IN THE MATTER OF ARBITRATION

BETWEEN

THE FRATERNAL ORDER OF POLICE

AND

YOUNGSTOWN STATE UNIVERSITY

FMCS No. 130521-02250-6

Before: Robert G. Stein, NAA

Issue: Compensatory Time
3 Grievances: No. 35 (Benko), 40 (Cox), and 42 (Guerrieri)

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("CBA") (Joint Ex. 1) between the Fraternal Order of Police ("Union" or "FOP") and Youngstown State University ("University," "Department," or "Employer"). The Union represents police officers, sergeants and dispatchers at the University. The CBA, which runs from July 1, 2012 through December 31, 2015, was in effect regarding the conduct which is the subject of the grievance under review herein.

Robert G. Stein was selected to arbitrate this matter in compliance with Article 6, Section 6.10 of the Agreement. A hearing was conducted on October 1, 2013 at the University facilities located in Youngstown, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was recorded via a fully-written transcript, was subsequently closed upon receipt of the parties' individual submissions of post-hearing briefs.

The parties have agreed to the statement of the issues to be resolved and also to the submission of five (5) joint exhibits and three (3) sets of stipulated facts. The parties also stipulated that the matter was properly before the arbitrator for a determination on the merits. (Joint Exs. F, G and H)

ISSUES

The parties stipulated to the following issues involving the three (3) Grievants:

Did the Employer violate Section 15.1 of the CBA when it denied Officer Benko's request to be paid compensatory time for time spent in court on March 12, 2013? If so, what shall the remedy be?

Did the Employer violate Sections 15.1 and 15.5 of the CBA when it denied Officer Cox's request to be paid compensatory time for time spent in court outside of regular work hours on April 29, 2013? If so, what shall the remedy be?

Did the Employer violate Section 15.1 of the CBA when it denied Officer Guerrieri's request for compensatory time for the May 27, 2013 holiday he worked? If so, what shall the remedy be?

RELEVANT AGREEMENT PROVISIONS

Article 6—Grievance Procedure
Article 15—Overtime

BACKGROUND

The three (3) individual Grievants in this case all claim that, pursuant to Article 15.1 of the CBA, they are contractually entitled to the option of receiving compensatory time, instead of overtime compensation, for extra hours when they individually engaged in carrying out functions or duties of the Department.

A. Officer David Benko ("Benko") grieved the result of his being summoned to appear at the Youngstown Municipal Court on March 12, 2013 outside of his regular shift. Pursuant to Article 15.5 of the CBA, he was thereby eligible for 3.34 overtime hours. When he requested compensatory time instead of overtime pay his request was denied. On March 19, 2013, he filed a grievance. (Joint Ex. B)

B. Officer Donald L. Cox II ("Cox") grieved the fact that on April 8, 2013 he was subpoenaed to court for two trials outside of his regular shift. As a result, Cox was eligible for 3.34 overtime hours pursuant to provisions contained in Section 15.5 of the CBA. On Wednesday, May 8, 2013, Cox was told by Deputy Chief Michael Cretella ("Cretella") that he would not be able to take compensatory time due to an order (Chief's Memorandum Number 13-004; Joint Ex. E) issued by Chief John Beshara, even though everything had been submitted and approved to enable Cox to receive the compensatory time. (Joint Ex. E) He was then verbally directed by Cretella to change his request for compensatory time to overtime pay. Cox objected to that directive and filed a grievance on May 9, 2013. (Joint Ex. C)

C. Dispatcher Adam Guerrieri ("Guerrieri") worked on Memorial Day, Monday, May 27, 2013, which is recognized in the CBA as a holiday. He submitted a Special Detail Sheet and requested that his holiday time worked be granted in the form of compensatory time in lieu of pay. He then was informed by Lt. Shawn Varso on Tuesday, June 4, 2013 that he would not be permitted to take compensatory time for his Memorial Day work. Citing the provisions of the CBA and accepted practice Guerrieri filed a grievance on June 4, 2013. (Joint Ex. D)

Because the above three (3) grievance remained unresolved after being addressed at the preliminary stages of the grievance procedure, as defined in Article 6, these matters were combined by mutual agreement of the parties and were all submitted to single arbitration for final and binding resolution.

SUMMARY OF THE UNION'S POSITION

The Union's detailed argument can be found in its brief and in the documents submitted into the record. In summary, the Union states that this is a very straightforward case and involves the contractual rights of all three (3) Grievants under Article 15.1. When Chief Beshara issued his Memorandum, he purportedly denied bargaining unit employees their rights under Article 15.1. That specific section of the CBA reads in pertinent part:

> ***15.1*** *Employees who are in active pay status, excluding the use of paid sick leave, for more than forty (40) hours in a given week, at the direction of the University, shall be paid overtime at one and one-half (1.5) times regular pay* ***or, at the discretion of the employee, receive compensatory time off at the rate of one and one-half (1.5) hours for each hour of overtime worked.*** *"Week" means the 168-hour period from 12:01 a.m. on Sunday through midnight at the end of the following Saturday. Compensatory time off must be taken when such time off shall not be unduly disruptive to the University's operations, but not later than the end of the last full pay period in the month of August of the year in which the overtime is worked. Compensatory time not taken in accordance with the preceding sentence will be paid off at the bargaining unit member's current rate of pay. A bargaining unit member may not exceed a 480-hour compensatory time balance. If a 480-hour compensatory time balance exists, the employee will automatically be given pay for any overtime worked. (emphasis added)*

In its brief, the Union avers:

> Article 15.1 of the collective bargaining agreement states that employees who are in active pay status, excluding the use of paid sick leave, for more than 40 hours in any given week, at the direction of the University, shall be paid overtime at 1½ times regular pay or, **at the discretion of the employee**, receive compensatory time off at the rate of 1½ hours for each hour of overtime worked . . .
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> The Grievants were in active pay status, and not on sick leave. Therefore, the University was obligated to pay them time and one-half, unless, at the employees' discretion, comp time was substituted for the time and one-half wages. It does not matter how dire the budget difficulties of the Department are. The contract requires the University to pay the employees either wages at time and one-half or comp time in an equal amount **at the employees' discretion.** The Chief's refusal to recognize the employees' discretion is a violation of the collective bargaining agreement and requires the arbitrator to sustain the grievance and order the University, and the chief of police to provide employees the opportunity to select either pay or comp time for all of their hours over 40 in a week.

(Union brief pp. 3-4)

Based on the above arguments and the evidence in the record, the Union requests that its grievances be granted.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer's detailed argument can be found in its brief and in the documentation submitted into the record. The University takes the position that the CBA language is clear regarding how the Department should handle the particular work performed by Benko, Cox, and Guerrieri. It contends that Article 15, Section 15.5 and Article 16, Section 16.3 dictate that overtime earned should be paid in cash and not compensatory time for this specific type of work. However, the Employer does admit that many years the Department did not follow the language of Article 15.5 and 16.3. According to the University, over the past several years the management of the Department has had a "large budget" to work with and was lax in how it enforced the CBA, permitting employees to take compensatory time instead of cash in spite of what the CBA required regarding overtime earned by individual officers while having to attend court proceedings or when working on contractually-recognized holidays. The University disagrees with the Union that past practice has risen to a term and condition of employment in the case of court time and holiday time worked. It asserts that the CBA's very specific language cannot be ignored and employees do not have the right to choose the accumulation of compensatory time, rather than overtime pay, for those duties. When Chief Beshara's budget was cut in 2012 he looked for ways to cut costs and reviewed the CBA, discovering that compensatory allocation was not being managed in accordance with the Agreement. He then issued a

Memorandum (Joint Ex. E) directing that employees who incur overtime for court appearances should be paid in accordance with the specific requirements of Article 15, Section 15.5, which reads:

> **15.5:** When an employee works during hours outside of his/her regularly scheduled workday, and those additional hours do not abut his normal workday, the employee shall be paid the larger of A) five (5) hours of regular pay, or B) the actual number of hours worked at one and one-half (1.5) times the employee's regular hourly rate of pay. This provision applies to appearances in court on behalf of the University. (Joint Ex. A)

And, for work performed on holidays an employee shall be paid in accordance with Article 16, Section 16.3, which reads:

> **16.3.** A member of the bargaining unit who is required to be on duty on a holiday observed by the University, as defined in Section 16.1, shall be paid an additional one and one-half (1.5) times his/her hourly rate of pay if the duty falls within his/her regular forty (40) hour work week. An employee who is scheduled to work on a holiday and reports off sick will be required to request the use of sick leave for the time missed. (Joint Ex. A)

The University argues that the specific language of the above provisions is controlling and supersedes the general language of Article 15, Section 15.1.

Based on the above arguments and evidence in the record, the Employer requests that the Union's grievances be denied.

DISCUSSION

In this matter, there is really no dispute between the parties as to the facts and occurrences giving rise to the instant grievance and its subsequent review in arbitration. Instead, what is disputed is whether the evidence establishes a contract violation. Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The majority of arbitration cases involve disputes

regarding the rights under such agreements. In these cases, the Agreement itself is the focus, and the function of the arbitrator is to interpret and apply its provisions.

In an arbitral proceeding involving the interpretation and application of the Agreement, the arbitrator is a creature of the contract from which he derives his authority, and he must confine his decisions. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator may not substitute his own sense of equity and justice because his award must be grounded in the contractual terms. An arbitrator's decision must be based on the terms of the contract which the parties themselves have created and adopted to govern their relationship, absent any inferences or intentions which are not apparent and not supported by words documenting any purported intent. It is the contract and its precise terms and established intent which must be examined to determine the merits of the case. Yet, it is also recognized that at times contractual provisions conflict with one another and create ambiguity.

It is generally-recognized that neither party to an agreement should be able to gain or avoid through arbitration what it has mutually accepted in prior negotiations or bargaining. The law presumes that the parties understood the import of their contract and that the parties made a good bargain. *Int'l Union of Operating Eng'rs, Local 3 and Premier Chems*. 00-1 Lab. Arb. Awards (CCH) p 3245 (Calhoun 1999). What is recognized by this arbitrator and his colleagues is that the bargain struck in negotiations must be recognized and enforced and that the parties are required to comply with the Agreement's provisions until or unless they are contractually modified through further negotiations in a successor collective bargaining agreement.

It must also be recognized that the Union, as the grieving party in this matter, has the burden of proving by a preponderance of the evidence that the Employer has, in fact, violated the Agreement if it is to prevail.

> An established principle in labor relations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a contract violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement.

Am. Std., Paintsville, Ky. and United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH) P 3213 (Allen 2005). Essentially, the Union must demonstrate that the University had a duty or obligation under the Agreement that it failed to meet or carry out in a reasonable manner. After a thorough review of the parties' arguments, hearing testimony, and evidence submitted, the arbitrator finds that the Union here has met that burden.

The language of Article 15, Section 15.1 defines and governs overtime and includes the conditions and the rate of pay applicable, including the accrual limited option provided to employees to receive compensatory time in lieu of overtime. This section also defines the threshold working hours (40 hours) above which overtime is to be earned, as well as the specific period in which this threshold is applicable (a week or 168 hours). Additionally, Section 15.1 provides an employee with <u>discretion</u> as to whether he/she desires to receive earned overtime in the form of pay or compensatory time with a specified limit or cap of 480 hours. Additionally, Section 15.1 defines the conditions under which overtime can be taken and a deadline (August 15) when it must either be used as compensatory time or paid out in cash. It is clear that Article 15, Section 15.1, as the lead paragraph regarding overtime, sets out in detail and without any discernable limitations

the contractually agreed-upon conditions and terms regarding overtime. What it does not do is delineate or describe specific types of overtime. In the instant matter, two types of overtime are described in subsequent provisions of the CBA. Proscribe

Article 15.5 is descriptive in nature and sets out the conditions applicable to court earned overtime. It does not appear to contain language that proscribes a different outcome than that which is plainly stated in Section 15.1. If the parties, who are presumably experienced in contract formulation, intended Section 15.5 to prohibit the conversion of overtime to compensatory time and they should have stated such in Section 15.5 or in Section 15.1. As written and adopted by the parties, Section 15.5 provides a floor of pay for employees who have to appear in court (either five hours of straight time, or if over 40 hours in a "week," time and one-half hours of pay), with the employee being able to receive the greater of those totals. Because Section 15.5 is a descriptive extension of Section 15.1 for a specific type of overtime (court earned) and does not contain language setting it out as a standalone provision, it must be read in conjunction with Section 15.1 for it to be understood and administered properly. For example, to understand how to apply Section 15.5 for a specific type of overtime, it is necessary to understanding how overtime comes about, how an employee becomes eligible for overtime, and the other conditions agreed upon in Section 15.1, including choice contractually guaranteed to employees. The same reasoning applies to Article 16, Section 16.3. That section cannot be reasonably understood or implemented, without applying the provisions contained Section 15.1. It, like Section 15.5, appears to be descriptive in nature and simply describes in detail another type of overtime, holiday work related overtime. The University's position that Sections 15.5 and 16.3 of the CBA are standalone provisions governing overtime is not supported by

the language of the CBA when read as a whole, and was severely undermined by the testimony of witnesses at the hearing.

At best, if one made the argument that Sections 15.5 and 16.3 were intended to be standalone provisions in spite of the parties failed to include contract language that clearly distinguishes these overtime earning opportunities to be separate and apart from the overarching provisions that appear in Section 15.1, there would then exist ambiguity among the terms of the CBA as to which overtime provisions govern. Certainly, clear contract provisions take precedent in interpreting and applying a contract. However, the absence of clarity in contractual language allows for consideration of past practice as an interpretative tool. "Past practice is one of the prime aides to interpretation with respect to resolving ambiguities in collective bargaining agreements." *Cooper Tire and Rubber Co., and United Steelworkers*, 14-1 Labor. Arb. Awards (CCH) P 6033 (Fullmer 2013)

> Arbitrators are bound by the agreement of the parties. The role of the arbitrator in enforcing collective bargaining agreements is to apply the terms of the agreement as it is written. If the agreement is ambiguous, the role of the arbitrator is to determine what the parties intended the ambiguous provision to mean . . . A contract provision is ambiguous if it fairly susceptible to more than one meaning.
>
> When the language is ambiguous, arbitrators use a number of techniques to ascertain the meaning of the ambiguous provision. One of the main techniques arbitrators use in interpreting agreements is to look at the past practice of the parties. Simply put a "part practice" is a frequent and consistent pattern of interpreting ambiguous language in one consistent way. Where this practice is well-known to the parties, a reasonable inference is that the parties have agreed to interpret the ambiguity in that way. In that context, past practice is evidence of an agreement of the parties.

Dairyland Power Coop. of La Crosse, Wis. and Local Union 953 of the Int'l Bhd. of Elec. Workers, 13-2 Lab. Arb. Awards (CCH) P 5996 (Michelstetter 2013).

The party asserting the existence of a past practice has the burden of proof, typically relying on such factors as frequency, longevity, and the circumstances purportedly creating

a mutually-recognized practice. *United Trans. Union Local 1636 and Alaska R.R. Corp., Trailmobile, Inc. and Paperworkers Int'l Union, Local 7591*, 98-2 Lab. Arb. Awards (CCH) P 5232 (Wolff 1998). Here, the hearing testimony of now-retired Deputy Chief Cretella indicated that the same policy or procedure of permitting officers to choose compensatory time in exchange for overtime hours has been consistently recognized and applied since either 1986 or 1989. (Tr. pp. 21-22) Despite Chief Beshara's efforts to make budgetary adjustments to create "an overall cost savings effect for the Department" after University-wide budget cuts through his April 2013 memorandum, that effort failed to eliminate the accepted and binding practice. "Arbitrators heavily rely upon proven past practice evidence because it represents evidence of the parties' mutual understanding." *Dairyland Power Coop*.

> The existence of a past practice is often asserted in an effort to clarify ambiguous contract language by applying the meaning consistently given to the parties' words in the day to day administration of the contract . . .
>
> To be a binding past practice, it must be shown that the practice has been clearly enunciated and acted upon; that the practice represents a consistent pattern of behavior over a lengthy period of time; that the practice is accepted by both parties as the correct and customary mans of handling a situation, and that the practice is supported by mutuality.

Carlton County and Law Enforcement Labor Servs., Inc., Local No. 259, 13-2 Lab. Arb. Awards (CCH) P 5976 (Imes 2013).

"As set out in the seminal case of *Ford Motor Co*., 19 LA 237 (Shulman 1952), past practice is not just a matter of happenstance but an agreed upon method of doing things." Lima Ref. Co. and United Steelworkers Local 624, 13-2 Lab. Arb. Awards (CCH) P 5984 (Fullmer 2013). In this specific matter, the parties have jointly recognized on a long-term basis the officers' option of having a choice to take compensatory time in lieu of overtime compensation for overtime hours worked.

> One of the requirements of past practice is that the evidence must be sufficient to find conduct of the parties that is repeated over a period of time, such that an unwavering, uniform pattern of behavior emerges. Such evidence should be sufficient to find conduct of the parties that is repeated over a period of time, such that an unwavering, uniform pattern of behavior emerges. Such evidence should be sufficient to base a finding that the parties shared an understanding that this repetitious, uniform conduct is the approved conduct . . .

U.S. Foodservice and Teamsters Local 355, 14-1 Lab. Arb. Awards (CCH) P 6045 (Abrams 2013*),* citing to *Reynoldsburg City School Dist*., 127 LA 325 664, 667 (Murphy 2010). In this matter, the arbitrator finds that strong proof has been provided to demonstrate that the practice of permitting officers to exercise individual choices about exchanging overtime hours for future compensatory hours is readily ascertainable over an extended period of time and may be viewed as a fixed and established practice mutually accepted by the parties.

AWARD

Grievances granted.

On a prospective basis from the date of this Award, the provisions of Article 15, Section 15.1, governing an employee's right to compensatory time is applicable to Article 15, Section 15.5 regarding court time and also Article 16, Section 16.3 regarding work on holidays.

Based on Article 6, Section 6.13, the arbitrator's fees and expenses shall be equally shared by the parties.

Respectfully submitted to the parties this _____ day of February 2014,

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Robert G. Stein, NAA