

INTRODUCTION

This arbitration arises out of a grievance filed by Local 3621, District Council 37, of the American Federation of State, County & Municipal Employees (Union) against the City of New York City and the New York City Fire Department (Employer), on behalf of Vincent Variale, as representative Grievant for himself and others (Grievant).

The Union asserted that the Employer had violated the parties' Collective Bargaining Agreement (Agreement) when it failed to properly compensate the Grievant for overtime work. Specifically, the Employer failed to compensate the Grievant and others for all overtime performed, instead imposing a 'first hour' deductible on paid overtime.

In response, the Employer denied any violation of the Agreement, arguing that the Union was misinterpreting the meaning of the relevant contract provision. It argued that the clause requiring overtime to be paid for all overtime, from the very first minute of overtime worked, only applied to employees who were assigned to the A, B or C Platoons (the 'Emergency Medical Service schedule'), and not to those, like the Grievant, who were assigned to the D Platoon schedule.

When the parties were unable to resolve this grievance through the regular grievance steps, the undersigned, a member of the panel of arbitrators for the New York City Office of Collective Bargaining, was selected to hear the grievance.

The arbitration was heard on June 2, 2011, at the offices of the New York City Office of Collective Bargaining, 40 Rector Street, New York, NY.

The Grievant was represented by Jesse Gribben, Assistant General Counsel, District Council 37 Legal Unit, AFSCME. The Employer was represented at the hearing by Jeffrey Smodish, Assistant General Counsel, Office of Labor Relations, City of New York. During the pendency of this proceeding, Assistant General Counsel Victor Levy was substituted in for Mr. Smodish, who had left the General Counsel's Office.

Both parties were afforded a full opportunity to offer written evidence, examine and cross examine witnesses, and present arguments in support of their positions. In fact, both applicants made excellent presentations in support of their positions.

At the conclusion of the hearing, it was agreed that the parties would submit written closing arguments. A postmark date of September 30, 2011, was set by the parties as the deadline for submission of their briefs. Subsequently, the parties extended that deadline until October 14, and then again until October 21, 2011, on which date the briefs were timely submitted. Thereafter the record was closed and the matter submitted for decision.

ISSUE

The parties were in essential agreement regarding the issue to be submitted for determination. That issue, as set forth in the Union's Request for Arbitration (with slightly altered wording), is:

Whether the Employer, the New York City Fire Department, violated the Collective Bargaining Agreement by failing to pay employees in the title of Supervisor Emergency Medical Service Specialist overtime for each minute of overtime actually worked?

If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Emergency Medical Services Agreement

Article V, Section 2. Meal Periods/Overtime.

a. Applicability

This provision shall only apply to Employees in the titles, Emergency Medical Services Specialist, Supervising Emergency Medical Services Specialist, Emergency Medical Specialist – EMT, and Emergency Medical Specialist – Paramedic assigned within the New York City Fire Department’s Emergency Medical Service.

c. Overtime

Effective July 1, 1982, each Employee in the titles listed in subsection A above, with the exception of Employees working in the Emergency Medical Dispatch, who performs overtime work beyond the assigned Emergency Medical Service schedule shall continue to be reimbursed at overtime rates applicable to work performed beyond 40 hours per week on a minute for minute basis.

POSITIONS OF THE PARTIES

THE UNION

The Union argues that the language of Article V, Section 2 (c) clearly requires that the Grievant be paid for all overtime worked.

Since the language is clear, the ‘plain meaning’ doctrine of contract interpretation requires that no parol evidence should be considered regarding its interpretation.

THE EMPLOYER

The Employer contends that the plain meaning of language of the Agreement is not clear, because the words “Emergency Medical Service schedule” is a particular term

of art, and that these words have a special meaning with regard to the Employer's platoon schedule. Thus parol evidence must be considered to determine the intended meaning of Paragraph (c) as the parties negotiated it.

Specifically, the Employer argues that "Emergency Medical Service schedule" refers only to A, B and C Platoon schedules. Employees on these schedules work shifts of five days on, two days off, followed by five days on, three days off, rotating days off throughout the year. But the Grievant is assigned to the Platoon D schedule, which is an unvarying administrative schedule of Monday - Friday, 8 hour days, with weekends off.

Thus, the Grievant is not assigned to an "Emergency Medical Service schedule" and is not entitled to the overtime provisions specified.

FINDINGS AND DISCUSSION

It is noted that, since this is non-disciplinary contract grievance, the Union has the burden of proof.

The threshold question which must be addressed, as raised by the Union, is whether the language in the Agreement has such clear, 'plain language' that it would be improper for the Arbitrator to consider any extrinsic (or parol) evidence beyond the four corners of the Agreement, to determine its meaning. Specifically, does the phrase 'assigned Emergency Medical Service schedule' clearly mean anyone assigned to work any schedule in Emergency Medical Services, or does, as the Employer contends, the

phrase denote the specific Emergency Medical Service schedules worked by the Emergency Medical Service employees in the A, B and C Platoons.

In order for me to ascertain whether these words are, as the Employer contends, a 'term of art' with a specific meaning within the context of the Employer's operations, going beyond the ordinary plain meaning of the words, I am required to consider parol evidence. I have done so.

The testimony and evidence shows that field personnel working in Emergency Medical Services are assigned to one of three Platoon schedules, denominated A, B or C Platoons. Employees on these schedules work alternating periods of 5 days on and 2 days off, and then 5 days on and 3 days off. They thus cycle through the calendar, with different days off each pay period. Employees on these schedules are treated differently from other employees. They do not get holidays off and do not have dedicated meal periods.

In distinction, the Grievant, and others represented by his grievance, are assigned to D Platoon, which is denominated a regular or administrative schedule. Employees assigned to D Platoon work an 8 hour day, five days a week, normally Monday to Friday, with weekends off.

The testimony further shows that these A, B and C Platoon schedules have been in effect since the 1970's, when the Emergency Medical Services functions were transferred from the New York City Health and Hospitals Corporation to the Fire Department.

Testimony from the Assistant Fire Chief in charge of Emergency Medical Services Operations and from the Assistant Commissioner of Budget and Finance was offered in support of the Employer's contention that the phrase 'Emergency Medical Service schedule' has for many years been understood to refer to the special A,B and C Platoon schedules worked by EMS field personnel.

In its brief, the Union correctly points out that neither of the Employer's witnesses were present when the language in the Agreement was negotiated. The testimony of the witnesses is based on their historic understandings and on past practice.

While these objections could cause an Arbitrator to assign less weight to such testimony than would otherwise be afforded, it does not completely exclude such testimony from consideration. Historic understandings and past practice are pertinent to a case such as this.

But, in response, the Union also failed to present any witnesses who were present during the negotiations and who might have offered contradictory testimony regarding the intended meaning of the phrase 'Emergency Medical Service schedule' when used in Article V, Section 2 (c).

It is the Union which has the burden of proof. To simply argue that the testimony of the Employer's witnesses, who were not present at the negotiations, should be given less weight, or even rejected because of that fact, does not relieve the Union of its own burden of proof.

In the end, I must find that the Union failed to meet this burden.

Finally, I find that the Opinion and Award of Arbitrator Gavin, relied upon by the Union, is not applicable to this case. In Arbitrator Gavin's Award, he found that the plain meaning rule of contract interpretation applied, and thus he was not permitted to go beyond the terms in the Agreement and consider extrinsic evidence. However, in this case I have found that, because of an ambiguity in the meaning of a clause in the Agreement, I am required to do just that.

AWARD

The Grievance is DENIED.

Respectfully submitted on November 21, 2011.

Martin Henner, Arbitrator