

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
KENOSHA CITY AND COUNTY JOINT SERVICES BOARD

and

AFSCME LOCAL 2430, AFL-IO

Case 31
No. 65181
MA-13145

(Grievance No. 2005-01)

Appearances:

Tom Berger, Staff Representative, Wisconsin Council 40, AFSCME, P.O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of AFSCME Local 2430, AFL-CIO.

Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912 56th Street, Kenosha, Wisconsin 53140-3747, appearing on behalf of the Kenosha City and County Joint Services Board.

ARBITRATION AWARD

The Kenosha City and County Joint Services Board and AFSCME Local 2430, AFL-CIO, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the Employer concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance concerning the meaning and interpretation of the terms of the agreement relating to overtime pay. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Kenosha, Wisconsin on February 21, 2006. The parties submitted written arguments on March 20, 2006, and waived the right to file replies.

ISSUE

The Union states the issue as:

“Did the Kenosha City and County Joint Services Board violate the terms of the Labor Agreement by not offering an overtime bonus to all employees in the Evidence/ID Department?”

The Municipal Employer states the issue as:

“Did the failure to pay employees for training in the Records and Evidence/ID Departments of Joint Services violate the terms of the collective bargaining agreement and if so, should back pay be awarded?”

I adopt the issue as presented by the union, adding, “If so, what is the appropriate remedy?”

RELEVANT CONTRACTUAL LANGUAGE

Section 1.2 – Management Rights. Except as otherwise provided in this Agreement, the Employer retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the forgoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for just cause; the right to decide the work to be done and location of work; to contract for work; services or materials; to schedule overtime work; to establish or abolish job classifications; to establish qualifications for various job classifications. The Employer shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The Employer will not contract out for bargaining unit work where such contracting out will result in the layoff of employees or the reduction of regular, straight time hours worked by bargaining unit employees.

Section 22.1 – Maintenance of Benefits Any benefits received by the employees, but not referred to in this document, shall remain in effect for the life of this Agreement.

BACKGROUND

Kenosha City/County Joint Services provides support services to the protective services agencies of the city and county of Kenosha, Wisconsin. The KCCJS workforce includes employees in the Communications Center (Dispatch), the Records Department, Fleet Maintenance and the Evidence/Identification Department. This grievance concerns the practice by KCCJS management to pay employees in the communications center and records department overtime for certain training activities, but not offer similar payment to all employees in the evidence/identification department.

In the early 1990's, KCCJS management became concerned over the extremely high turnover rate of employees in the dispatch area. At one point, the turnover rate among probationary dispatch employees was practically one hundred percent, as new employees either quit or failed probation. Although all KCCJS staff have as part of their standard job duties the requirement that they "assis(t) in training," management in 1996 concluded it needed a better training program, and began using a training plan from the Association of Public Safety Communications Officials (APCO) International. This plan required Communications Training Officers (CTO's) to attend a three-day training seminar, where they were instructed in various aspects of adult education and training, and given a training manual approximately 3.5 inches thick. One of the techniques the CTO's studied was the use of a Daily Observation Report (DOR), a four-page document which the trainer uses to evaluate the trainee, and communicate that evaluation both to the trainee and KCCJS management for use in determining whether a new employee passes probation. The DOR includes the following questions for the trainer to address:

1. Attitude: Acceptance of feedback/corrections
2. Attitude: Attitude towards CTO [Communications Training Officer]
3. Attitude: Follows instructions & obeys orders
4. Attitude: Accepts responsibility for actions
5. Attitude: Truthfulness
6. Attitude: Courteous to callers and fellow workers
7. Attitude: Strives to operate professionally
8. Attitude: Ability to recover from errors
9. Attitude: Operates with confidence
10. Attitude: Assertive in their performance
11. Attitude: Defensiveness
12. Job Readiness: Punctuality/dependability
13. Job Readiness: Absenteeism/sick call-in
14. Job Readiness: Mental Alertness
15. Job Readiness: General Appearance
16. General Knowledge: Knowledge and adherence to policies & procedures
17. General Knowledge: Knowledge of call prioritization
18. General Knowledge: Knowledge of CAD system
- C1 CT: Speed & accuracy of call entry
- C2 CT: Information gathering
- C3 CT: Writing down information before CAD entry
- C4 CT: Telephone skills
- C5 CT: Geographic knowledge
- C6 CT: Stress Management
- C7 CT: Problem solving/decision making
- C8 CT: Ability to multi-task
- C9 CT: Ability to handle both 911 & EMD calls
- F1 Fire: Ability to dispatch fire & rescue calls
- K1 LE/Fire: Ability to back up & replace units

- K2 LE/Fire: Appropriate use of radio procedure
- K3 LE/Fire: Radio: Listens & comprehends
- K4 LE/Fire: Radio: Articulation & voice control/quality
- K5 LE/Fire: Problem solving/decision making
- K6 LE/Fire: Overall performance in normal conditions
- K7 LE/Fire: Overall performance in stressful conditions
- L1 LE: Speed & accuracy of entry to CAD system
- L2 LE: Assertiveness & control level
- L3 LE: Geographic knowledge
- T1 TTY: Accuracy on TIME system
- T2 TTY: Speed on TIME system
- T3 TTY: Ability to hear & understand radio
- T4 TTY: Multi-Tasking
- T5 TTY: Accuracy & timeliness of notifications & requests
- T6 TTY: Accuracy & timeliness of warrant confirmations
- T7 TTY: Knowledge & use of 10-codes
- T8 TTY: TTY functions/resources
- T9 TTY: Utilization of TTY functions/resources
- T10 TTY: Notification book

The DOR also includes a section for comments, as follows:

What was the PO's (Probationary Officer's) most satisfactory performance of today?

What was the PO's least satisfactory performance of today?

Instructions & Goals for Trainee

Upon implementation of this training regimen, KCCJS management decided to pay CTO's a half-hour of overtime "for each day they are completing a DOR on a new trainee." (Employer Exhibit 4, Memo Dated 5/99, 12/02) Management later increased that to .75 hours, paid whether the CTO actually worked overtime or not, but *only* paid when the CTO completed a DOR. As part of the new training process, each CTO in the "Kenosha County 911 Center Training Team" signed a supplemental agreement (drafted in October 1999, revised in June 2005) which included the following provisions:

- I will complete required DOR's, tests, evaluations and any other required paperwork in a timely manner.
- I will teach Policy and Procedure as written and will follow them in my teaching methods and expect the same of my trainee.

- I will remain active in the program and to the training of new employees for one (1) year from signing this agreement. At that time I will decide if I wish to remain in active status.
- I will not enter into a personal relationship with my trainee outside of work that would jeopardize my ability to evaluate their performance objectively.

ANY FAILURE TO ABIDE BY THIS AGREEMENT WILL RESULT IN COUNSELING, DISCIPLINE OR REMOVAL FROM THE PROGRAM.

The Employer did not present this arrangement to the Union prior to its implementation; after its implementation, the Union neither grieved any part of this arrangement, nor requested to bargain over any aspect of it.

On December 18, 2004, Rhonda Maney, first shift supervisor, Records Department, sent the following memo to Records Clerks:

Re: Training Officers

We are in the process of creating a new training program. This new training program incorporates a 12 week detailed, specific and standardized training calendar. The daily calendar will dictate the type of training for the day. In some aspects, this training is radically different to past training.

- The training will be standardized. Every new employee will be trained exactly the same. They will all receive the same training based on the number of days training. All new clerks will be trained on warrant entry. A new clerk will not count prior to 12 weeks.
- The trainer will be completing a Daily Observation Report on the trainee. The trainer, through daily evaluations of performance and behavior, will objectively evaluate the trainee's performance and progress (or lack thereof) of the trainee. The trainer will review the daily observation report with the trainee.
- Trainers will receive a ½ hour of overtime pay for each day of training.
- For the first 8 weeks of training, the trainer will not count.
- This basic training will be done on either 1st, 4th or 2nd shift. Training will not be done on the shift that is short staffed.

- We will be purchasing headsets for both the trainer and trainee. The headsets will allow both the trainee and trainer to hear the telephone call without having to put the call on speaker phone.
- Trainers will be asked for recommendations for changes in the training program. As trainers, you will have insight on what works and what doesn't.

For this program to be successful, we need you. We need those of you who are willing to train. If you are willing to train, please send your supervisor an e-mail so stating this by January 3rd.

On March 16, 2005, Maney sent the following e-mail:

Subject: Training Program

Our new training program shadows Dispatch's training program. The Records training program follows the same principle in its design. I miscommunicated one aspect of the this program to you in my memo reference Training Officers dated 12/18/2004. The overtime pay is for completing the Daily Observation Report not for being a trainer. If a Daily Observation Report is not filled out on a day, there is no overtime pay for that day.

Dispatch has raised the overtime pay for completing the DOR from .5hrs to .75hrs. This overtime pay will be consistent for Dispatch and Records.

I apologize for any confusion this has created. If you have questions, please ask.

On April 18, 2005, Sue Whiteside, on behalf of "Training Personnel," filled a grievance that "employees not paid for training new employees in Records and Id-Evidence." She provided the following analysis:

Since some employees have been paid for training of new employees to their department, we believe this benefit should be offered to all Joint Service employees in a non-discriminatory manner per Article XXII Maintenance of Benefits section 22.1

We are requesting back pay to be consistent with the policy in dispatch for any employees training a new employee to a department since 1998. It is not the fault of any of the employees doing the training in Records or Id-Evidence that a Daily Observation Report was not filled out as this form was not provided by management. At that time, trainees in Records and Id-Evidence reported the progress of the trainee directly to management.

On May 5, 2005, Marcinkus replied to Whiteside as follows:

On April 28, 2005, I met with you and Kathy Bach to discuss policy grievance 05-01 on “employees not paid for training new employees in Records and Id-Evidence.” This grievance resulted from the implementation of the new records training program that requires that each trainer complete an evaluation of the trainee and discuss the evaluation with the trainee on a daily basis. The evaluation is otherwise known as a daily observation report or DOR. The trainer is allowed $\frac{3}{4}$ of any hour to complete this DOR and is paid overtime for its completion and discussion with the employee. The new records training program is based on the existing Communications training program which has had that condition since approximately 1998.

Your grievance states that “since some employees have been paid for the training of new employees to their department, we believe this benefit should be offered to all Joint Service employees in a non-discriminatory manner per Article XXII Maintenance of Benefits section 22.1.” I have denied the grievance on the following basis.

1. There was no contract violation. There is no provision to pay employees for training and “assists in training” is listed in each job description.
2. The training that is paid to the CTO’s and RTO’s (Communications and Records Training Officers) is for completion of the daily observation report. This observation is shared with the employee at the end of the day. The overtime payment is to allow the time necessary for this process. If an employee trains but does not complete a DOR for whatever reason, the employee is not entitled to nor is he or she paid the overtime.
3. The overtime is paid in a non-discriminatory manner. Again, those employees that complete a DOR receive the overtime. Those employees that do not complete the DOR do not receive the overtime.
4. Section XXII – Benefits states, “Any benefits received by the employees, but not referred to in this document, shall remain in effect for the life of this agreement.” We have not violated this section since we are not taking the overtime away from the CTO’s and RTO’s who complete DOR’s.

In our meeting we discussed creating a training program in the Evidence/Identification Department that does include completing a DOR. Developing this type of training program takes a considerable effort, and you have volunteered to assist in this process. Our first meeting was scheduled for May 6 but needs to be rescheduled due to unforeseen absences. We look forward to having the same type of training program in Evidence/ID that we have in Communications and Records.

On June 20, 2005, Marcinkus wrote the Joint Services Board regarding this grievance as follows:

History/Management's Position

Prior to 1998, the Comm Center was experiencing an almost 100% turnover in probationary dispatchers. To improve the retention rate, both the training program and the hiring practices were scrutinized. Based on the Police and Sheriff's Departments' field training officer program and conditions, a new training program was designed for the Comm Center. The redesign consisted of developing standardized training criteria and bench marks for passing to evaluate how new employees were meeting that criteria. It also involves a daily observation report (DOR) that the trainer completes and discusses with the trainee. For the time involved in completing a DOR, the trainer is paid .75 hours overtime. This overtime was based on the fact that staffing shortages prevented time to discuss the evaluation during work hours, so additional time was spent after normal hours for this process. Currently, this may or may not be the case. Receiving overtime for completing a DOR is an arrangement outside the union agreement, except if it actually involves the additional time. The new program aided in improving the retention rate, but, more importantly, it provided the necessary documentation to either retain or terminate a probationary dispatcher on a timely basis.

Previous to 2003, there were few problems with retaining probationary employees in the Records and Evidence/Identification Departments, however, in 2003 the Records Department began to experience problems similar to the Comm Center. Employees were not passing their probationary period or were not performing as expected upon passing. This year, Records developed training criteria and bench marks to meet that criteria so the proper information would be available to pass or terminate a probationary employee. The trainers evaluate the trainees daily and for this they are paid .75 hours overtime.

Evidence/Identification has not experienced such problems. With the exception of the part-time employee hired in 1998, most Ev/Id employees transfer from other departments. Although these employees need to be familiarized with specific department tasks, they are successful performers in the agency. The

training program in Ev/Id is more loosely designed with the employees learning the tasks as time permits, not restricted by trying to determine whether they will or will not pass probation.

In the discussion and denial of this grievance, it was decided to develop a similar training program for Evidence/Identification. This program will be developed by the end of the year in preparation for future vacancies which could be filled from outside the agency.

For the Board's information, all job descriptions in Joint Services include training as a duty/responsibility of the employees.

Union's Position

The Union believes we are being discriminatory in paying some people for training and not others. They are requesting that all people be paid similarly and requesting back pay for those people training since 1998, but not receiving overtime.

This grievance has been reviewed at the required levels and now is being presented to the Joint Services Board for a decision.

The Joint Services Board denied the grievance, and the matter was advanced to arbitration in a timely manner.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The practice of paying an overtime bonus was never discussed with the union, which only became aware of the practice when it was offered to one employee for acting as a training officer and not another employee who was also training probationary employees. For some reason the Joint Services Board implemented a different process for the Evidence/ID Department which denies some members of that department the overtime bonus enjoyed by every employee acting as a training officer in other departments under the terms of the same Labor Agreement. This unequal treatment is discriminatory and violates the Labor Agreement. Further, the board should have bargained with the union regarding the practice that offers additional or bonus overtime pay for an assignment that the board itself points out is part of every employee's job description. When the board argued that the Evidence/ID Department had not experienced problems like those in Dispatching and Records, its decision to deny the grievance did not consider whether the agreement had been violated, only whether the board was willing to pay the overtime.

Employees in the Evidence/ID Department who train probationary employees are performing the same duties and take their responsibility as training officers every bit as seriously as their counterparts in Dispatch and Records. That responsibility should be rewarded just like it is for the employees of Dispatch and Records.

The employer has violated section 1.2 by applying this practice in an unfair and discriminatory manner, and violated article 22 by giving an overtime bonus to some employees while denying the benefit to others covered by the same agreement. The grievance should be granted.

In support of its position that the grievance should be denied, the Municipal Employer asserts and avers as follows:

Under its contractual right to decide the work and its location, the employer instituted a training program to better prepare its workforce, including the completion of a Daily Observation Report. Because the DOR required additional work outside the normal scope of duties for a dispatcher, the employer paid .75 hours of overtime to the training officers who complete the exhaustive report. While all employees have done training, not all who give training have completed the APCO Training or filled out a DOR. The grievant has never filled out a DOR, and the training program in her department did not include the four-page assessment tool until December 2005.

The training program has been used successfully since 1996, and the issue of the .75 hour overtime for dispatch trainers has not been raised in negotiations. It was not until the training program was introduced in the Records Department in early 2005 that an objection was raised.

The payment of overtime is not a benefit, but a payment for additional work, namely the completion of the DOR. Perhaps the payment may be viewed as an incentive, which may be viewed as a benefit; but it is a benefit only available to those specifically trained to perform this task. It is available to those who earn it; it is not like insurance or sick leave. The grievant never completed a DOR nor was she trained to do so. She did not work overtime, and did not perform any additional work. All joint services personnel assist in training, but only a select few have been certified as trainers and are charged with the completion of the DOR. There was no obligation to pay the grievant any overtime for training, the payment of overtime to the trainers remains in effect, and there was no violation of the collective bargaining agreement.

DISCUSSION

The Union has raised several arguments in support of its grievance. I have not found any of them persuasive, and so have denied and dismissed the grievance.

At the outset, I must admit to some uncertainty over the precise parameters of the union's grievance. At times, it seems the complaint is that employees in dispatch and records receive the overtime payment for training, but employees in the evidence/ID department do not; elsewhere, the complaint is that one evidence/ID employee received an overtime payment, but that others in that area did not. I will attempt to address each aspect.

The Union rests its grievance on two clauses in the collective bargaining agreement. The first, taken from the section establishing management's rights, is that the employer's "right to adopt reasonable rules and regulations ... will not be applied in a discriminatory manner." The other provision, entitled "Maintenance of Benefits," requires that any benefits received by employees which is not referred to in the collective bargaining agreement, "shall remain in effect for the life" of the agreement.

I first consider whether it is discriminatory for the employer to offer overtime payments for training conducted in the dispatch and records departments but not to employees in the evidence/identification department.

I have no reason to question the Union's assertion that employees in the evidence/ID department who train probationary employees take their responsibility as training officers just as seriously as do their counterparts in dispatch and records. However, the record does not support the Union's further contention that all these employees perform the same duties.

Most significantly, the employees who have received the overtime payment have completed Daily Observation Reports; those who do not complete DOR's do not receive the overtime payments. Employees in dispatch and records who conduct training activities have completed Daily Observation Reports; employees in the evidence/identification department have not.

The Union contends it is discriminatory for the employer to establish a training program which provides overtime pay for employees in the dispatch and records departments, but not the evidence/identification department, and that this "unequal treatment" violates the mandate in the collective bargaining agreement's recognition clause which requires that any rule and regulation which the employer adopts "not be applied in a discriminatory manner."

The essence of discrimination, as used in this context, is disparate treatment of employees who were situated identically. If there were employees who all did the same work, and some received overtime while others did not, a claim of discrimination would appear to be in order.

But that is not the situation before me. Because she did not prepare or otherwise work with Daily Observation Reports, the grievant simply did not do the same work as the training officers in dispatch and records.

Nor is it discriminatory for the employer to determine that different departments have different training needs. The initial move for more intensive training of dispatchers was in response to a direct need – the overwhelming percentage of probationary employees who failed to attain permanent status. Use of the DOR was later extended to the records department after a subsequent increase in the number of its probationary employees also having problems attaining permanent status.

The activities of the evidence/ID department, while certainly important, are not as frenetic and stressful as the work in dispatch, and its new employees have generally been existing KCCJS employees posting in as opposed to new hires. Existing employees who only need training on particular policies and procedures simply do not require the same degree of training, nor the same degree of observation, as new hires. Moreover, performance in the evidence/ID area cannot be as standardized as in dispatch, and that department does not allow for the measurement of objective criteria. These significant differences in the work and the employees involved justify different training programs.

The Union also notes that the employer did not discuss the “overtime” payments at the outset of the program, and states that “the board should have bargained with the Union regarding the practice that offers additional or bonus overtime pay for an assignment that the board itself points out is part of every employee’s job description.” The Union may, if it wishes, bring a grievance or complaint seeking to bar the employer from making any and all overtime payments to employees in the dispatch and records departments. On the basis of this record, however, I do not believe it would be appropriate for me to strike down entirely those overtime payment.

I turn now to the alternate aspect of the grievance, whether the employer violated the collective bargaining agreement by making overtime payments to some, but not all, employees in the evidence/ID department.

The grievant testified that “one of the people” in her department was offered “three or four days” overtime for training other employees on a particular device called a Mug-O-Matic, even though she hadn’t undergone any special training to be a trainer. “I don’t know how many days she got overtime, maybe three,” the grievant testified. “We complained, and she stopped getting the pay.” The grievant further testified that the evidence/ID department did not use the Daily Observation Report as a training tool.

According to the KCCJS director, however, the employee who conducted the training on the Mug – O - Matic “actually worked overtime and was paid for it,” and did not receive a non-overtime premium payment as did the trainers who completed DOR’s.

Given the Union's burden of persuasion in a non-disciplinary grievance, the record does not establish that the employer improperly discriminated among employees in the evidence/identification department.

The employer had a legitimate business reason for establishing a more focused and formalized training process in the dispatch and records departments than in evidence/identification, so it was not discriminatory for it to do so. Nor was it discriminatory for the employer to offer overtime payments to training personnel for each day they completed a Daily Observation Report, and to standardize the amount of overtime.

Finally, the Union devotes one sentence in its brief to its secondary claim, a conclusory statement that the employer's actions violated section 22.1 of the agreement "by giving an overtime bonus benefit to some employees while denying the overtime bonus benefit to other employees covered by the same" labor agreement.

This sentence appears to establish that once the employer has provided a benefit, even if it is not referred to in the agreement, it cannot discontinue the benefit during the term of the agreement. Assuming that the overtime payments at issue in the instant matter constitute "benefits" as that term is commonly understood in provisions of this nature, the employer did not discontinue any aspect of those payments during the term of the agreement. In fact, by providing the payments to employees in the records department as well as dispatch, the employer actually expanded the benefit. Contrary to the Union's assertion, such a course of conduct did not violate the contractual mandate for maintenance of benefits.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 8th day of June, 2006.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

