Stratton #2

FEDERAL MEDIATION AND CONCILIATION SERVICE

VOLUNTARY LABOR ARBITRATION TRIBUNAL

Employer, MI (Employer)

-and-

Union

Employee 1 (Overtime Pay)

ARBITRATOR'S OPINION AND AWARD

A grievance arbitration hearing for the above captioned grievance was conducted on November 7, 2006, at the Employer Police Department before Arbitrator Steven B. Stratton. Each party had the opportunity to present evidence and to examine and cross-examine witnesses. The hearing was closed December 12, 2006, upon receipt of written post-hearing briefs which were simultaneously exchanged by the arbitrator. Both parties put forth thoughtful arguments which have been carefully considered by the arbitrator even though every detail will not be re-stated in the following Opinion and Award.

BACKGROUND

The Employer and the Union are parties to a collective bargaining agreement dated January 1, 2004 through December 31, 2007 (Joint Exhibit 2). The Union represents employees of the Employer Police Department in the classification of "Emergency Communication Technician" (ECT). Employee 1 (Grievant) has worked for the Employer for over nineteen (19) years. She is classified as ECT II.

Employee 1 was scheduled to work May 29, 2006, which is the Memorial Day recognized holiday pursuant to Article 14, Section 5. She reported at her scheduled time of 11:00 p.m. (2300) and worked until 7:00 a.m. (0700). Employee 1 received eight (8) hours holiday pay plus time and one-half for the eight hour shift. The parties agree she was properly compensated for that work period.

Grievant returned to work at 3:00 p.m. (1500) and worked until 7:00 p.m. (1900). She was compensated for this four (4) hour period at time and one-half. Therein lies the dispute. Employee 1 requested to be compensated at the double time rate for the four hours. The request was denied and a grievance was filed (Joint Exhibit 1). The grievance was processed to the arbitration step of the grievance procedure and since there are no procedural arguments, is properly before the arbitrator for disposition.

ISSUE

Did the Employer violate the collective bargaining agreement by refusing to pay Employee 1 at the double time rate for the hours worked from 3:00 p.m. (1500 hours) until 7:00 p.m. (1900 hours) on the Memorial Day holiday? If so, what shall be the remedy?

SUMMARY OF THE FACTS

The Grievant testified that she had been scheduled and worked both the eight hour shift and the four hour overtime shift on the Memorial Day holiday. She filed the grievance after being denied double time for the four hour overtime shift.

Union witness Person 1 is also an ECT II. She testified that two grievances had been settled in the past which led to a memo dated September 16, 2003. The grievances were not entered into the record. The memo was included as the fourth page of Joint Exhibit 1. It was authored by Person 2 who did not testify. Person 1 stated that Employee 1 should be entitled to double time for the four overtime hours worked during the 1900 to 1900 work day.

Union witness Person 3 retired as an ECT II. She was the president of the bargaining unit from 2003 to 2005. Person 3 was a member of the Union's bargaining committee for the current collective bargaining agreement. Her testimony supported the position of the Union.

Person 4 also testified on behalf of the Union. She is the current president.

Employer witness Person 5 has been the 911 Director for over four years and prior to that served as the Deputy Director for a similar period of time. She testified that the Memo merely defines a "timekeeping day" not the "work day" as the Union contends. She acknowledged that a "work shift" is different than a "work day". Person 5 stated that the Memo had nothing to do with holidays when it was created and that no employee had received double time under these circumstances at least since 1999. No documentary evidence was offered to verify the payments to similarly situated employees. Person 5 testified that no grievances had been filed with a claim similar to the instant grievance.

Employer witness Person 6 has been a supervisor for over 6 years. She was the person who denied the request of the Grievant. She testified that she was the author of the phrase

"overtime in conjunction with" which replaced the word "beyond" and resulted in a Memorandum of Understanding between the Union and the Employer. She was a member of the bargaining unit and the Union President at the time. Employer 4 is the resultant agreement and was subsequently incorporated into the collective bargaining agreement. She signed it as the Union President. Person 6 explained her understanding that the intent of the change was to limit eligibility for the double time to overtime work performed immediately before and immediately after the employee's regularly scheduled shift. Person 6 stated that the language hasn't changed since its inception in 1999. During her investigation of the grievance she found no other grievances had been previously filed and the Union did not provide her with any. She acknowledged that a "timekeeping day" and a "work day" are synonymous. Person 6 verified that the Grievant's work day covered the 24-hour period; 1900 to 1900. Finally, Person 6 testified that Employee 1 would have received double time if she had remained at work after 7:00 a.m. rather than have a break then return because it would have been in conjunction with her regularly scheduled work day as she understands it.

Employer witness Person 7 is a communications supervisor. Prior to becoming supervisor she also was in ECT II. She was on the bargaining committee when Employer Exhibit 4 was incorporated into the collective bargaining agreement. Person 7 supported the testimony of Person 6.

There was no evidence offered since 1999, that any employee worked their regular shift on a holiday, left and then returned to work overtime during their 24-hour work period as did the Grievant.

PERTINENT CONTRACT LANGUAGE

ARTICLE 18- Section 2, Step 5-

The unresolved grievance may be submitted to arbitration by the Union. Arbitration may be invoked by the Union by filing a written demand for arbitration with the Federal Mediation and Conciliation Service and the Employer. Grievances appealed to arbitration shall be appealed within thirty (30) calendar days of the date of the Appeal Board Hearing, unless a greater period is agreed to by the parties, otherwise they shall not be eligible for further appeal to arbitration. At the hearing, the parties may present arguments and proofs pertaining to the statement of the question, as well as to the merits.

The arbitrator shall render his/her decision according to the following:

1. The arbitrator shall answer in writing, within thirty (30) days after the hearing or after the submission of any briefs, only the question submitted or the question selected, in accordance with the interpretation and application of this Agreement.
2. The arbitrator shall not add to, subtract from, or modify this Agreement.
3. The arbitrator is prohibited from rendering any decision which is contrary to public policy.
4. The award of the arbitrator shall be the award of the Appeal Board, and it shall be final and binding on the Employer, the Union, and any employee covered by this Agreement.
5. Once the question has been submitted to the arbitrator, neither party is permitted to withdraw the case from the arbitrator.
6. The fees and expenses incurred by the arbitrator shall be paid equally by the parties to this Agreement.
7. The arbitrator's decision may be based upon written briefs submitted by the parties, or, if either party wishes, upon such briefs and a hearing at which the parties shall have the opportunity to present evidence and examine and cross-examine witnesses. (At page 45)

ARTICLE 14- Section 5-

If an employee is not regularly scheduled to work a holiday and works the holiday, or if an employee is scheduled to work the holiday and works overtime in conjunction with his/her scheduled work day, the employee shall be compensated at the rate of two (2) times his/her regular hourly rate of pay for each hour so worked. (At page 29)

POSITIONS OF THE PARTIES

THE UNION-

The Union maintains that the language of Article 14-Section 5, is clear and unambiguous. If an arbitrator finds that language is clear and unambiguous, the arbitrator should enforce the normal, usual and clear meaning. It references Webster's New World Dictionary, 2nd college edition, when comparing the words "*conjunction*" and "*consecutive*". The word "*conjunction*"

has several meanings, the first being: **a joining together or being joined together; Union; association; combination**. The second definition is: **an occurring together; coincidence**. The word "*consecutive*" is defined as: **following in order without interruption; successive as in for four consecutive days**. In order for the Employer to prevail in this case, the Union maintains that the word "*consecutive*" should have been used rather than "*conjunction*" at the time Employer Exhibit 4 was written and signed.

The Union argues that the contract language is further strengthened by the memo dated December 1, 1999, from director Person 8 (Employer Exhibit 5). The Union believes that the pertinent part of that memo reads as follows-

> "This is not to be confused with the provision bargained with the Employer by the Fraternal Order of Police which provides for holiday overtime premium to be paid for any overtime worked in conjunction with a holiday shift even if the overtime work is in the previous timekeeping day or the following timekeeping day."

The Union contends that the memo clearly states what the Employer's position is and the plain language not only of the contract, but also the memo, indicates that "any" overtime worked in conjunction with a holiday whether it precedes the actual holiday or is post the actual holiday, entitles an employee to the double time premium.

THE EMPLOYER-

The Employer argues that the Union must establish by a preponderance of the evidence that the Employer violated the collective bargaining agreement. With respect to interpretation of the language, the Employer maintains that the arbitrator should ascertain and give effect to the mutual intent of the parties. Additionally, when the parties settle a grievance, the evidence of intent as to the meaning of the provision should carry special weight.

The Employer believes that the arbitrator should utilize a dictionary definition as an aid

in reaching his decision. Employer defines "*conjunction*" as: **the act or instance of conjoining....occurrence together in time or space**. This definition is taken from Merriam-Webster's Collegiate Dictionary, 10th edition.

The Employer maintains that the intent of Employer Exhibit 4 was clearly described by the testimony of Person 6 and Person 7. Making the same argument as the Union, the Employer urges the arbitrator to adopt the plain meaning of the words "*in conjunction with*".

DISCUSSION AND OPINION

Any emphasis by the arbitrator is underlined hereinafter. Language is considered ambiguous if plausible contentions can be made for conflicting interpretations (County of Ottawa, 112 LA 104). If the words are plain and clear, the arbitrator will generally apply the clear meaning (Elkouri and Elkouri, How Arbitration Works, Fifth Edition, p. 370). If the language is determined to be ambiguous, the arbitrator must turn to reasonable methods to ascertain the meaning of the language in question. So, what have we here?

Each party believes the language is clear and unambiguous. Each party cites dictionary definitions to support its respective case. There is conflicting testimony in regards to the meaning of the key phrase. A careful reading of the documents in evidence reveals the following. Current 911 Director Person 5, in her grievance answer dated June 14, 2006, states "... that the employee would be paid double time for any additional time worked only when it was continuous with the holiday time." Ironically, the word continuous is the word the Union argues should have been used when the original Memo of Understanding was reached. Current Union Director Person 1 writes in her undated letter "Yes, the 4 hrs in question is not in conjunction to ECT Employee 1 work hours but it does fall in her work day..." (see Joint Exhibit 1, page 3). Employer Exhibit 5 authored by communications director Person 8 states in part, "... which provides for a holiday

overtime premium to be paid for any overtime worked in conjunction with a holiday shift...."

Continuous, conjunction, work hours, work day, holiday shift; all confusing to say the least....but certainly not clear and unambiguous, Finally, your arbitrator is not able to determine a clear meaning from a simple reading of the paragraph in question. My conclusion therefore, is that the language is ambiguous. So let's turn to some reasonable methods to determine the meaning.

Previous grievance settlements - The parties made mention of previous grievances that were settled yet; no such grievances were entered into the record. Inclusion of the previous grievances may have been very helpful to the arbitrator in assessing the original reason for the change in the language and thus, to determine its meaning.

Dictionary versus everyday usage - The dictionary definitions were somewhat helpful but did not dispose of the matter. To this arbitrator, the phrase "*in conjunction with*" is not unlike the phrase "in concert with" meaning that some items are joined together, or in other words, you can't have one without the other, A good (and perhaps unintentional) example of the everyday usage of the language was contained in the written brief filed by the Union. At page 2 of the brief, counsel points out that the contract language contained in Article 14, Section 5 must be "*read in conjunction with Employer Exhibit 5*". In other words, you can't read one without the other. That appears to the arbitrator to be a common usage of the phrase "*in conjunction with*".

The Original Memorandum (Employer Exhibit 4) - The memorandum became effective November 30, 1999. Person 8's memo, Employer Exhibit 5, was published one day later on December 1, 1999. The arbitrator finds it significant that Director Person 8 saw fit to issue a letter of clarification merely one day after the parties had agreed upon a language change. Person 8 wrote, "The timekeeping day is most often used to identify the beginning and end of holidays

and vacation slots." The parties have agreed that Employee 1' work day began at 1900 and ended 24 hours later at 1900. The same time frame also constituted her holiday time frame. Any hours worked during that 24-hour period was during her scheduled work day and during her holiday, including the four overtime hours in question, 1500 to 1900.

The Author of the Language - Person 6 testified that she wrote the language and that the intent of the original memorandum was to provide double time for an employee who worked immediately prior to or immediately after the regular shift. Unfortunately, that is not what the language says. A standard rule of contract interpretation is that ambiguous language may be construed against the party who drafted the language. Enforcement of this rule is practical because it promotes careful drafting of language and careful disclosure of what the drafter intends by the language (Elkouri at pages 509, 510). The almost immediate clarification by the Person 8 memo underscores the uncertainty of what the language meant. If the language had stated "immediately before or immediately after the scheduled work shift" as Person 6 contends it was supposed to mean, the parties would not be in arbitration.

This is not intended as a slap against Person 6. The most seasoned contract negotiators regularly author ambiguous language. That is why arbitrators and the arbitration forum exist. The Elkouri's wrote-

> "Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The great bulk of arbitration cases involve disputes over rights under such agreements. In these cases the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions." (At page 470).

Such is the case here.

Avoidance of Nonsensical Results – When one interpretation would lead to a nonsensical result, while an alternative interpretation would lead to a reasonable result, the latter

interpretation will be used. (Elkouri at page 495). Two questions considered by your arbitrator were- *Does it make sense that an employee would receive double time for working overtime on the holiday immediately after the shift but not receive double time for working overtime on the holiday with a break in hours? What if the break in hours had only been thirty minutes?* It doesn't make sense to the arbitrator. I respectively disagree with Witness Person 5 that the language change had nothing to do with holidays. It has everything to do with holidays; it's in the holiday section of the collective bargaining agreement; it only applies to employees who work a holiday and then work overtime on the same work day.

Employees understand that in 24/7 operations such as the 911 Center, holidays will be scheduled as a part of their regular schedule. It is the overtime work on a holiday that is distinguished by the language of the collective bargaining agreement. It's quite common for parties to negotiate the payment of an extra premium to compensate an employee for the inconvenience of having to work overtime on a holiday. The fact that the Grievant was able to go home after completion of her regular shift does not negate the fact that she returned to work overtime on her current scheduled work day as the language is written.

CONCLUSION

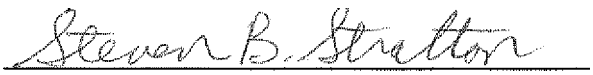
Perhaps to simplify, the language of Article 14, Section 5, can be broken down as follows:

"...if an employee is scheduled to work the holiday (she was) and works overtime in conjunction with his/her scheduled work day (she did since her work day didn't end until 1900), the employee shall be compensated at the rate of two (2) times his/her regular rate of pay for each hour so worked." (she wasn't). In other words, the payment of double time is required when; 1) the employee is scheduled to work the holiday, and 2) that is joined with the working of

overtime on the current scheduled work day.

AWARD

The grievance is granted. The Employer violated the collective bargaining agreement by refusing to pay Employee 1 at the double time rate for the hours worked from 3:00 p.m. (1500 hours) until 7:00 p.m. (1900 hours) on the Memorial Day holiday. The Employer is directed to pay Grievant the difference between the double time rate and the amount she received for the four (4) hours in question.



DATED: 12/22/2006

Steven B. Stratton