

The Issue

The issue to be determined, as stipulated by the parties, is as follows:

What shall be the remedy in this matter, consistent with the NP-4 Contract?

Relevant Contract Language

Article 15, § 2 (Voluntary Overtime Distribution) of the parties' Collective Bargaining Agreement provides:

All employees wanting to work voluntary overtime will sign a quarterly overtime list. Overtime will be distributed in accordance with either section A. or B. below. Each facility will be allowed to vote, upon request, once each contract period on which method to use....

- A. **“Red Eight” System.** All overtime work, including overtime holdovers caused by short notice of absence, shall be distributed equally, to the extent practicable, to employees within the same job class at each institution, regardless of shift[,] who have volunteered for such overtime. Equalization shall be accomplished annually, subject to quarterly review of the overtime list by both parties....
- B. **“Sign-up Book” System.** The sign-up book will contain pages representing each day of each month, separated into three sections representing each shift worked by employees in continuous operations....

...

3) **Supervisor to Use Book.** When a Supervisor needs to fill a vacancy with overtime, he/she will refer to the sign-up book and call the staff member with the least number of overtime hours for that quarter who has signed the book for that day and shift. When additional staff are needed to fill overtime vacancies, it will be done in order from least to most overtime hours among the employees who have signed the list for that day and shift.

...

8) **Equalization.** It is understood by all parties that utilizing the sign-up book system cannot ensure equalization among all employees at the end of each fiscal year due to employees being able to choose the days they want to work overtime. However, it is also understood that the employer will make every effort to equalize overtime among those employees signing the book by offering the employees with the least number of hours who have signed up for a shift the overtime first.

Background

The grievance in the instant case was filed in April 2002, and alleged that the Employer had violated Article 15, § 2.B, by failing to offer Grievant overtime to which he was entitled under the voluntary overtime distribution system. The Union requested that Grievant be made whole and receive payment for the overtime hours he had missed. The grievance was processed according to the procedure set forth in the parties' Agreement, and at the third step of the process, the Employer sustained the grievance with regard to the asserted contractual violation. However, the Employer was not willing to grant the Union's requested remedy. The parties have therefore presented the limited issue of remedy to this Arbitrator for final resolution.

The parties have stipulated to the following facts:

1. The Grievant, Christopher Muckle, is a Correction Officer with the Connecticut Department of Correction, having been hired on December 3, 1999.
2. At all times pertinent to this matter, Officer Muckle was assigned to the J.B. Gates Correctional Institution.
3. Correction Officer voluntary overtime distribution at Gates CI, at all times pertinent to this matter, was governed by Article 15, Section 2.B. (Sign-up Book System) of the NP-4 Contract.
4. Officer Muckle had signed the quarterly overtime list for the April 1 – June 30, 2002 quarter.
5. Officer Muckle had signed up to work overtime, if available, for first shift on both April 16 and 17, 2002.
6. Overtime was available for first shift on both April 16 and 17, 2002.
7. Officer Muckle was not offered overtime on either April 16 or 17, 2002.
8. The available overtime for April 16 was given to another officer who was not on the quarterly overtime list and had not signed up for overtime on April 16. Officer Muckle would have been the next officer in order who had signed up for overtime on April 16.
9. The overtime assignment worked by the other officer on April 16 was the Admitting and Processing post which is a specialized assignment.

This overtime was during first shift and this officer was the regular second shift AP officer.

10. There was at least one other Correction Officer regularly assigned to first shift who was qualified to work the AP post and who was at work on both[sic] April 16, 2002. Grievant, although not qualified to work the AP post, was qualified to work the other officers' post had that officer been reassigned to the AP room.
11. On April 17, an officer with more overtime hours than Officer Muckle was hired for overtime for a full shift. Officer Muckle should have been offered the overtime instead of this officer.
12. The number of overtime hours potentially available to Grievant for both days was ten and one-half (10 ½) hours, two and one-half (2 ½) on April 16 and eight (8) on April 17.
13. The employees responsible for administering the overtime offers for each shift, Correctional Lieutenants, are members of the NP-8 (Corrections Supervisors Council) Bargaining Unit.

Contentions of the Employer

It is the Employer's position that it would be improper for Grievant to receive pay for time he did not actually work, as the Union requests. According to the Employer, in order for the Union's requested remedy to be appropriate, the Union must demonstrate that Grievant suffered harm from the Employer's failure to offer Grievant the overtime work at issue on April 16 and 17, 2002. While the Employer acknowledges that the voluntary overtime distribution system established by the parties' Agreement is intended to equalize (so far as possible) the overtime available to each employee on the voluntary overtime list, the Employer argues that such equalization takes place over the period of a year. Therefore, the Employer contends, in order to prevail the Union must show—and has not—that Grievant was harmed by the contractual violation because his overtime opportunities had not been equalized by the end of the year.

The Employer points to Joint Exhibit 5, at page 6 (Overall Call Sheet), which shows Grievant as having 16 overtime hours as of April 15. Joint Exhibit 5 at page 8

shows that on April 16, an employee ineligible for overtime worked 2.75 hours overtime in Booking/Intake Processing (rather than the 2.5 hours to which the parties have stipulated). The Employer argues that if Grievant had worked the 2.75 hours of overtime to which he was entitled on April 16, and the 8.0 hours of overtime to which he was entitled on April 17, his cumulative total thereafter would have been 26.75 overtime hours. According to the Employer, Grievant therefore would have moved down the distribution list, with more employees having fewer overtime hours than he had, and it would have been less likely that Grievant would have been called for overtime later in the quarter. The Employer asserts that “it is simply too speculative to conclude that Grievant did not have later opportunities to work overtime hours equal to those he did not get on April 16 or 17.” (Emp. Brf. at 8.) The Employer further contends that nothing in the parties’ Agreement authorizes payment for time not worked on the basis of a mere presumption that overtime was not equalized for Grievant by the end of the year.

The Employer seeks to distinguish from the instant case the arbitral precedents submitted by the Union in support of its requested remedy, on the ground that they either do not involve the State as employer, do not address the equalization of overtime on an annual basis, or deal with outdated NP-4 contract language and not the language at issue here, which was added to the contract only in 2001.

The Contentions of the Union

The Union contends that “the entire task of assigning overtime, equalization and recordkeeping of such is the sole responsibility of the [Employer]....” (Un. Brf. at 4.) The Union further argues that, while the Employer suggested at Step III of the grievance process that remedies other than paying Grievant for time he did not work might be

available, such remedies may merely deny other employees overtime work to which they are entitled. It is the Union's position that the issue presented herein has been arbitrarily adjudicated in the past and decided in favor of the remedy the Union requests (citing *Town of Wallingford v. Council 4, AFSCME Local 1183*, Case No. 8485-A-882 (grievants awarded pay for half of the overtime hours they should have been offered); *Township of Wallingford v. Council 4, AFSCME Local 1183*, Case No. 8687-A-776 (grievants awarded pay for overtime hours entitled to but not offered); *Connecticut v. Council 4, AFSCME NP-4*, Case No. 8081-A-478 (same); *Connecticut v. Council 4, AFSCME NP-4*, Case No. 8182-A-567 (same); *Connecticut v. Council 4, AFSCME NP-4*, Case No. 8586-A-502 (same)).

It is the Union's additional position that the Employer has had opportunities to negotiate Agreement language specifying that no compensation may be paid for hours not worked. The Union submitted several collective bargaining agreements between the Employer and other unions in which such language has been included, and cited Joint Exhibit 13 (Employer proposals from the 1994, 2001 and 2004 collective negotiations) as demonstrating that the Employer during the last three contract negotiations proposed similar language—"there shall be no basis for any employee claim for compensation in any form for hours not worked"—but each time withdrew the proposal. The result is that no such language was ever incorporated in the parties' Agreement. The Union asserts that the Employer's acknowledgement that it violated the Agreement coupled with its failure to provide a solution "only serves to uphold [the Employer's] disdain for the collective bargaining process." (Un. Brf. at 6.) The Union requests that the Arbitrator award Grievant 10.5 hours of overtime pay at the applicable rate.

Opinion

It is undisputed that Grievant should have been offered overtime on April 16 and 17, 2002, according to the terms of the parties' Agreement. The Employer has acknowledged that its failure to offer the overtime to Grievant was a violation of Article 15, § 2.B of the parties' Agreement. The Employer argues, however, that the Union's requested remedy is not appropriate because the Employer would then be paying Grievant for hours he did not actually work. It is the Employer's position that the Union must show that Grievant suffered actual harm from the contractual violation: that Grievant was not the recipient of equalized overtime hours by the end of the applicable year. In the absence of such a showing, the Employer argues, the remedy requested by the Union in the instant case would be based on a "presumption" that Grievant did not receive overtime opportunities in the remainder of the year equalizing his share of such hours. According to the Employer, the requested remedy therefore would be improperly speculative in nature. For the reasons set forth below, however, the Arbitrator finds the Employer's position to be unpersuasive, and accordingly will order the Employer to pay Grievant for the overtime hours he was denied on April 16 and 17, 2002.

While the Employer contends that the Union's requested remedy would be "speculative," the Arbitrator finds that it would be speculative to assume that Grievant's missed overtime opportunities on April 16 and 17, 2002 were made up for later in the year, so that he suffered no harm from the Employer's violation of the parties' Agreement. The Arbitrator notes that the Employer maintains the relevant records, but submitted no documentary evidence showing that Grievant had received equalized overtime opportunities by the end of the year. Indeed, the Arbitrator doubts that such a

proposition could be easily proved. As Article 15, § 2.B(8) of the parties' Agreement states: "It is understood by all parties that utilizing the sign-up book system cannot ensure equalization among all employees at the end of each fiscal year due to employees being able to choose the days they want to work overtime." It is these vagaries that are the very reason for the voluntary overtime distribution system mandated by § 2.B. The Arbitrator declines to issue an award based on an *assumed* equalization of overtime hours.

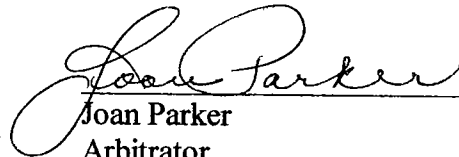
With regard to the Employer's protest that it is not appropriate to pay an employee for hours not actually worked, the Arbitrator finds it significant that the Employer has negotiated contractual language reflecting this position with other unions, and has repeatedly proposed similar language in negotiations for the Agreement between the parties herein. Despite the Employer's proposals, no such language has been incorporated in the instant Agreement. It is axiomatic that the Employer cannot obtain through arbitration what it has to date failed to obtain through collective bargaining negotiations. It is beyond the Arbitrator's authority to read such language into the parties' Agreement.

The time-honored arbitral remedy where an employer has denied overtime to which a grievant was contractually entitled is to award the grievant payment for the overtime he was wrongfully denied. This remedy is not only supported by the precedents submitted by the Union, but by the bulk of arbitral precedents considering the issue. Therefore, the Arbitrator will grant the Union's requested remedy in this case. The parties have stipulated that Grievant should have been offered 2.5 hours of overtime on April 16, 2002, and 8.0 hours on April 17, 2002. However, as Joint Exhibit 5

demonstrates, and as pointed out in the Employer's brief, Grievant was actually wrongfully denied 2.75 overtime hours on April 16. The Arbitrator is not inclined to penalize Grievant for a simple mistake made in the parties' stipulations, where the factual evidence is clear. Therefore, the Arbitrator will order that Grievant be paid for the 10.75 hours of overtime he was denied on April 16 and 17, 2002, at his applicable April 2002 rate.

Award

The Employer shall pay Grievant for 10.75 overtime hours at the rate applicable to him in April 2002.


Joan Parker
Arbitrator

December 29, 2007