to claim one hour of overtime for each FTO shift they worked without actually having working said overtime hour. In addition, the County contends that neither Mr. Lyons nor Sheriff Winger were aware of the alleged FTO pay practice.

In response to the Union's charge that the County improperly and unilateral

revoked the parties' FTO pay practice, the County argues that it was under no obligation to either notify or negotiate with the Union since the alleged FTO pay practice was in violation of both the CBA and County Rules, and because the County had no knowledge of the alleged FTO pay practice.

VI. DISCUSSION

The Union claims that the County has been compensating deputies for working FTO shift assignments for more than a decade. Specifically, the practice has been to pay FTOs the equivalent of (1) one hour's pay computed at time and one-half or (2) one and one-half hours of compensatory time earned; and, further, FTO pay has never been premised on the requirement that the FTO actually work one hour beyond his/her regularly scheduled shift. The Union also claims that to receive their FTO pay, deputies were instructed to enter one hour of overtime or one and one-half hours of compensatory time earned on their biweekly timesheets, even though the indicated overtime was not worked.

The County rejects these claims, asserting that its policy has never been to compensate deputies for working FTO shifts *per se*. Rather, the County maintains, to the best of its knowledge, FTOs have only received FTO pay when they worked beyond the end of their regularly scheduled shift (i.e., overtime) to complete FTO paperwork.

The bulk of documented evidence in this case addresses these competing claims. After carefully reviewing these documents, the undersigned finds that they support the Union's position. The voluminous set of timesheets in the record display an identical and uniform pattern of FTO-related one hour of overtime pay

or one and one-half hours of compensatory time entries, which are consistent with the Union's version of events. If deputies only received pay for FTO-related overtime actually worked, then the timesheets should have revealed a range of hourly overtime entries rather than the referenced identical and uniform pattern that is observed. Regarding this point, the record does not support the conclusion that each FTO shift requires the same amount of time to complete the requisite FTO paperwork.

There are other reasons leading to this finding. The most compelling among them having been supplied by the County itself. First, in one of the January 23, 2009 e-mail exchanges between Chief Deputy Bakka and Sergeant Page, the former admits that "For many years in the SO [Sheriff's Office] there were in-house pay arrangements that were really extra-contractual pay increases that weren't based on actually (sic) hours worked." (Employer Exhibit 6) The context from which this quote was taken suggests that one such extra-contractual arrangement applied to FTO pay. More to the point, however, is the following quote:

I also explained that permitting the past practice of authorizing the falsification of timesheets and claiming of hours not worked in order to provide additional pay to FTO's (sic) was illegal. Even though it has been the past practice in this department this practice was no longer going to take place.

(Joint Exhibit 4) This statement, excerpted from Sheriff Hodapp's Step II answer to the grievance, can only be interpreted to mean that FTOs were indeed being paid for working FTO shifts and not for performing FTO duties after hours. Last, the undersigned acknowledges that Sergeant Page has never set FTO pay policy,

as the County avers. Nevertheless, it was he who instructed the Grievant on how the timesheet ought to be filled out, and it was he, among others, who signed on the “supervisor’s signature” line of the FTO timesheets. It would be naive to conclude for more than a decade, pay period after pay period, Chief Deputy Lyons, Chief Deputy Bakke and the various Sheriff’s Department sergeants who signed these timesheets were not aware of the fact that deputies assigned FTO shifts were not actually working the overtime they claimed.

Next, the Union persuasively argues that above-discussed FTO pay practice was long-standing, clear, consistently applied and mutually acceptable to all concerned. Thus, the Union urges, said practice constitutes a binding and enforceable past practice that may not be unilaterally uprooted without Union acquiescence or that such unilateral action must await the current CBA’s expiration. The County strongly disagrees, citing several reasons. First, with reference to Article 10.4 in the CBA, the County points out those employees who work in excess of their regularly scheduled shift shall maintain a record of same. However, under the terms of the disputed FTO pay practice overtime not worked was reported as time worked, in violation of this article. Second, Article 10.5 requires the County to compensate employees at the overtime rate of time and one-half but only for hours worked beyond an employee’s scheduled shift. Since the FTO pay practice involved the reporting and paying of overtime not worked this article was also being violated. Last, the County notes that Article 6.5.6 of the County’s Rules make the reporting of false claims of hours worked a disciplinary offense.

Upon reflecting on the record evidence in its totality, the undersigned concludes that this matter involves the lax enforcement of policy every bit as much as it involves past practices. All witness testimony was credible, although it appears that Deputy Sheriff Rankin may have been mistaken when he suggested that in 1998 Chief Deputy Lyons confirmed his version of the FTO pay policy, simply because Chief Deputy Lyons did join the County's workforce until May 10, 1999. Nevertheless, in the undersigned's opinion, the confluence of testimony by County and Union witnesses suggests that in the late 1990s the prevailing FTO policy was to allow deputies to spend time after the end of their shifts to complete FTO paperwork for which they were compensated at the overtime rate. Reference the sworn testimony of Deputy Sheriff Lyons and Sheriff Winger. This articulation of FTO pay policy is consistent with the way Sergeant Page instructed FTOs to report overtime on their timesheets, time for which they were paid for having worked. It is also consistent with the policy prescriptions embodied in the CBA Articles 10.4 and 10.5, as well as in County Rule Article 6.5.6.

It is further opined, that sometime thereafter this policy morphed into the now disputed FTO pay practice. Reference the sworn testimony of Deputy Sheriffs Rankin and Walton. Apparently, FTOs began completing FTO paperwork during their regular shift hours, obviating the need to actually work overtime; yet, with the concurrence of their supervisors, they continued to report overtime on their timesheets, exactly one hour of overtime per FTO shift assignment, and they received compensation for same, even though it was not worked. This transformation of policy sustained for more than a decade even though, as the

County correctly points out, it was inconsistent with the “rules” governing overtime pay. Nevertheless, this transformation explains why FTOs like Mr. Walton viewed the FTO pay policy as a “bonus” for working a FTO shift, and how the charade of overtime worked and timesheet manipulation evolved.

Regrettably, neither the Union nor the County offered timesheet records dating back to the late 1990s, records that would have documented or failed to have documented the undersigned’s interpretation of the testimonies of Sheriff Winger, Chief Deputy Lyons and Deputy Sheriffs Rankin and Walton.

This analysis leads the undersigned to conclude that the disputed FTO pay policy was not a “gap filling” past practice, as the Union would have it. Rather, it was a manifestation of the parties’ mutual willingness to vary from (or to relax the enforcement of) prevailing and controlling CBA and County policies. Under circumstances like this, either party, at any time, may withdraw its concurrence to a past practice and insist on the enforcement of expressed policy or policies. In this case, the County is now requiring that deputies working FTO shifts may report and be paid the equivalent of one hour of overtime provided they actually worked the overtime hour in question. In so many words, the County is returning to the FTO pay policy “rule” that prevailed before the aforementioned transformation—a rule that is contractually prescribed and compliant.

However, the County failed to provide timely advice to the Union and to its FTO-trained deputies that the FTO pay practice was no longer acceptable and that, henceforth, FTO shifts would be compensated in accord with existing contractual language governing overtime reporting and pay. It is well established

in arbitral precedent that the employer is obligated to provide the Union and affected employees due notice of its intent to withdraw from a prevailing past practice.

On January 7, 2009, Chief Deputy Bakke advised deputies that henceforth overtime would be monitored closely and would require prior approval. With respect to the instant matter, this notice is unacceptably general. Further, on January 23, 2009, Messrs. Bakke and Page exchanged e-mail messages in an effort to clarify how the County's new overtime posture would affect FTO pay. In addition, the fact that the Grievant was paid one hour of overtime for working FTO shifts on January 12 and 13, 2009, certainly did not signal Mr. Walton and the other FTO deputies that FTO pay practices were about to change. To abandon a past practice that emanates from the lax enforcement of expressed policy and to return to said policy's enforcement requires due notice, which, in this case was not given to the Union or to the Grievant.

VII. AWARD

For the reasons discussed above, the County did not violate a binding and enforceable FTO pay practice when it opted to bring said practice back into line with both existing CBA policies and the County Rule governing overtime reporting and pay. Accordingly, the portion of the grievance seeking continuance of the FTO pay practice is denied. However, the County was obligated to give timely notice to the Union, the Grievant and other FTO-trained deputies of its intent to withdraw from the disputed FTO pay practice. In the opinion of the undersigned, said notice was not effectively provided until February 2, 2009, the date on which

the Union grieved the instant matter. For this reason, the County is ordered to compensate the Grievant for the seven hours of FTO duty claimed on his January 15, 2009 to January 28, 2009 timesheet at time and one-half. (Union Exhibit 12, page 2)

Issued and ordered from Tucson,
AZ on the 23rd day of March 2010,

Mario F. Bognanno, Labor Arbitrator