

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>MINNESOTA TEAMSTERS PUBLIC &amp; LAW ENFORCEMENT EMPLOYEES UNION LOCAL NO. 320</b>	)	<b>OPINION AND AWARD</b>
	)	
<b>AND</b>	)	<b>BMS CASE NO. 10-PN-0623</b>
	)	
<b>HENNEPIN COUNTY</b>	)	<b>INTEREST ARBITRATION</b>

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ARBITRATOR: Charlotte Neigh  
HEARING: September 9, 2010  
POSTHEARING BRIEFS RECEIVED: September 24, 2010  
AWARD: October 19, 2010

**REPRESENTATIVES**

For the Union:

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For the Employer:

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**JURISDICTION AND PROCEDURE**

In accordance with the Minnesota Public Employment Labor Relations Act, Charlotte Neigh was selected to arbitrate this matter and the Commissioner of the Minnesota Bureau of Mediation Services certified the issues to be arbitrated. A hearing was held in Minneapolis, at which time both parties had a full opportunity to offer evidence. By agreement of the parties, posthearing briefs were e-mailed on September 24th, and the record was closed upon their receipt.

**ISSUES CERTIFIED TO ARBITRATION**

1. Compensatory Time - Accrual and Usage of Compensatory Time - Art. 10, Sec. 4
2. Seniority/Days Off - Shift Bidding Days Off - Art 7, Sec. 4 (NEW)
3. Schedule Changes - Rate of Pay for Schedule Changes - Art. 10, Sec. 5
4. Shift Bidding - Annual or Semi-annual Shift Bidding - Art. 7, Sec. 4 (*WITHDRAWN*)

## **BACKGROUND**

The parties successfully negotiated economic and other issues for a new collective bargaining agreement (CBA) for 2010-11. Teamsters Local No. 320, along with the other County bargaining units (BUs), agreed to a wage freeze and no step increases for 2011. However, the parties reached impasse on three Union proposals related to scheduling of work in the Jail.

Teamsters Local No. 320 represents approximately 218 of the 798 employees of the Hennepin County Sheriff's Office, including: 158 Detention Deputies (DDs); 51 Telecommunications or emergency 911 operators; 8 Detention Technicians; and 1 Evidence Specialist. Some of the employees in the Jail are Licensed Deputies (LDs) and belong to a separate bargaining unit; the two seniority lists have been merged for purposes of scheduling the Jail's 24/7 staffing.

In May 2009 the Sheriff unilaterally imposed a new work schedule, replacing the 6-days-on/3-days-off rotation that had operated for 36 years. The new schedule covers a 28-day period, during which the employees work twenty 8-hour days and have eight days off. One result of the new schedule, which reduces shifts from 8.5 to 8 hours, is that the employees work an additional 15.25 to 17 days per year for the same amount of pay. This was not well received by the employees. The Employer set some restrictions on how days off may be distributed. Some aspects of the procedure were adopted by the Employer based on input from the two affected BUs during meet-and-confer sessions. The Union acknowledges the Employer's right to set the schedule but wants to have some aspects of the scheduling procedure written into the collective bargaining agreement (CBA).

Currently the Employer is scheduling days off using seniority "to the greatest extent practicable" based on selections made by the employees. Two restrictions that the employees must follow in selecting days off are: a maximum of eight consecutive days on duty; and work at least one weekend during the 28-day period. Other factors that must be incorporated by the scheduling supervisor (SS) are: meeting the required minimum for staffing the shift; having no more than 50% with less than two years of experience; and accommodating requests for vacation and holidays while minimizing the amount of overtime (OT) costs incurred for filling vacant slots.

The effect generally has been that employees in the top half of the seniority list usually get the days off that they select, while those with less seniority don't get as many of their selected days. It is possible for a more senior employee to be off on three out of four weekends, leaving more weekend duty for the less senior employees. More senior employees also usually can choose whether to take a designated holiday off or work it at the OT rate.

The current practice is to post the schedules for three 28-day periods, thus giving employees that much advance notice for planning days off. After the schedule is posted, an employee may request vacation and/or holiday time off, or trade days with a coworker; the SS tries to accommodate these requests and notes changes on the officially posted schedule as they occur. The only changes to a posted schedule since at least January 2010 have been initiated by the affected employee(s).

**ISSUE NO. 1: Accrual and Usage of Compensatory Time - Article 10, Section 4***Current Language***ARTICLE 10 - WORK SCHEDULES - PREMIUM PAY**

**Section 4. For Detention Deputies**, worked hours in excess of the assigned work shift of eight (8) or more hours or an averaged eighty (80) hours per payroll period, with the exception of the twelve mandatory training hours for employees on a 6-3 schedule, shall be overtime and compensated at one and one-half (1 1/2) times the employee's base pay rate, or one and one-half (1 1/2) hours compensatory time for each hour worked, subject to the provision that no employee shall be eligible for overtime premium unless prior approval of the overtime work was granted by the Sheriff or his designee.

**For Telecommunicators, Detention Technicians and Evidence Specialists**, worked hours in excess of forty (40) hours per work week shall be overtime and compensated at one and one-half times the employee's base pay rate or one and one-half (1 1/2) hours compensatory time for each hour worked, subject to the provision that no employee shall be eligible for overtime premium unless prior approval of the overtime work was granted by the employee's immediate supervisor or his/her designee.

**For All Classes**, overtime premium shall be provided in the form of either cash payment or compensatory time as determined by the EMPLOYER, provided that an employee may carry up to 24 hours compensatory time, which shall be used or cash payment made at the EMPLOYER'S discretion. Employees may express their preference for compensatory time or cash payment for their approved overtime earnings.

*Employer Position*

Status quo. Hennepin County proposes no change to the language contained in Article 10, Section 4.

*Union Proposals*

1. Change the wording to give the discretion regarding cash or time to the Employee rather than the Employer.
2. Add for all classes: "An employee who has requested the use of compensatory time shall be permitted to use it within a reasonable time after the request so long as it does not unduly disrupt the operations of the Department".

*UNION ARGUMENTS*

- Although the Union has unsuccessfully tried to accomplish this change in previous negotiations, the circumstances now are different due to a radical change in the schedule, resulting in an additional 15.25 to 17 workdays per year.
- It is not accurate to say that every use of compensatory time off would result in OT costs for filling those hours. This erroneously assumes that such requested time off would be with short notice, whereas it might be done in advance, as is done with vacation leave, where the SS can adjust staff to accommodate requests.
- Even if a last-minute request resulted in overtime, that is what happens when an employee calls in sick. Accumulated compensatory time is limited to 24 hours, contrasting with 720 hours possible for accumulated sick leave. This makes compensatory time off a comparatively minor liability.

### Union Arguments (continued)

- The new language would allow usage of compensatory time in accordance with the Fair Labor Standards Act (FLSA): within a reasonable time; and not unduly disrupt operations. These phrases are more than adequately defined in law.

### *EMPLOYER ARGUMENTS*

- An arbitrator should not award something that the Employer would never agree to and the extensive bargaining history between these parties demonstrates that: the provision for Employer discretion has been in the relevant CBAs for many years; and the Employer has repeatedly rejected proposals to change it, including as recently as 2003 and 2005.
- In a 1990 arbitration award a three-member panel concluded that giving discretion to the employee would “create undue and severe problems for the Sheriff’s Department, both for budgetary and staffing reasons”. This continues to be the case.
- A DD at top rate earns approximately \$40.88 for an hour of overtime, which is adequate compensation.
- The Union’s proposal is driven by a desire for more time off. However, the DDs’ vacation benefits are already adequate: in comparison with the market; and as demonstrated by the fact that many DDs don’t use all of the vacation time they have earned. If employees can use compensatory time instead of vacation time, they will next be seeking an increase in the cap of 280 hours for accrued vacation to be paid when they leave the County’s employ, a considerable cost to the County.
- The Union complains about difficulty in using vacation days; adding more time off in the form of compensatory time would only exacerbate this perceived problem.
- The Union’s proposal ignores the interplay between vacation time off and compensatory time off in scheduling, where they are essentially fungible when determining how to adequately staff the Jail without incurring significant overtime costs or operational problems.
- In response to the Union’s desire to allow more employees to take vacation time off, the number allowed per shift has been increased from three to five on the day and middle shifts and to four on the night shift, which is roughly the 10% factor that the Union sought. Adding even more time off in the form of compensatory time would compound the scheduling problems and raise issues regarding precedence for the different kinds of time off. A possible reading of the FLSA would require precedence for compensatory time, necessitating denial of vacation requests.
- Current staffing levels cannot permit more than 10% of a shift to be off for vacation or compensatory time; accommodating both types of time off would cause unaffordable OT costs, on top of those already incurred for sick, funeral, military and FMLA leaves.

### Employer Arguments (continued)

- Granting compensatory time off in the Jail's situation creates a cascading effect, where the hours needing to be filled on each consequent occasion are at the OT rate in order to maintain minimum 24/7 staffing requirements. Overtime paid in cash is done and over with.
- Granting the Union's proposal would require hiring additional employees and considerably more OT costs. This is the burden rejected by the 1990 arbitration panel, as it should be in this case.
- The 24-hour cap on accumulated compensatory time is a rolling cap, meaning that an employee working two 8-hour OT shifts could then demand 24 hours off for compensatory time within "a reasonable time", and then be free to work more OT shifts and accumulate more compensatory time, possibly as much as 288 hours in a year. This would provide the equivalent of seven additional weeks of vacation and allow the employee to accumulate unused vacation to be paid at severance.
- The Employer has consistently reserved the discretion to pay cash rather than compensatory time off for overtime with its other BUs. Granting the Union's proposal could spill over to the other BUs in future negotiations, and appear as an impasse item in future interest arbitration cases with other essential employees.
- The Union has not shown that similarly situated employees in other jurisdictions have the discretion to choose compensatory time off rather than cash payment.
- This is the first time that the Union has proposed adding the FLSA language regarding "reasonable time" and "unduly disrupt the operations". This standard has been a quagmire for other employers to administer, resulting in substantial litigation and a split among the federal circuit courts regarding interpretation. This is another reason the Employer prefers to pay cash for OT hours.
- Given the complexity of the Jail's operation and the necessity of maintaining minimum staffing requirements, the Union's proposal for compensatory time off is too expensive and inefficient and would outrage the taxpaying public.

### **ANALYSIS AND DISCUSSION**

The Union acknowledges that its proposal has failed in the past but argues that reconsideration is warranted because of the additional 15.25 to 17 workdays per year that have resulted from the new schedule. The Union and the employees understandably do not like this particular aspect of the new schedule but do not have any basis for challenging it directly. Thus this proposal is clearly an attempt to allow for more days when DDs can be excused from work. However, this proposal would directly exacerbate the financial problems facing the County, which were the reason for the wage freeze to which the Union agreed.

### Analysis and Discussion (continued)

The Employer has convincingly demonstrated the problems of balancing: the available workforce; the minimum required staffing levels; and scheduling days off for the already mandated reasons such as vacation, sick, funeral, military, and FMLA leaves. The Union has not met its substantial burden of showing why such a long-standing CBA provision, which has repeatedly survived efforts to change it, should be reversed now through arbitration.

The conclusion of the 1990 panel of arbitrators still holds: giving the Employee the right to choose compensatory time off would create undue and severe problems for the Sheriff's Department, both for budgetary and staffing reasons. Because the proposal to change discretion from the Employer to the Employee is being denied, the proposed additional language regarding usage is not applicable.

### AWARD

The Employer's position is awarded:

There shall be no change to the language contained in Article 10, Section 4.

### **ISSUE NO. 2: Seniority/Days Off - Shift Bidding Days Off - Article 7, Section 4 (NEW)**

#### *Current Language*

#### **ARTICLE 7 - SENIORITY**

##### **Section 4. SHIFT BIDDING**

- A. On or about February 15 and August 15 of each year, each Detention Deputy and Detention Technician shall be permitted to bid for the shift such employee prefers within the work unit of the Sheriff's Office to which such Detention Deputy and Detention Technician is assigned. When a shift vacancy occurs between such bidding dates, such vacancy shall be filled based upon their bid preference as set forth in the most recent semi-annual bid. The new shift vacancy created by such process and one additional new shift vacancy shall be filled in the same manner. The annual shift bid for Telecommunicators shall be done in accordance with Communications Division Policy.
- B. Employees who work in work units that use rotating shifts shall be required to rotate only between the two shifts that each employee specifies in the semi-annual bidding for shifts.
- C. The senior bidder for each shift is entitled to the shift bid for, if such bidder is qualified.
- D. If, as a result of a bidding for shifts, any shift would be staffed with personnel less than fifty percent of whom have at least two years of experience in the work unit, the EMPLOYER may reassign to such shift the most junior employees in the work unit who have the requisite two years of experience and make such other adjustment as may be necessary in order to retain such level of experience.
- E. No employee shall be permitted to bid for shifts if such employee has less than twelve months of total employment in the Sheriff's Office, or if such employee has less than eight months of total service in the work unit to which such employee is assigned. The EMPLOYER shall have flexibility in assigning such employees between shifts to provide employees with training and experience.
- F. "Seniority" for shift bidding shall be an employee's length of service from his/her most recent date of employment to a classification covered by this AGREEMENT.
- G. Nothing in this section shall be construed to limit the right of the EMPLOYER to assign or reassign an employee to the work unit where the EMPLOYER determines such employee is needed or is best suited.

*Employer Position*

Status quo. Hennepin County proposes no change to the language contained in Article 7, Sect. 4.

*Union Proposal*

Add a new provision to Article 7, Section 4:

H. At the same time that employees bid for shift preference as provided in Section 4(A), the employees shall bid by seniority their days off, which shall remain in effect until the next bid cycle.

*UNION ARGUMENTS*

- There is no contractual language addressing the new 28-day schedule; such a dramatic change requires adding certain language to the contract. Codifying the ability to bid for days off by seniority would cost the County nothing and there is no reason not to include it in the CBA.
- The County is already permitting the employees to bid for their days off by seniority, as the parties agreed during meet-and-confer sessions. It should be simple to codify the employees' ability to do this.
- If the Union's position is awarded, senior members will continue to include at least one weekend and not more than eight days on in a row when they bid for their days off. There is no reason that language should not be included in the contract to reflect that.

*EMPLOYER ARGUMENTS*

- The 28-day schedule as implemented by the Employer allows employees to submit their day-off requests prior to the posting of the schedule, and to the greatest extent practicable, seniority is used in determining the days employees are scheduled to be off from work. The more seniority employees have, the more likely they will have a schedule to their liking.
- Other limiting criteria are that an employee working an 8-hour shift may not work more than eight days in a row, and employees must work at least one weekend in each 28-day period.
- The Union's proposal is the first time the parties have addressed this subject in negotiations and it needs to be thoroughly vetted in negotiations before it would be appropriate for an interest arbitrator to consider it. The Union should not be encouraged to bypass serious negotiations in an attempt to get something from an arbitrator.
- The Union has not met its burden of persuasion on this issue. Other BUs of the Employer do not have this option; they generally live with the posting of schedules 14 days in advance of the effective date. The Union presented no evidence regarding the external market on this matter. No evidence was offered that the situation demanded immediate relief to correct a substantial inequity or injustice.

### Employer Arguments (continued)

- Under the guidelines put in place by the Employer, employees in the upper half of the seniority list generally get all of the eight days off they request. The employees above the bottom third but below the top half get from five to seven of the days off requested. There is no harm to the Union in preserving the status quo and having the parties continue to bargain over this issue, as opposed to the considerable harm to the Employer, the LDs, and the senior Jail employees if the Union's position prevails.
- The Employer has responded to the employees' desire to know schedules well in advance by increasing the advance time for posting from ten days to three 28-day periods. There is no need to post schedules six months in advance, which decreases the flexibility employees have in designing their own work schedules.
- If the Union's proposal were added to the CBA, there would be grievances about violating seniority rights when requested days off are not granted because of other criteria governing the scheduling, such as: a maximum of eight consecutive days on duty; a minimum of two consecutive days off if working the night shift; or working at least one weekend per 28-day period. These and other factors are ignored in the Union's proposal and are another reason why the proposal should be returned to the bargaining table.
- One faction that would be significantly harmed by the proposal is the Licensed Deputies who are combined on the Jail seniority list for the purposes of shift and schedule bidding. The LDs would be disadvantaged if they get to select their days off only three months in advance, while the DDs make their selections six months in advance. The LDs prefer the current selection and posting timelines, as reflected in their attempt to have language codifying the current timelines put into their CBA during a recent interest arbitration. In that case Arbitrator Jacobs declined to add the timelines to the CBA, as should be done in this case.
- The combined seniority list requires that both BUs be involved in establishing criteria and procedures regarding scheduling and only the Employer can bring these two together to make this happen. This is another reason the issue should be returned to the bargaining table.

### **ANALYSIS AND DISCUSSION**

It is understandable that the Union wants to make seniority an enforceable criterion for selecting days off, as the parties have done with shift bidding. However, scheduling days off is inevitably complicated by other factors. Although the Union asserts that bids would honor the limitations of a maximum of eight consecutive days on duty and working at least one weekend, that is not reflected in the language proposed by the Union. The Union's proposal would have the effect of selecting days off and posting schedules six months in advance, but the Union has not demonstrated that such lengthy advance scheduling is warranted or addressed the problems it would cause.

### Analysis and Discussion (continued)

The Employer has identified some legitimate concerns about problems that would be caused by awarding the Union's proposal. It is necessary to address the effect any new provision would have on scheduling the LDs, whose seniority rights must also be protected; this requires negotiations with that BU to assure uniform treatment of DDs and LDs. Any new language regarding the role of seniority in selecting days off must be carefully tailored to allow balancing with other criteria reflecting operational demands and safety.

The Employer correctly points out that the system now in place uses seniority to the greatest extent practicable. The system apparently has been operating reasonably well since January 2010 and there is no urgent need to codify it in the CBA. The current CBA expires at the end of 2011, so the parties will be back at the bargaining table a year from now. With another year's experience of operating under the new schedule, the parties will be better prepared to devise contractual language that will protect their respective interests while minimizing the likelihood of grievances.

### AWARD

The Employer's position is awarded:

There shall be no change or addition to the language contained in Article 7, Section 4.

### **ISSUE NO. 3: Schedule Changes - Rate of Pay for Schedule Changes - Article 10, Sect. 5**

#### *Current Language*

#### **ARTICLE 10 - WORK SCHEDULES - PREMIUM PAY**

**Section 5.** When the EMPLOYER determines changes in work schedules are necessary, at least forty-eight (48) hours advance notice shall be given to employees and posted whenever practicable. Except in emergencies, should it become necessary to change work schedules without forty-eight clock hours prior notice, when it is practicable to give such prior notice, the EMPLOYER shall pay for those hours worked outside of the employee's regular work schedule hours at a rate of one and one-half times his/her regular base pay rate. Employees shall be required to work overtime, holidays and night shifts when assigned to such unless excused by the EMPLOYER. The base pay rate or premium compensation shall not be paid more than once for the same hours worked under any provisions of this AGREEMENT, nor shall there be any pyramiding of premium compensation.

#### *Employer Position*

Status quo. Hennepin County proposes no change to Article 10, Section 5.

#### *Union Proposal*

Change the 48-hour notice requirement to ten days.

### UNION ARGUMENTS

- Although similar proposed changes have been rejected in the past, reconsideration is warranted by a dramatic change in circumstances. Under the new schedule, employees have been subjected to last-minute schedule changes that range from the ridiculous to the heartbreaking, including one who was off on his honeymoon, and another who had to miss her own child's baptism. Although the administration appeared to be trying to eliminate this problem in the months prior to the arbitration, there is no guarantee that it will not happen again. If the County is confident in its ability to finalize and post the schedule ten days prior to the work period, it should not object to this proposal.
- Arbitrator Jacobs' rejection of a similar proposal for the other BU was based on the lack of evidence of abusive or arbitrary schedule changes; such evidence exists in this case.

### EMPLOYER ARGUMENTS

- For almost 40 years the County has preserved its right to establish and modify work schedules as necessary, which has been tempered by penalty pay provisions in three of the County's 16 CBAs. The Employer pays a penalty at the rate of 1 1/2 times the hourly rate when it changes schedules without the prescribed notice unless there is an emergency. The 48-hour notice is the same in the CBAs for the BUs of the DDs and the LDs. The penalty period in the CBA for the Workhouse Correctional Officers is even less, at 24 hours.
- The Union attempted to change this notice requirement to 72 hours in 2003, 2005 and 2007; the Employer resisted that lesser change and certainly would not agree to this change, which does not include any quid pro quo.
- Arbitrator Jacobs recently rejected the same proposal from the LDs' BU.
- Seriously entertaining this proposal would require substantial direct evidence that the Employer has engaged in widespread abusive scheduling practices; this is not shown by a smattering of isolated incidents that occurred several months ago when there were some growing pains associated with implementing the new scheduling system. The Employer has responded to the issue and requires that any schedule change not driven by the employee can be done only with the approval of one of the two Captains who oversee Jail operations; no schedule change not driven by the employee has occurred since January 2010.
- No other sheriff department in the metropolitan area has adopted a penalty pay provision for schedule changes.

## ANALYSIS AND DISCUSSION

The Employer correctly points out that such an increase in the time for notice of a schedule change is not supported by either internal or external comparisons. The evidence shows that effective controls were put in place to avoid a reoccurrence of the glitches arising in the early months of the scheduling system. There is no evidence of any changes to the posted schedule other than those initiated by the employee since January 2010. The Union has not presented any of the usually required justifications for an interest arbitrator to award such a proposal.

## AWARD

The Employer's position is awarded:

There shall be no change to Article 10, Section 5.

## SUMMARY OF ITEMS AWARDED

### Issue No. 1

No change to the language contained in Article 10, Section 4.

### Issue No. 2

No change or addition to the language contained in Article 7, Section 4.

### Issue No. 3

No change to the language of Article 10, Section 5.

Because it was withdrawn, there is no award on Issue No. 4.

This award is in full settlement of all issues submitted to this arbitration

October 19, 2010

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Charlotte Neigh, Arbitrator