THE MATTER OF ARBITRATION BETWEEN

MINNESOTA TEAMSTERS PUBLIC & LAW ENFORCEMENT EMPLOYEES UNION, LOCAL N0. 320,	)	
Union,	)	
and	)	**CALLBACK COMPENSATION GRIEVANCE**
CITY OF RED WING,	)	
Employer.	)	**BMS Case No. 12-PA-0729**

Arbitrator:	Stephen F. Befort
Hearing Date:	July 11, 2012
Post-hearing briefs received:	August 2, 2012
Date of Decision:	September 6, 2012

APPEARANCES

For the Union:	Joseph A. Kelly
For the Employer:	Amy Mace

INTRODUCTION

Teamsters Local 320 (Union), as the exclusive representative of a unit of peace officers, brings this grievance claiming that the City of Red Wing, Minnesota (Employer) violated the parties' collective bargaining agreement by declining to provide callback pay for four officers called into work immediately preceding a scheduled shift. The Union claims that Section 12.7 of the parties' collective bargaining agreement requires a minimum of two hours callback pay

under such circumstances, while the Employer maintains that Section 12.1 requires only time and one-half overtime pay for hours actually worked. 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. The parties have waived the requirement that an arbitration decision must be issued within 30 days of the closing of the record.

ISSUES

Did the Employer violate the parties' collective bargaining agreement by declining to provide a minimum of two hours callback pay for an officer called into work immediately preceding a scheduled shift? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XII

ARTICLE XII. OVERTIME

12.1 EMPLOYEES will be compensated at one and one-half (1-1/2) times the EMPLOYEE's regular rate of pay for hours worked in excess of the EMPLOYEE'S regularly scheduled shift. Changes of shifts do not qualify an EMPLOYEE for overtime under this Article.

* * *

12.7 Call-Back Compensation:

All callbacks on an officer's off-duty time shall be compensated at the overtime rate of time and one-half (1-1/2) the base hourly rate with a minimum of two (2) hours except Court Time which will have a three (3) hour minimum if the court proceeding is scheduled and held on the off-duty time.

FACTUAL BACKGROUND

The Employer and the Union are parties to a collective bargaining agreement effective January 1, 2011 through December 31, 2012. The agreement applies to a unit of peace officers, including investigators, employed by the City of Red Wing. The agreement includes provisions that authorize overtime pay at the rate of time and one-half (Section 12.1) and call-back pay at the same rate but guaranteed for a minimum of two hours duration (Section 12.7).

On December 3, 2011, a snow storm hit the Red Wing area. The inclement weather resulted in a rash of accidents and a lack of police officers available to respond to the many calls for assistance. Daniel McMahon, the senior officer on duty, began contacting off duty officers for assistance and eventually summoned Officer Cory Rasmussen who reported an hour and one-half before his scheduled 4:00 p.m. shift. Officer Rasmussen then called three other officers scheduled for later duty that day--Officers Bray, Burbank and Metling--and told them to report immediately. Each officer worked less than two hours of unscheduled time in addition to their regularly scheduled shift.

At the conclusion of their regular shifts, each of the four officers submitted an overtime authorization sheet requesting a minimum of two hours of overtime pay pursuant to Section 12.7 of the parties' collective bargaining agreement. Sergeant Gordon Rohr denied the minimum two-hour request on the grounds that the overtime work was a shift extension rather than a callback and thus was entitled to overtime pay only for time actually worked pursuant to Section 12.1.

The Union filed a grievance challenging the Employer's action as a violation of Section 12.7. Sergeant Rohr denied the grievance at the first step, explaining as follows:

> In this case, Officers Rasmussen, Bray, Burbank, and Metling were called in early to begin their shifts due to adverse weather conditions. In the past, this has always been

> considered a shift extension as it has extended their normally scheduled shift and has been paid as such. "Call back" [pay] has always been a stand alone situation in which the officer has performed a job function and returned off duty outside his/her normal work schedule.

At the arbitration hearing, Chief Timothy Sletten, Captain Darold Glander and Sergeant Gene Grave each testified that for at least the past 30 years, officers who performed overtime work during a period contiguous to a regularly scheduled shift did not qualify for callback pay, but instead received overtime pay only for the unscheduled time actually worked. The Employer also submitted an exhibit of time records which it claims shows that, over the course of the past five years, officers who have been called in to work for unscheduled time adjacent to a regularly scheduled shift have been paid only for time actually worked except on one occasion on which Officer Bray received two hours of pay for an August 17, 2011 shift. Sergeant Rohr testified that his approval of Officer Bray's overtime pay request was in error.

POSITIONS OF THE PARTIES

Union

The Union contends that the Employer violated the parties' collective bargaining agreement by declining to provide a minimum of two hours callback pay to four officers called into work on December 3, 2011 immediately preceding a scheduled shift. The Union maintains that the plain language of Section 12.7 clearly entitles officers to a minimum of two hours of overtime pay "for all callbacks on an officer's off-duty time" regardless of whether the unscheduled time is contiguous to a regularly scheduled shift. The Union additionally argues that it is inappropriate to consider evidence of past practice where the contract language subject to interpretation is clear and unambiguous in nature. Finally, the Union claims that, in any event, the Employer's conduct has not established the existence of a clear and consistent past practice.

Employer

The Employer argues that its decision not to provide a minimum of two hours of callback pay for the unscheduled work performed on December 3, 2011 is consistent with both the language of the parties' agreement and past practice. The Employer contends that this dispute is governed by Section 12.1 which only obligates the Employer to provide time and one-half overtime pay for hours actually worked. The Employer claims that the "callback" provision of Section 12.7 is ambiguous in terms of its meaning and application. As such, the Employer argues that it is appropriate to consider the past practice of the parties which has been to treat overtime incurred immediately preceding a regularly scheduled shift as a shift extension subject to Section 12.1 rather than as a callback subject to Section 12.7.

DISCUSSION AND OPINION

The Contract Language

The plain language of the parties' collective bargaining agreement provides the starting point in any contract interpretation dispute. In this respect, Section 12.1 provides as follows:

> 12.1 EMPLOYEES will be compensated at one and one-half (1-1/2) times the EMPLOYEE's regular rate of pay for hours worked in excess of the EMPLOYEE'S regularly scheduled shift. Changes of shifts do not qualify an EMPLOYEE for overtime under this Article.

That provision is modified by Section 12.7 which provides a more generous method of computing overtime when an officer is called-back to work while off-duty:

> 12.7 <u>Call-Back Compensation:</u>
>
> All callbacks on an officer's off-duty time shall be compensated at the overtime rate of time and one-half (1-1/2) the base hourly rate with a minimum of two (2) hours except

> Court Time which will have a three (3) hour minimum if the court proceeding is scheduled and held on the off-duty time.

The principal question posed by this grievance is whether the grievants' unscheduled work time is governed by Section 12.1 or by Section 12.7. The Union claims that Section 12.7 entitles the grievants to a minimum of two hours of overtime pay, while the Employer maintains that Section 12.1 controls, entitling the grievants to overtime pay only for time actually worked.

The Union contends that the language of Section 12.7 clearly and unambiguously applies to this dispute. That language provides that officers are to receive a minimum of two hours of overtime pay "for all callbacks on an officer's off-duty time." The Union argues that this provision applies on its face whenever an officer is called into work during an off-duty period. The Union further notes that Section 12.7 does not explicitly exempt callbacks that are for a period of time contiguous to a regularly scheduled shift.

The Union also relies on an analogy to the Employer's contract with its firefighter employees. That contract explicitly states that "an extension or early report to an assigned shift is not a call-back." Based on this language, the Union claims that the Employer is attempting to obtain a similar result in arbitration without having engaged in the give and take of collective bargaining in order to achieve that result.

Relying on this allegedly clear contract language, the Union argues that a consideration of extrinsic evidence is unnecessary.

The Employer, in contrast, points out that the contract does not define the term "callback" and argues that the meaning of that term is ambiguous. Since the parties' agreement does not expressly resolve the debate over whether a callback includes a period of time contiguous to a regularly scheduled shift, I agree that the agreement is ambiguous as to that issue. As such, it is

appropriate to examine extrinsic evidence as a helpful tool in ascertaining the intent of the parties.

Past Practice

It is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the ambiguous 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 Mittenthal, *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 605-30 (6th ed. 2003).

At the arbitration hearing, the Employer introduced the testimony of Chief Timothy Sletten, Captain Darold Glander and Sergeant Gene Grave who each testified that, for at least the past 30 years, officers who performed overtime work during a period contiguous to a regularly scheduled shift did not qualify for callback pay, but instead received overtime pay only for the unscheduled time actually worked. The Employer also submitted time records purportedly showing that over the course of the past five years, all officers who have been called in to work for unscheduled time adjacent to a regularly scheduled shift received pay only for time actually worked except on one occasion on which Officer Bray received two hours of pay for an August 17, 2011 shift. Sergeant Rohr testified that his approval of Officer Bray's overtime pay request was in error.

The Union disputes the existence of a clear past practice on two grounds. First, the Union asserts in its post-hearing brief that the documentary records submitted into evidence covering the past five years shows that the Employer compensated officers similarly-situated to

the grievants with callback pay in eleven instances. The Union additionally points out that the Employer has not consistently coded overtime authorization sheets with respect to the "shift extension" and "call in" categories.

A closer examination of the Union's objections reveal that they are largely without merit. All of the asserted similar instances, except Officer Bray's August 17, 2011 shift, involve situations in which the officers in question worked more than two hours of unscheduled time with the result that Section 12.7 was not implicated. Accordingly, the evidence establishes a virtually unbroken record of employees not receiving call-back pay for shift extensions with the exception of Officer Bray's August 17, 2011 overtime work. In addition, while the Employer admittedly has not been consistent in coding overtime work into categories on overtime authorization sheets, this minor procedural discrepancy in no way contradicts the substance of the Employer's past practice.

In the end, the Employer has produced evidence establishing a viable past practice claim. The Employer has shown that it has consistently limited call-back pay to situations that did not involve a contiguous shift extension. This practice is longstanding in that it has continued for at least the past 30 years. The practice also has been mutually acceptable since the testimony shows that Union representatives knew of the practice and did not object. Given this clear past practice, the Employer's continuation of that practice so as to deny callback pay to the grievants is reasonable and does not offend the parties' collective bargaining agreement.

AWARD

The grievance is denied.

Dated: September 6, 2012

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Stephen F. Befort
Arbitrator