LABOR & EMPLOYMENT

Arbitration Decisions

Labor Arbitration Decision, Santa Clara Cnty., 139 BNA LA 214

Pagination
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Decision of Arbitrator

In re COUNTY OF SANTA CLARA and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521

January 17, 2019

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BNA Headnotes

LABOR ARBITRATION

OVERTIME

[1] Non-contiguous overtime guarantee - Bargaining history ►100.480507 ►24.37 [Show Topic Path]
Bargaining history does not help decide whether county violated labor contract when it declined to guarantee eight hours overtime pay for bargaining-unit employees who worked more than four but less than eight hours on their scheduled day off, where current contract guarantees four hours overtime for work that does not precede/follow regular work shift, it does so for "each occurrence of non-contiguous overtime," except that employee "shall not be credited" with an additional four hour guaranteed minimum "until the original four hours has elapsed," and parties presented no evidence that meaning of occurrence or meaning of last key phrase was discussed.

[2] Non-contiguous overtime guarantee - Ambiguity - Application ►100.480507 ►24.15 [Show Topic Path]
Union failed to prove that county violated labor contract when it declined to guarantee eight hours overtime pay for employees who worked over four hours but less than eight hours on their scheduled day off, where some ambiguity exists in contract language-that guarantees four hours overtime for work that does not precede/follow regular work shift for "each occurrence of non-contiguous overtime"-union presented no evidence that county has ever interpreted this to mean that once employee is directed to work part of a fifth hour a second four-hour overtime minimum applies, and county showed that three departments have never paid four-hour minimum in this situation, but rather paid for hours actually worked.

[3] Non-contiguous overtime guarantee ►100.480507 [Show Topic Path]
County did not violate labor contract when it declined to guarantee eight hours overtime pay for bargaining-unit employees who worked more than four hours but less than eight hours on their scheduled day off, where contract guarantees four hours overtime for work that does not precede/follow regular work shift for "each occurrence of non-contiguous overtime," and additional block of work time immediately following initial four-hour block is "contiguous overtime," to which four-hour guarantee does not apply.

[*215]

For the employer-Catherine Blue Holmes, labor relations representative.

For the union-Caroline N. Cohen (Weinberg, Roger, & Rosenfeld), attorney.

PAUL D. ROOSE, Arbitrator.

OPINION AND AWARD IN ARBITRATION PROCEEDINGS PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

James Horrigan et al - Non-Contiguous Overtime

PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators contained in the parties' CBA. The matter was heard on October 4, 2018 in San Jose, California.

The parties stipulated that the matter was properly before the arbitrator. The parties also stipulated that the arbitrator retains jurisdiction over the implementation of the remedy if the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties chose to conclude their presentations by written briefs. Briefs were received on December 20, 2018 and the matter was submitted for decision.

ISSUE

The parties were unable to agree on a statement of the issue in this matter. The Union proposed the issue as follows:

> Did the County of Santa Clara violate the Agreement when it failed to pay a minimum of four hours for non-contiguous overtime worked? If so, what is the appropriate remedy?

The County formulated the issue as follows:

> Does Section 8.8 of the SEIU Memorandum of Agreement (hereafter "MOA") require the County to pay a *second* four-hour minimum in **[*216]** cases where an employee works an uninterrupted, prescheduled, non-contiguous overtime shift of more than four hours?

The parties ceded to the arbitrator the authority to formulate an issue statement. The arbitrator's formulation of the issue statement in this matter is as follows:

> Did the Employer violate the CBA when it declined to guarantee eight hours overtime pay for Behavioral Health Sciences Department employees who worked more than four hours but less than eight hours on their scheduled day off? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS AND RULES

Agreement Between County of Santa Clara and Service Employees International Union Local 521 - September 2, 2013-June 21, 2015

Article 8 - *Hours of Work, Overtime, Premium Pay*

Section 8.8 Non-Contiguous Overtime Guarantee

> If overtime work does not immediately follow or precede the regular work shift, a minimum of four hours overtime shall be credited to the worker …
>
> The payment of the guaranteed four hour minimum is subject to all the provisions of Article 8, Section 8.2, Overtime Work.
>
> A worker is credited with a guaranteed four hour minimum under this section for each occurrence of non-contiguous overtime during a scheduled shift, except that a worker shall not be credited with an additional four hour guaranteed minimum until the original four hours has elapsed.

FACTS

The Grievants are Health Care and Clerical Employees Who Worked on Their Days Off at the County's Methadone Clinics:

James Horrigan is a former quality improvement coordinator for the County's Department of Behavioral Health Services (DBHS). He retired in December 2017. At the time of the events that led to this grievance, Mr. Horrigan also served as chief shop steward for the Union.

At that time, the County operated three methadone clinics. Employees in the clinics normally worked a Monday-Friday schedule. Management staffed the clinics on the weekends and holidays with volunteers working overtime. Employees in the following Union-represented job classifications worked these overtime shifts:

Licensed Vocational Nurse

Medical Assistant

Psychiatric Tech II

Quality Improvement Coordinator II

Marriage and Family Therapist II

Health Service Representative

Psychiatric Social Worker I

Rehabilitation Counselor

Office Specialist I

The duration of the weekend/holiday shifts varied from clinic to clinic and employee to employee. Some worked less than four hours, others worked over four hours. Nothing in the record indicates that any employees worked over eight hours.

The County paid the unit members for actual hours worked on these weekend clinic days at the overtime rate of pay.

The Union Filed a Grievance, Asking for Four Hours Pay for Work Less than Four Hours and Eight Hours Pay for Working More Than Four Hours But Less Than Eight Hours:

Mr. Horrigan testified that a unit member approached him in February 2014, stating that a second unit member was complaining about the lack of a guaranteed number of hours when called in to work weekends at the clinics. According to steward Horrigan, this complaining unit member had formerly worked for the County's Medical Center and (apparently) believed that a different practice was followed at the Medical Center.

As a result of the complaint, the Union researched the matter and filed a class grievance on March 13, 2014. The identified class was "all affected" in the Department of Alcohol and Drug Services (the predecessor department for DBHS). The time period for a requested **[*217]** make-whole remedy was identified as June 24, 2013 through March 2, 2014.

In the grievance, the Union alleged a violation of Section 8.8 of the CBA. The Union alleged that employees who worked less than four hours must be paid for four hours rather than the actual hours worked. The Union also alleged that unit members who worked more than four hours, but less than eight hours, must be paid for eight hours rather than the actual hours worked.

The County Granted the First Part of the Grievance and Denied the Second Part:

Department management worked in concert with the Union to identify each instance of overtime worked by employees within the specified time frame and how overtime was paid out. The parties determined that all employees had been paid only for actual hours worked. In response to the grievance, management agreed to pay all employees who worked less than four hours the difference between four hours and their actual hours worked. Management denied the other allegation in the grievance regarding employees working over four hours but less than eight hours, responding that it did not agree with the Union's interpretation of the CBA on this point.

A total of $8,247.42 for 160 hours of overtime was paid out as a result of the partial granting of the grievance. The Union claimed another $22,743 was owed based on its reading of the CBA. It is that portion of the grievance that is before the arbitrator.

No Evidence Was in the Record That Overtime is Paid According to the Union's Interpretation Anywhere in the County:

The Union presented no evidence that the County pays or has paid guaranteed hours of non-contiguous overtime in accordance with the Union's interpretation of the language. The County presented three management witnesses who testified to the practices in their departments. In

those departments - facilities and fleet, animal care and control, and roads and airports - witnesses testified that the County does not guarantee eight hours of overtime pay for employees who work over four hours of non-contiguous overtime.

Lisa Jenkins is the program manager II for animal care and control. The following exchange took place on direct examination:

> Q: … how would you record it if an animal control officer got a call at 9:00, finished the call by 10:00, went home, thought he was done - or she - and then got another call at 11:00?
>
> A: They would get their four hours of non-contiguous call-out pay.
>
> Q: … and if … the second call were outside of four hours?
>
> A: So it would depend on a couple things. If the second call was contiguous to the initial four-hour call, then they get overtime for that, in addition to that four-hour block. If they get called in non-contiguously, so say they get called out again at … 3:00 a.m., then they would get the two four hours.

The Parties Bargained Changes to Section 8.8 of the CBA During 2006 Negotiations:

Prior to 2006 bargaining, Section 8.8 of the CBA read as follows, in relevant part:

Section 8.8 - Call-Back Pay

> If overtime work does not immediately follow or precede the regular work shift, a minimum of four hours call-back time shall be credited to the worker …
>
> Call-back pay is subject to all provisions of Article 8, Section 8.2, Overtime Work.
>
> Workers will be credited for each call-back during a scheduled shift. Except that workers shall not be credited with additional call-backs until the original four hour call-back time has elapsed.

In 2006 contract negotiations, the parties agreed to change the Section 8.8 language. (The complete current language is quoted in relevant part on page 3 of this award). The title of the section was changed from “Call-Back Pay” to “Non-Contiguous Overtime Guarantee.” Language in the section was modified to conform to the title change.

No evidence was presented by either party about the origin of the phrase “Except that workers shall not be credited with additional call-backs until the original four hour call-back time has elapsed.” That phrase pre-dated the 2006 negotiations.

The parties both presented evidence and testimony concerning the 2006 bargaining of this section. No evidence was presented that **[*218]** the meaning of the “shall not be credited” clause was discussed at the bargaining table.

UNION’S POSITION

The Union contends that the meaning of section 8.8 is clear and unambiguous on its face. Once an employee is directed to work a part of a fifth hour, this is a new occurrence of non-contiguous overtime. It is not clear what management’s interpretation of the section is.

The Union argues that the reason for the provision is to create a disincentive for the County to call in employees from their weekends and provides a reward to employees for heeding the call.

Since the meaning of 8.8 is clear, the Union asserts, there is no need to resort to interpretation. A plain reading of the language supports an interpretation that each occurrence of non-contiguous overtime shall be paid a mandatory four-hour block at the overtime rate.

The bargaining history supports the Union’s reading of the language, the Union argues. No evidence was presented by the Employer that supports the County’s interpretation.

The Union asserts that the County has failed to prove a binding past practice. The County’s presentation of witnesses from other departments does not establish a longstanding County-wide practice. The County did not even prove that other departments are working under the same contract language.

The Union requests that the arbitrator find a violation of the CBA and sustain the grievance. The Union asks that the arbitrator order the County to cease and desist from future violations of

the CBA. The Union asks that the arbitrator order the County to reimburse and make whole Mr. Horrigan and all affected individuals from June 24, 2013 through the present. Alternatively, the Union asks that the arbitrator order the remedy through March 2, 2014 as specified in the Union's grievance.

EMPLOYER'S POSITION

The Employer asserts that its practice of compensating employees under section 8.8 did not change with the modification in the 2006 negotiations. The County's position continues to be that, once the four-hour guarantee is reached, only hours actually worked beyond that must be compensated.

The County contends that the Union offered no evidence that any County department paid employees a second four-hour minimum. The Union, as the moving party, offered no evidence that the contract language change led to any change in practice.

The Employer argues that the contract language does not define "occurrence" or limit it to four hours or less. "There is no expressed cap on the length of an occurrence," in the contract. The Union is asserting an artificial limit on the duration of an occurrence of non-contiguous overtime.

The County asserts that the language should be read as to allow the County to pay for only one four-hour guarantee for two separate tasks performed within the four-hour time period. Even if the arbitrator agrees that the lapsing of the original four hours triggers a new four-hour period, arguendo the second four-hour block is contiguous to the first block and therefore does not require a new four-hour guarantee.

The Employer contends that its interpretation "simply makes more sense." The County requests that the County's partial denial of the grievance be upheld.

DISCUSSION

The Changes to the CBA in 2006 Are Only Marginally Relevant to the Instant Dispute:

[1] At the core of the dispute in this grievance is the meaning of "except that a worker shall not be credited with an additional four hour guaranteed minimum until the original four hours has elapsed" in Section 8.8 of the CBA. That key phrase, modified for clarification only in 2006, pre-dates the 2006 negotiations.

The Union believes that this clause means that unit members are granted a second four-hour minimum overtime guarantee after working four hours of overtime on their day off. The Union posits that this second four-hour guarantee applies regardless of whether the second four hours is contiguous to the first four-hour time block.

The Employer believes that the "elapsed" phrase means that a unit member who is called in for overtime, completes a task and is **[*219]** sent home might then be called again for overtime that day. In that case, a second four-hour guarantee would apply, but only if the call-in is at least four hours after the start time of the first call-in. The Employer believes that a second four-hour guarantee does not apply if all the overtime is contiguous.

Both parties presented testimony concerning the bargaining over Section 8.8 during the 2006 negotiations. Each side asserted that the bargaining history from that year bolsters its position in this grievance.

What changed in 2006 was the title of the section - from "call-back pay" to "non-contiguous overtime guarantee." A related change was made in the "elapsed" phrase - substituting "additional four hour guaranteed minimum until the original four hours has elapsed" for "additional call-backs until the original four hour call-back time has elapsed."

Also, the word "guaranteed" was added to the word "credited."

The undersigned reads the 2006 changes from "call-back" to "non-contiguous overtime" as a clarification of the language, not a substantive change. The parties made it clear that, regardless of whether the overtime takes place on a scheduled work day or a day off, the four-hour minimum guarantee applies provided that the overtime is not contiguous to the regular shift hours. The use of the word "guaranteed" in addition to "credited" also appears to be a clarification rather than an enhanced benefit or right.

No evidence emerged that the parties discussed any hypothetical scenarios at the bargaining table in 2006 that inform the disposition of this grievance. Neither side gave testimony or presented documentation that the key phrase - "until the original four hours has elapsed" - was discussed.

The Absence of Any Evidence of Application of the Language Consistent with the Union's Interpretation Adversely Impacts the Union's Case:

[2] In addition to bargaining history, an arbitrator examines how the parties have previously applied the language as an aid to deciding a grievance such as this one. No evidence was presented regarding how the language had previously been interpreted within the grieving department.

The Employer, on the other hand, presented evidence about three other departments. In each of those departments, managers testified that they do not pay a second four-hour minimum under the scenario presented in the instant grievance. While the Union is correct that this testimony did not prove a full-fledged past practice, these assertions do stand unrebutted in the record. The Union could not, or did not, present a single counter-point example of a department that applies the language in the manner the Union prefers. The Union relies, instead, on a "plain meaning" argument. That argument is addressed below.

In the case of one department, animal care and control, the Employer's witness testified to practices that seem consistent with management's explanation of the meaning of the key disputed phrase. In that department, unit members sometimes are called in for relatively brief tasks, then sent home. If called back later that day for another task, they are credited with an additional four-hour guarantee, but only if the second call-in is outside the timeframe of the original four hours of the first call-in.

The practice - how the agreement has been interpreted and applied - leans then toward the Employer's position. While not dispositive, it gives the Employer an advantage in this grievance that only crystal-clear contract language would overcome.

Article 8.8 of the CBA Has Some Ambiguity, But the Meaning Tilts Toward the Employer's Interpretation When All the Language is Read Together:

To ferret out the meaning of 8.8, the reader must first step back and ask: what is this contract section about? It is about unit members working overtime that is not contiguous with (next to) regular work hours. Presumably, it stems from an acknowledgement that employees incur a transitional cost when they prepare to go to work, travel to work, and travel home.

In recognition of the additional effort and life disruption ensuing from non-contiguous overtime, and as an incentive to get unit members to volunteer, the Employer agrees to **[*220]** guarantee at least four hours work or pay each time it occurs. In contrast, overtime that is appended to an existing shift, either immediately before or after, is not subject to a guaranteed minimum. Presumably, the key difference is that the unit member is already at work when the overtime is contiguous. No additional preparation or travel is required.

[3] The weakness in the Union's theory of this grievance is that it pushes this "guarantee" concept beyond the boundaries of its core meaning. The Union stretches the minimum-hours guarantee for the disruption of coming to work into a minimum-hours guarantee for blocks of work time that are contiguous to other blocks of work time.

The sole ambiguity in section 8.8 resides in the "elapsed" phrase. This phrase could, as the Union reads it, mean that a new four-hour guarantee applies when the first four hours of overtime work has been completed. The fundamental flaw in this interpretation is that the entire section 8.8 is about guarantees for "non-contiguous" overtime. An additional block of work time, immediately after another block of work time, is contiguous overtime not *non-contiguous* overtime. An additional four-hour guarantee, therefore, does not apply.

The preponderance of the evidence is that the "elapsed" phrase covers the scenario as outlined by Ms. Jenkins, the animal care and control manager. Her interpretation is consistent with the concept that the guarantee is only for non-contiguous overtime. If a second call-in occurs within the already-guaranteed four-hour time frame, that time is already paid time. A second non-contiguous call-in, after the first four hours has "elapsed," triggers a second four-hour guarantee.

The Union Has Failed to Meet Its Burden that the Agreement Has Been Violated:

Section 8.8 of the Agreement covers non-contiguous overtime guarantees. While some ambiguity exists in the language, the Employer's interpretation of the disputed "elapsed" phrase is more consistent with an overall reading of the section.

Since the language tips in the Employer's favor, the burden is on the Union to show through a preponderance of the evidence that the Agreement has been interpreted and implemented in the manner asserted by the Union. The Union has not presented such evidence, either through bargaining history or through a recitation of how the contract section is applied in other departments.

Accordingly, the Employer has not violated the agreement.

AWARD

The Employer has not violated the CBA by declining to guarantee eight hours overtime pay for Behavioral Health Sciences Department employees who worked more than four hours but less than eight hours on their scheduled day off.

Date: January 17, 2019.