

Pearson #1

IN THE MATTER OF THE ARBITRATION BETWEEN

EMPLOYER

AND

UNION

GRIEVANCE: Employee 1/ Overtime

OPINION AND AWARD

ARBITRATOR: Donald W. Pearson

AWARD DATE: March 26, 2008

A hearing on the above grievance was held on February 7, 2008 in the office of the Employer Michigan, beginning at 10 O'clock in the morning.

PROCEDURAL HISTORY

The Employer is hereinafter referred to as "Employer". The Union is hereinafter referred to as "Union". Deputy Employee 1 is hereinafter referred to as "Grievant". The Agreement between Employer and Union, Effective: January 1, 2004 through December 31, 2006 is hereinafter referred to as "Agreement"

Grievance no. 00/00 Employee 1/ Denied Overtime was submitted to the Employer in writing on December 22, 2006 and thereafter processed in accordance with Article 5 of the Agreement between the Employer and the Union first effective January 1, 2004. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with

Article 5, Section 5 of the Agreement. Using the services of the Federal Mediation and Conciliation Service, Donald W. Pearson was appointed as Arbitrator.

An arbitration hearing was held at the Employer's Department office in Michigan, on February 7, 2008. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The Grievant was not present at the hearing, but with full agreement of the parties, and with the Arbitrator's consent given the focus of the grievance, the hearing proceeded without the presence of the Grievant.

The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received the last brief on March 11, 2008, and the record was closed.

The Employer's stated position was, first, that the dispute in question was non-grievable and, second, that the creation of a combined overtime list for command and non-command officers assigned to the county jail was an acceptable right of management as detailed in Article 4 of the Agreement.

The Union's stated position was that the dispute was properly subject to the grievance procedure because the creation of a combined overtime list for command and non-command officers violates the recognition clause of the Agreement (Article 1, Section 1) by assigning bargaining-unit work to non-bargaining unit employees. It further maintained that Deputy Employee 1 should be compensated for overtime he did not receive but otherwise would have except for the imposition of the new jail overtime policy.

PERTINENT PROVISIONS OF THE AGREEMENT

Article 1 RECOGNITION

Section 1. Collective Bargaining Unit. The Employer recognizes the Union as the exclusive bargaining representative for the following unit of employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and all other terms and conditions of employment:

All full-time employees of the Department, but excluding the Employer, Undersheriff, Chief Deputy, Captains, Lieutenants, Animal Control Officers, all office and clerical employees, all food service employees, Court Bailiffs, part-time deputies (defined as those working less than 1,000 hours per calendar year), special deputies, summer marine deputies, and reserve officers.

Article 4 MANAGEMENT RIGHTS

Section 1. Rights. It is hereby agreed that the customary and usual rights, powers, functions and authority of management are vested in the Sheriff of Employer and the Employer Board of Commissioners. These rights include but are not limited to those provided by the statutes or law, along with the right to direct, hire, promote, transfer, and assign employees; to investigate, suspend, demote, discharge for just cause or to take other disciplinary action that is necessary to maintain the efficient operation of the department; to determine the work to be performed, the equipment and facilities to be used; to establish and/or change classifications of work and the methods, means and procedures for performing the work; to subcontract work; to make and enforce reasonable rules and regulations relating to personnel policies, procedures and working conditions; to schedule hours and shifts of work, including overtime. It is expressly understood that the Sheriff of Employer and the County Board of Commissioners, herein referred to as the Employer, hereby retain and reserve all their inherent and customary rights. The Employer agrees that it will not exercise these rights in violation of any specific provision of the Agreement.

Article 5 GRIEVANCE AND ARBITRATION PROCEDURE

Section 2. Non-grievable Matters. The following matters are not subject to the grievance procedure and may not be processed hereunder: 1) discipline involving any probationary employee, 2) the establishment of wage rates of newly created jobs, job descriptions or internal departmental operating procedures, 3) discipline or discharge of any employee who has been convicted of a felony or other crimes involving specific intent or moral turpitude, 4) all other actions which are exclusively reserved to management under Article 4.

Section 6. Arbitrator's Powers.

(a) The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written, and he shall at all times be governed wholly by the terms of this Agreement. He shall have no power or authority to amend, alter or modify this Agreement in any respect. The arbitrator shall have no power to hear any disputes involving the exercise of any of the Employer's reserved and inherent rights not specifically limited by the express terms of this Agreement. It is the intent of the Parties that arbitration shall be used during the life of the Agreement to resolve grievances which arise concerning the express provisions of the Agreement, which reflect the only concessions which the Employer has yielded.

Article 17 MISCELLANEOUS

Section 9. Rules and Regulations. The Employer reserves the right to establish reasonable rules and regulations concerning employee performance and conduct not inconsistent with this Agreement. A written copy of any new rule or regulation shall be furnished to the Union.

Section 12 Waiver. This Agreement contains the entire terms and conditions of employment agreed upon between the Employer and the Union. The Parties acknowledge that there are no other agreements either oral or written, express or implied, that cover the relationship of the Parties. Each Party hereby expressly waives the right to require the other to enter into further negotiations on any matter whatsoever, either covered in the Agreement or not, or where such subject matter was or was not within the knowledge or contemplation of either or both of the Parties at the time they negotiated or executed this Agreement. This Agreement, however, may be extended by mutual agreement of the Parties in writing.

BACKGROUND

The following summarizes what the Arbitrator sees as undisputed facts regarding this case.

On October 23, 2006, by authority of Sheriff Person 1 a new Jail Overtime Policy (Employer Policy and Procedures, Chapter 3, Section 65) became effective. (Joint Exhibit 3) This provides for use of an Overtime Signup Roster, posted quarterly, which allows for officers

interested in working overtime to sign and indicate their availability for overtime assignment. Those eligible to sign up for overtime are “Deputies assigned to a shift in the jail, the jail administrative Deputy, Sergeants assigned to a shift at the jail, the Jail Classification Sergeant, Lieutenants assigned to a shift in the jail, the Jail Operations Lieutenant and the jail Captain.” When overtime becomes available, it is offered in order of sign up, top to bottom beginning at the last name previously offered, to those officers who have signed the roster, regardless of their status (command or non-command).

On November 29, 2006 Deputy Person 2 called off sick. Use of the Overtime Signup Roster resulted in assignment of the resultant overtime to Lt. Person 3, whose name was next on the list. (Joint Exhibit 4) The name following Lt. Person 3's on the list was that of Deputy Employee 1.

Deputy Employee 1 filed a grievance alleging that he and not Lt. Person 3 should have been assigned the overtime, as Lt. Person 3 is not a member of the Deputy/Sergeant Bargaining unit and that “it is the past practice of the Employer Sheriff's Department to fill overtime created within the Deputy/Sergeant Union Bargaining unit with a member of the same Union Bargaining Unit.” The grievance asks that the Overtime Signup Roster system be modified so that overtime opportunities created by Deputy/Sergeant absences be available first to members of the Deputy/Sergeant Bargaining Unit, then to non-bargaining unit (command) officers only if no Deputy/Sergeant is willing to accept it. (Joint Exhibit 2, pp. 2-3) It also asks that Deputy Employee 1 be made whole for the overtime he missed.

The Employer's response to the grievance is that it is a non-grievable matter in that the development and modification of the system under which assignment of overtime is made is very clearly a management right and that, even if it is a grievable matter, past practice does not apply

to restrict the development of the new Overtime Signup Roster. (Agreement, Article 4, Section 1. and Article 5, Section 2. and Article 17, Section 12.)

POSITIONS OF THE PARTIES

UNION

Through the testimony of its witness Deputy Person 4 and in its post-hearing brief the Union contends that the change to the new Jail Overtime Policy in October of 2006 resulted in the loss of bargaining-unit work (specifically, overtime) to non-bargaining-unit employees. The union recognizes that the Employer has the right to devise a schedule for allocating overtime, but it contends that any system must recognize the exclusivity inherent in the recognition clause of the Agreement and must offer overtime occasioned by the absence of Deputies and Sergeants to Deputies and Sergeants. To do otherwise would be to deprive members of the bargaining unit their right to bargaining unit work. Only after failing to find Deputies or Sergeants to fill overtime-creating vacancies may the Employer offer such work to non-bargaining-unit members.

The Union contends that the previous system of offering overtime first to members of the bargaining unit was an established and recognized past practice that had been effective for at least fourteen years. Union Exhibit 1, Overtime Posting Procedure, (Employer Policy and Procedures, Chapter 5, Section 13, Section II(G)) states this policy, which is still in effect for non-jail personnel.

The Union further contends that the Employer is obligated under Article 17, Section 9 of the Agreement to provide a written copy of any new rule or regulation to the Union and that the Employer did not do so in this case.

The Union asks the arbitrator to uphold this grievance and direct the employer to return

to the previous overtime policy. The Union further asks that Deputy Employee 1 be made whole for loss of overtime on November 29, 2006.

EMPLOYER

The Employer, in the testimony of its witness Captain David C, in its cross examination of Union witness Person 4, and in its post-hearing brief contends that management's right to establish and change overtime scheduling policies is clear and not subject to grievance. The Employer further contends that the change in the jail overtime policy of October, 2006 was necessary in order to address shortcomings in the previous overtime policy which incorporated separate, seniority-based overtime lists for each of three employee groups working in the jail, and which was cumbersome to implement. It had different methods of selection for working overtime, depending on the amount of advance notice of the need for overtime. With long advance notice it restricted the replacement of an absent employee to an employee in the same bargaining unit by rank and seniority in the same bargaining unit, unless no match could be found. In this case an employee from another bargaining unit could be offered the overtime.

The Employer contends that the previous system was cumbersome and inefficient to the operation of the jail and that its obligation to efficiently operate the jail and to protect public safety, as well as its contractually outlined Management Rights, give it the unfettered ability to devise and implement the new jail overtime policy.

The Employer requests the Arbitrator deny the grievance either by ruling the issue is not grievable, or by ruling that the Employer has the right under the contract to develop a new jail overtime policy.

DISCUSSION

The first issue to be resolved in the present arbitration is whether or not the dispute is non-grievable. The Agreement (Article 5, Section 2) identifies a list of non-grievable matters which includes the phrase, "all other actions which are exclusively reserved to management under Article 4." In Article 4, Section 1, among other rights listed is the right "to schedule hours and shift work, including overtime." Now, it would seem on the face of it that the Employer has the unfettered right to implement a new jail overtime policy. However, in Article 4 section 1, the language also states, "[t]he Employer agrees that it will not exercise these rights in violation of any specific provision of the Agreement." In Article 17, Section 9 there is the following specific agreement, "A written copy of any new rule or regulation will be furnished to the Union." This was not done.

In Article 1, Section 1 the Union is recognized as the exclusive bargaining representative for:

All full-time employees of the Department, but excluding the Sheriff, Undersheriff, Chief Deputy, Captains, Lieutenants, Animal Control Officers, all office and clerical employees, all food service employees, Court Bailiffs, part-time deputies (defined as those working less than 1,000 hours per calendar year), special deputies, summer marine deputies, and reserve officers.

As exclusive representative the Union has a legitimate interest in and a right to be heard on any change which might impact the terms and conditions of employment of the employees it represents. The grievance procedure is the contractually established venue for such input.

In my opinion and for the reasons given above, the issue is properly grievable and properly before me as arbitrator.

The second issue to be resolved is whether or not, under the terms and conditions of the Agreement and past practice, the employer had the right to develop and implement the new Jail

Overtime Posting policy. As I said above, it would seem under Article 4, Section 1 that the Employer has that right, but for the question of the Union's status as exclusive representative.

The Union's argument on the issue from its post-hearing brief says:

The Department's ability to assign overtime is restricted by the recognition clause of the collective bargaining agreement and the parties' past practice. The Department's authority to assign overtime under the management rights clause is explicitly limited to deputies and sergeants, and does not extend to lieutenants and captains. Moreover, for at least fourteen years, the Department has consistently given deputies and sergeants the first opportunity to work overtime where a deputy or sergeant has called off....

In the last sentence of this statement we see the reality that over a period of at least fourteen years the Union has agreed to a practice that only gives its members the "first opportunity" to overtime. The Union agrees that there will be times when Employer may assign non-bargaining-unit employees to perform bargaining-unit work. By this the parties have acknowledged that the primacy of the efficient and safe operation of the jail may result in the need for overtime work, and that the efficient allocation of that work does not stop at the boundaries of a single bargaining unit.

According to testimony presented, the previous system of filling overtime slots left the Employer with "difficulty filling overtime slots," was a "hassle," and "frequently left the jail with minimum staffing." Witness C testified that this system for allocating jail overtime is less cumbersome than the older system. He further testified that it is his impression that Deputies overall have more overtime opportunities under this new policy than under the previous one.

The overtime policy in question applies only to the county jail. The long-time practice of allowing for the possibility of command and non-command officers in the jail to work overtime in the other's absence indicates an acceptance by the parties that the work of jail personnel, when it comes to meeting overtime needs, is less bargaining-unit specific than is work in other areas of the Employer's Department. In this reality the Employer devised and implemented the

new Jail Overtime Policy effective October 23, 2006 as manager of the Employer Employer's Department. I find it acceptable under the Agreement.

AWARD

The issue is grievable.

The Employer is directed in future to furnish a written copy of all new rules and regulations to the Union.

The Grievance is denied.

Dated:

Donald W. Pearson, Arbitrator
Michigan