

IN THE MATTER OF ARBITRATION BETWEEN

WRIGHT COUNTY DEPUTY'S)	
ASSOCIATION,)	ARBITRATION
)	AWARD
Union,)	
)	
and)	
)	NON-SHIFT
)	TRAVEL TIME
)	GRIEVANCE
WRIGHT COUNTY,)	
)	
Employer.)	BMS Case No. 10-PA-0058
)	
)	

Arbitrator: Stephen F. Befort

Hearing Date: September 16, 2010

Post-hearing briefs received: November 2, 2010

Date of decision: November 24, 2010

APPEARANCES

For the Union: Robert J. Fowler

For the Employer: Susan Hansen

INTRODUCTION

The Wright County Deputy's Association (Union) is the exclusive representative of a unit of licensed deputies in the Wright County Sheriff's Office (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by failing to provide overtime pay for non-shift time spent by two unit employees while driving to duty assignments outside of Wright County. 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.

ISSUES

1. Is the grievance substantively arbitrable?
2. Did the Employer violate the parties' collective bargaining agreement when it denied overtime compensation for drive time outside of normal work hours spent for the purpose of attending out-of-county training and court appearances?
3. If so, should the Employer be enjoined from denying compensation for all similar out-of-county drive time that is required outside of an officer's regular work shift?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII. EMPLOYEE RIGHTS- GRIEVANCE PROCEDURE

7.5 ARBITRATORS AUTHORITY

- A. The Arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way with the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the Arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

ARTICLE VIII. SAVINGS CLAUSE

This Agreement is subject to the laws of the United States, the State of Minnesota, and the County of Wright. In the event any provision of this Agreement shall be held to be contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided, such provisions shall be voided. All other provisions of this Agreement shall continue in full force and effect. The voided provision may be renegotiated at the written request of either party.

ARTICLE XII. OVERTIME

- 12.1 Employees will be paid at an overtime rate of one and one half (1 ½) or compensatory time on a time and one half (1 ½) basis, at the Employer's option, for hours worked as an extension of the employee's regularly scheduled shift. Changes of shifts do not qualify an employee for overtime under this article. The maximum number of compensatory time allowed shall be 48, non-renewable, per calendar year. All hours of compensatory time shall be used by the end of the year. If an employee has not used his accrual of compensatory time and wishes to be paid for the unused accrual in cash, he may do so provided:
- The request is received in writing by December 1st so that it can be processed through the payroll system within the calendar year.
 - Payment of the accrual is at the rate the compensatory time was earned, minus any required deductibles.

ARTICLE XIII. COURT TIME

An employee who is required to appear in court during the employee's scheduled off-duty time shall receive a minimum of two (2) hours pay at one and one-half (1 ½) times the employees base pay rate. Pay as one and one-half (1 ½) times the employees base pay rate shall also be paid to the employee if the court appearance scheduled during the employee's off duty time is cancelled after 10:30 a.m. on the date of the scheduled court appearance. An extension of or early report to a regularly scheduled shift for court appearance does not qualify the employee for the two (2) hour minimum.

FACTUAL BACKGROUND

Grievants Julie Eaton and Andy Fashant are Detectives employed in the Wright County Sheriff's Office. They are covered by a collective bargaining agreement negotiated by the Union and the Employer applicable to non-supervisory deputies employed in the Sheriff's Office. Both employees sought overtime pay for time spent driving to work-related activities outside of Wright County and grieve the denial of those requests.

On October 22, 2007, Detective Julie Eaton drove to St. Paul in a squad car for a court appearance. Her appearance was commanded for 9:00 a.m. by a subpoena issued

by a Ramsey County District Court judge for the purpose of testifying in a matter related to her work as a Wright County Detective. She departed from her home at 6:58 a.m. in order to complete the one and one-half hour drive to St. Paul in a timely manner. She subsequently submitted a request for one hour of overtime to compensate for the drive time that took place outside of her normal 8:00 a.m. to 4:30 p.m. work time and that was beyond her normal home-to-work commute time. That request was denied on the grounds that the trip to St. Paul was within a 60-mile radius of Buffalo, Minnesota, the county seat of Wright County.

Detective Andy Fashant drove to Minneapolis during a four-day period beginning on March 2, 2009 in order to attend a training program on interviewing victims of child abuse. Detective Fashant's work assignment was to investigate child sex abuse cases as part of a three-member team along with a child protection worker and an assistant county attorney. Sergeant Becky Howell directed Detective Fashant to attend this training. Through an intermediary, Social Worker Janelle Jackson, who also was attending this training program, asked to ride with Detective Fashant to save county expenses. They agreed that they would meet at a county facility in Clearwater, Minnesota and then drive together to Minneapolis. Mr. Fashant testified that he arrived in Clearwater at 6:54 a.m. on March 2, drove to Minneapolis, attended the training, and then returned to the Clearwater facility at 5:57 p.m. The same pattern generally repeated on each of the following three days. Mr. Fashant submitted a request for 2.5 hours of overtime pay for each day of the training program for the drive time performed outside of his normal 8:00 a.m. to 4:30 p.m. shift. This request was denied based on the 60-mile radius policy. The Employer, however, did approve a lesser amount of overtime pay for time spent by

Detective Fashant in fueling his vehicle, making work-related phone calls, and in performing training-related work activities outside of his normal shift hours.

Chief Deputy Joe Hagerty testified as to the Employer's drive time policy. As part of his duties as Chief Deputy, he reviews the time sheets of Sheriff Office employees and determines issues concerning overtime pay. Chief Deputy Hagerty testified that when he initially assumed the duties of that position, he consulted with his predecessors in that office to determine departmental policy concerning pre- and post-shift drive time pay. He testified that previous chief deputies informed him of the 60-mile policy that has been followed since at least 1990. In its post-hearing brief, the Employer summarized the policy as follows:

When pre- or post-shift drive to off-site training or court is within a 60 mile radius of Buffalo, the employee is not compensated for the commute time as normal home to work travel. . . . When the pre- or post-shift drive is beyond a 60 mile radius of Buffalo, the driver is compensated for drive time, but the passenger is not.

Chief Deputy Hagerty testified that he denied the overtime pay requests of each grievant because their respective out-of-county trips were within a 60-mile radius of Buffalo.

The Union timely filed grievances on behalf of both detectives. The Employer denied each of the grievances through the initial three steps of the contract grievance procedure. The parties then agreed to consolidate the two grievances which have now proceeded to arbitration.

POSITIONS OF THE PARTIES

Union:

The Union initially contends that this dispute is arbitrable since the parties' collective bargaining agreement expressly states that it is "subject to the laws of the

United States” which necessarily includes the Fair Labor Standards Act (FLSA). As to the merits, the Union makes two alternative arguments in support of its claim that the grievants are entitled to non-shift drive time compensation. First, the Union maintains that the FLSA’s “special-one day trip” rule requires that the Employer compensate the grievants for drive time on required out-of-county trips that occur outside of normal working hours. Alternatively, the Union argues that the grievants are entitled to compensation for drive time in which they actively perform work duties. In terms of remedy, the Union asks that the grievants be compensated for such unpaid drive time and that the Employer be enjoined from denying compensation for similar out-of-county drive time in the future.

Employer:

The Employer first asserts that the grievances are not arbitrable because no provision of the parties’ agreement addresses the topic of compensation for non-shift drive time. With respect to the merits, the Employer contends that the parties have long followed a past practice of compensating unit employees for pre- or post-shift drive time only if the destination for the site is beyond a 60-mile radius of Buffalo, Minnesota. Here, the work-related destination of both grievants was less than 60 miles in distance from Buffalo. The Employer also relies on precedent under the FLSA that found that police officers are not entitled to additional compensation for non-shift drive time when the training in question is as beneficial to the officers as it is to the employer. Finally, the Employer argues that the grievants did not perform more than *de minimus* work duties during the commutes in question and that an arbitrator lacks the authority to order injunctive relief.

DISCUSSION AND OPINION

A. Arbitrability

The issue of arbitrability is a matter governed by the parties' contractual agreement. While the Supreme Court has counseled that a finding of arbitrability generally is favored, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the parties are free to withhold matters from arbitration by the terms of their contractual arrangement.

In this instance, the Employer argues that the grievances are not substantively arbitrable because the parties' agreement does not specifically address the topic of compensation for non-shift drive time. More broadly, the Employer contends that an arbitrator generally is confined to reading the terms of the parties' agreement and lacks the authority to interpret and apply external law.

The issue of whether an arbitrator should consider external law in interpreting contract language has long been subject to debate. *See generally* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 486-509 (6th ed. 2003). In recent years, the tide of opinion has favored consideration of external law unless expressly barred by the parties' contract, and one commentator has stated that the debate now has essentially been resolved in that direction. *See* Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is it Time for Courts to Declare Howlett the Winner?* 24 LAB. LAWYER 1 (2008). Such a broad pronouncement is unnecessary in this case, however, since Article VIII of the parties' contract expressly states that the contract is "subject to the laws of the United States, the State of Minnesota, and the County of Wright." By incorporating external law in this manner, the contract clearly confers authority on the

arbitrator to determine whether the overtime pay provisions of Article XII are applied in a manner that is consistent with federal law. Thus, these grievances are arbitrable.

B. Non-Shift Drive Time

1. Past Practice

The Employer contends that the parties have long followed a past practice of compensating unit employees for pre- or post-shift drive time only if the destination for the site is beyond a 60-mile radius of Buffalo, Minnesota. It is well-recognized that a clear and established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A “past practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. *See* ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 648-51 (5th ed. 1997).

In this case, the Employer introduced evidence showing that the Employer has openly followed the sixty mile radius policy since at least 1990. Since the record contains nothing to refute this assertion, I conclude that the Employer has successfully established the 60-mile radius policy as an ongoing past practice.

2. The FLSA

While the Employer has established the existence of a past practice, that practice cannot prevail if it is illegal under federal or state law. Here, the Union contends that the 60-mile radius policy offends the FLSA which recognizes non-shift drive time as

compensable with respect to: a) special one-day trips, and b) for trips in which employees actively perform work-related duties.

In general, employers are not required to compensate employees under the FLSA for time spent commuting from home to one's assigned work station. 29 U.S.C. § 254(a)(1). The regulations, however, recognize an exception to this general rule for certain special work assignments:

A problem arises when an employee who regularly works at a fixed location in one city is given special 1-day work assignment in another city. For example, an employee who works in Washington, D.C., with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at this special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question. . . . All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted; it being in the "home-to-work" category.

29 C.F.R. § 785.37.

A leading treatise on the FLSA summarizes the "special one-day trip" principle in a similar fashion:

Travel time spent on special one-day trip assignments to another city, performed for the employer's benefit, is generally considered compensable. Such travel qualifies as an integral part of the "principal activity which the employee was hired to perform on the workday in question."

All of the travel time involved is not compensable, however. Because the employee would ordinarily have to report to the employer's regular work site, the travel between the employee's home and the railroad depot or airport may be deducted, being in the "home-to-work" category. Usual mealtimes are also deductible from compensable time.

ELLEN C. KEARNS, THE FAIR LABOR STANDARDS ACT 502 (BNA 1999).

Summarizing these sources, travel time spent on a trip outside of an employee's normal work zone and outside the employee's normal work shift is compensable if it is an assignment performed for the employer's benefit. The Union argues that these principles support the compensation requests at issue since both grievants performed special assignments outside of Wright County for the primary benefit of the Employer. The Union also correctly points out that the pertinent authorities do not provide any support for the Employer's 60-mile radius rule.

The Employer counters that these assignments are not compensable in that they resemble the assignment found not to be compensable by the Ninth Circuit Court of Appeals in Imada v. City of Hercules, 138 F.3d 1294 (9th Cir. 1998). In that case, a city required police officer employees to attend POST training necessary in order to maintain licensure as certified peace officers. The assignment included travel time that exceeded normal shift time as well as normal home-to-work commuting time. The Ninth Circuit held that such excess travel time was not compensable because it was "at least equally beneficial to the officers, who must attend POST-approved training in order to meet and maintain state law enforcement certification requirements" as it was to the municipal employer. 138 F.3d at 1297. The Employer argues that the non-shift travel time in this case similarly is not compensable.

I believe that the non-shift travel time expended by both grievants is compensable under the FLSA. Both employees were required to engage in such travel by virtue of their work assignments. Both employees engaged in drive time activities above and beyond their normal assigned work shift hours. And, in contrast to Imada, where the employees benefited by maintaining certification in their chosen profession, the activities

required in these instances were undoubtedly for the principal benefit of the employer and had little independent benefit for the individual grievants.

A limiting principle recognized in the above sources, however, is that the employee's normal home-to-work commute time should be deducted from any compensatory award. Thus, Ms. Eaton's drive time to St. Paul should be net of her drive time from her home to Buffalo. Similarly, Mr. Fashant's drive time to Minneapolis and back should be net of his drive time from his home to Clearwater as well as the return trip from Clearwater to his home. The Union's requested remedy of one hour of compensable drive time for Ms. Eaton and eight hours of compensable drive time for Mr. Fashant appropriately reflects the deduction of non-compensable home-to-work travel time. Since this drive time was above and beyond the normal 40-hour work week, it should be compensated as overtime at time-and-one-half pay.

Since the Union has prevailed in establishing that the grievants are entitled to overtime pay pursuant to its "one-day special trip" argument, it is unnecessary to consider the alternative argument that the grievants performed work duties during their respective non-shift commutes.

C. Injunctive Relief

As an additional remedy, the Union has requested that the arbitrator enjoin the Employer from denying compensation in future instances in which a unit employee is directed to engaged in non-shift drive time outside of Wright County for a purpose that is of primary benefit to the Employer, minus normally uncompensated home-to-work travel time. I decline that request because I do not believe that an arbitrator generally has the authority to compel future compliance by means of injunctive relief.

AWARD

The grievance is sustained in part and denied in part. Grievant Eaton is entitled to one hour of overtime pay to compensate for unpaid non-shift travel time outside of Wright County. Grievant Fashant is entitled to eight hours of overtime pay to compensate for unpaid non-shift travel time outside of Wright County. The Union's request for injunctive relief is denied.

Dated: November 24, 2010

Stephen F. Befort
Arbitrator