

ARBITRATION DECISION NO.:

365

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

June 18, 1991

DATE OF DECISION:

July 18, 1991

GRIEVANT:

John Patrick

OCB GRIEVANCE NO.:

31-01-(88-04-21)-0020-01-13

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

Tim Miller

FOR THE EMPLOYER:

G. Dewayne Slack

KEY WORDS:

Overtime

Purge Date

Timeliness of Filing Grievance

Arbitrability

ARTICLES:

Article 13 - Work Week,
Schedules and Overtime

§13.01-Standard

Work Week

§13.07-Overtime

Article 25 - Grievance

Procedure

§25.02-Grievance Steps

§25.03-Arbitration

Procedures

FACTS

The grievant, a Design Engineer in the Planning and Design Section of ODOT, had been employed by

the State of Ohio for ten years at the time of the grievance. The grievant claimed that the employer violated the Contract by denying him overtime opportunities which were given to junior employees. Overtime was distributed on a rotating basis to the senior employee with the least number of overtime hours. Insofar as practicable, overtime was to be equalized under the provisions of Article 13.07.

As of March 31, 1988, the grievant had been offered fewer overtime opportunities than other Design Engineers with less seniority. When the grievant spoke to the employer about the problem, he was assured that his overtime hours would be equalized but this did not occur. Effective April 1, 1988, all overtime hours were purged. Upon hearing of the purge, the grievant filed his grievance claiming that the employer failed to distribute overtime "equally on a rotating basis by seniority among those who normally perform the work."

UNION'S POSITION

In response to the employer's argument that the grievance was untimely filed, the union argued that the grievant initiated the grievance after the purge because, after that event, the grievance procedure was the only means by which he could recover the lost overtime. Thus, the union maintained that the grievance was properly before the arbitrator.

Furthermore, the union argued that the employer violated Article 13.07 of the Contract by denying the grievant overtime opportunities. The grievant claimed that he was available, willing and qualified to perform the overtime work which had been offered to junior employees with more overtime hours. The grievant stated that he only worked 159 hours of overtime between July 1, 1986 and March 31, 1988, while junior employees had worked as many as 582 hours during that period.

EMPLOYER'S POSITION

The employer claimed that the grievance should be denied because it was not filed in a timely manner in accordance with Article 25. Between July 1, 1986 and March 31, 1988, numerous overtime assignments were made within the grievant's section, however the grievant at no time asserted a claim that he had been improperly bypassed. The employer asserted that the "occurrences" giving rise to any grievance were the individual overtime assignments made between July 1, 1986 and March 31, 1988. The employer disagreed with the union's assertion that the "purge" was the "occurrence" which precipitated the filing of the grievance. Thus, the employer argued that the grievance was not arbitrable.

The state maintained that the overtime assignments in question were properly offered to employees with a thorough working knowledge of the specific projects requiring the overtime on the various dates cited by the union. Due to the unique aspects of the Design Engineer's work, it is not practicable to rotate overtime assignments. Consequently, the employer argued that the grievance should be denied.

ARBITRATOR'S DECISION

The arbitrator found the grievance to be arbitrable. The arbitrator believed that, although the grievant knew that he had worked less overtime than junior employees prior to April 13, 1988, the purging of the overtime roster was the event which caused him to become aware that any inequity in past overtime distribution could not be rectified through additional overtime opportunities. The arbitrator found that, until the grievant saw the new overtime policy on April 5, 1988, he relied on assurances from the employer that he would be offered overtime. It was not until April 5, 1988 that the grievant actually suffered a grievable loss. Consequently, the purge was the occurrence which gave rise to the grievance, and the issue presented is timely and can be addressed on its merits.

As to the merits, however, the arbitrator found that she was restricted to considering only those events which occurred within ten days prior to the filing of the grievance. The evidence establishes that the overtime roster was purged effective April 1, 1988, and after that date, overtime in the grievant's section was equalized. There is no dispute between the parties regarding overtime assignments beginning ten days prior to April 13, 1988. There were no overtime opportunities for which the grievant was skipped in the 10 days immediately prior to the filing of the grievance. The purge was the event which triggered the filing of this grievance, however, without the initiation of formal grievances during the preceding 21 month period, the recovery of lost overtime cannot be permitted. According to the arbitrator, no contract violation occurred

during the ten day period prior to the filing of this grievance.

AWARD

The grievance is arbitrable but it is denied on the merits.

TEXT OF THE OPINION:

**Arbitration Proceedings
Before
Linda DiLeone Klein**

In the Matter of Arbitration

between

**The State of Ohio
Department of
Transportation**

and

**OCSEA, Local 11
AFSCME, AFL-CIO**

Grievance of John Patrick

Case No:

31-01(88-04-21)-0020-01-13

Heard:

June 18 1991

Appearances

For the Employer

G. Dewayne Slack, Advocate
Rachel Livengood,
OCB Representative

For the Union

Tim Miller, Staff Representative
John Patrick, Grievant

ISSUES

- I. Is the grievance arbitrable?
- II. Did the Employer violate Article 13.07 of the collective bargaining agreement? If so, what is the appropriate remedy?

Applicable Contract Language

Article 13.07 - Overtime

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Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work.The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

...

Article 25 - Grievance Procedure

...

25.02 - Grievance Steps

Step 1 - Immediate Supervisor

... All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

...

25.03 - Arbitration Procedures

...

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

...

OPINION

The grievant began his employment with the State in June of 1978. In April 1988 when the instant grievance was initiated, he was classified as a Design Engineer 2 in the Planning and Design Section.

Prior to April 1, 1988, overtime assignments were governed by Article 13.07. Overtime was distributed on a rotating basis to the senior employee with the least number of overtime hours; also considered was whether the employee "normally performed the work". Insofar as practicable, overtime could be equalized under the provisions of Article 13.07.

However, certain exceptions to this policy existed; if there was an assignment specific to an employee's claim load or specialized work assignment or if the incumbent was required to finish a work assignment, the policy was not applied.

There were six Design Engineers in the Planning and Design Office who were involved with various phases of the development of highway construction plans, and according to Management, rotation of overtime assignments pursuant to Article 13.07 was not always practicable due to the complexity of the work.

As of March 31, 1988, the grievant had been offered fewer overtime opportunities than other Design Engineers with less seniority. According to the grievant, he had discussed equalization of overtime with Management beginning in 1985 prior to the effective date of the 1986-1989 labor agreement, and he had been advised that adjustments would be made by the offering of overtime opportunities. The grievant received overtime assignments, but his hours were not equalized. Also according to the grievant, he raised the issue on an informal basis after the contract became effective.

In March 1988, the Joint Labor Management Overtime Committee met to "develop a policy consistent with Article 13 of the agreement in regards to overtime". The parties determined that "all overtime will be carried with employees from assignment to assignment for the duration of the overtime period beginning April 1, 1988 and ending March 31, 1989." In other words, effective April 1, 1988, all overtime hours would be purged; the notice regarding the purging of the overtime roster was posted on April 5, 1988.

Upon learning of the above-referenced purge, the grievant contacted his Union Steward, and on April 13, 1988, he initiated the instant grievance. He claimed that he was available, willing and qualified to perform the overtime work which had been offered to junior employees with more overtime hours; he also claimed

that he had been improperly bypassed and thereby deprived of overtime. The grievant claimed that Management failed to distribute overtime "equally on a rotating basis by seniority among those who normally perform the work". He stated that he worked only 159 hours of overtime between July 1, 1986 and March 31, 1988, while junior employees had worked as much as 582 hours during that period. The grievant maintained further that he initiated the grievance after the purge because after that event, the grievance procedure was the only means by which he could recover the lost overtime.

The grievance was denied by Management on the basis that it was not filed in a timely manner in accordance with Article 25.

At the hearing, the Employer raised the threshold issue of arbi-trability. Between July 1, 1986 and March 31, 1988, numerous overtime assignments were made within the grievant's section, however says Management, he at no time asserted a claim that he had been improperly bypassed; he may have "felt" that he should have been offered the assignments, but he did not initiate a formal grievance on any occurrence. Overtime rosters were posted regularly, therefore, it cannot be held that he was unaware of the overtime hours worked by other Design Engineers.

The Employer is adamant in its position that the "occurrences" giving rise to any grievance were the individual overtime assignments made between July 1, 1986 and March 31, 1988, the grievant should have protested the assignments as they were made if he considered that overtime was not being distributed in accordance with Article 13.07. The Employer vehemently disagrees with the Union assertion that the "purge" was the "occurrence" which precipitated the filing of the grievance. The Employer contends that the Union "sat on its rights" by failing to take action as overtime assignments were made.

The State maintains that the overtime assignments in question were properly offered to employees with a thorough working knowledge of the specific projects requiring the overtime on the various dates cited by the Union. Due to the unique aspects of the Design Engineer's work, it is not practicable to rotate overtime assignments. The State maintains further that the parties recognized this factor by setting forth certain exceptions to the application of the overtime policy. The State asserts that the Union failed to show that the overtime assignments were not performed by the incumbents or that said assignments were not "specialized" and therefore exempt.

The State asks the Arbitrator to find that the grievance is not arbitrable. If, however, this position on arbitrability is not sustained, the State requests that the grievance be denied on the merits.

Considerable time was spent at the hearing discussing arbitrability and Management's request for a ruling on said issue prior to the introduction of evidence pertaining to the merits; however, the Arbitrator held that a preliminary determination on arbitrability could not reasonably be made without hearing the merits.

After a careful evaluation of all the evidence presented, the Arbitrator finds that the matter is arbitrable. Although it must be held that the grievant knew that he had worked less overtime than junior Design Engineers prior to April 13, 1988, the purging of the overtime roster was the event which caused him to become aware that any inequity in past overtime distribution could not be rectified through additional overtime opportunities. Until he saw the posting on April 5, 1988, he relied on assurances from Management that he would be offered overtime. Until April 5, 1988, he had suffered no loss. When he learned of the purge and realized that his overtime would never be equalized for the period extending from July 1, 1986 until March 31, 1988, he "suffered an adverse effect".

Under the circumstances of this case, it must be held that the purge was the occurrence which gave rise to the grievance, and the issue presented may properly be addressed on its merits.

As it pertains to the merits, however, the Arbitrator finds that she is restricted to considering only those events which occurred within ten days prior to the filing of the grievance. The evidence establishes that the overtime roster was purged effective April 1, 1988, and after that date, overtime in the grievant's section was equalized; there is no dispute between the parties regarding overtime assignments beginning ten days prior to April 13, 1988.

The ruling on the arbitrability issue does not signify that the grievant is automatically entitled to the remedy sought. The purge was the event which triggered the filing of this grievance; however, without the initiation of formal grievances during the period complained of, the recovery of lost overtime cannot be permitted, especially in view of the fact that the agreement to purge overtime rosters was a joint decision.

During the ten day period prior to the filing of this grievance, no contract violation occurred; accordingly, the grievance must be denied.

A W A R D

The grievance is arbitrable, however, it is denied on the merits.

LINDA DILEONE KLEIN

Dated this 18 th day of July 1991
Cleveland, Ohio