

OFFICE OF COLLECTIVE BARGAINING

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: In the Matter of the Arbitration

: BETWEEN

: CORRECTION CAPTAINS ASSOCIATION

: - and -

: THE CITY OF NEW YORK

: (Tour Change Grievance: OCB A-2467-86)

: OPINION  
: and  
: INTERIM AWARD  
:  
:-----x

APPEARANCES:

For the CCA:

Adam Ira Klein, P.C.  
by: Mark Steven Soroka, Esq.  
Donald J. Cranston, President, CCA

For The City of New York:

Marc Z. Kramer, Esq.  
Associate Counsel, Office of Municipal  
Labor Relations  
Brian P. Boylan, Esq.  
Assistant Counsel, OMLR  
James Hanley, Deputy Director, OMLR  
William F. Lewis, Director of Labor Relations,  
Department of Correction

On April 22, 1986, the Union filed a Step III grievance alleging that the scheduling of Captains at the Brooklyn Correctional Facility was in violation of Article III, Section 2 of the then applicable Collective Bargaining Agreement between the Union and the City of New York.

Section 1 of that Article provides that ordered or authorized overtime "in excess of forty (40) hours in any week or in excess of the hours required of an employee by reason of his regular duty chart if a week's measurement is not appropriate" is to be compensated at time and one-half, either in cash or compensatory time off at the employee's option.

Section 2 provides:

"In order to preserve the intent and spirit of this Section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory re-assignment of personnel to different days off and/or tours of duty."

It's the Union's contention that Captains working rotating tours of duty are "routinely being assigned off the midnight tour to either the 5AM-1:30PM or 6:30AM-3PM tour and that this constitutes a "rescheduling of . . . tours of duty" within the meaning of the above-quoted provision, one violative of the clause because such "rescheduling" is being done solely to avoid the payment of overtime.

On the City's denial of the claim, the matter was referred to arbitration and the Undersigned was selected to hear and determine the issues. A hearing was thereafter held in New York City on July 10, 1987, at which time the Parties were afforded full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. A transcript was taken and supplied to the Arbitrator. Subsequently, post-hearing briefs and reply memoranda were filed, with the Record closed as of October 19, 1987.

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Section 9-116 of the Administrative Code (Joint Exhibit 3), provides for a three platoon system for all custodial officers, including Captains. Subsection c. of that Section defines the "normal tours of duty" as those beginning at midnight, 8:00 AM and 4:00 PM. It also allows wardens to create other "miscellaneous" tours. Under the statute, miscellaneous tours beginning on or after 8:00 PM and before 7:00 AM "are considered part of that normal tour of duty which commences at midnight." Similarly, tours beginning at or after 7:00 AM and before 11:00 AM are considered part of the normal 8:00 AM "day" tour and tours beginning at or after 11:00 AM and before 8:00 PM are considered

part of the normal 4:00 PM "evening" tour.

The "normal" tours at the Brooklyn facility are 11:00 PM to 7:30 AM (the midnight tour), 7:00 AM to 3:30 PM (the day tour) and 3:00 PM to 11:30 PM (the evening tour). Though there is nothing in the Contract linking particular tours and particular duties (the Captain job description [Joint Exhibit 4] is all-embracing), Captains are generally assigned to posts approved for certain tours, which tours carry with them certain tasks and responsibilities. For example, there is a day-time facilities training post, but no night-time facilities training post. There are also day and night housing posts, day and night control posts, a day personnel post, a day visits post, etc.

On occasion prior to the grievance, a Captain assigned to work a housing post from 11:00 PM to 7:30 AM would be held over to work in the same housing unit until 3:30 PM, receiving overtime for the hours worked after 7:30. Beginning October 28, 1985 and ending June 6, 1986, there were, according to the Union, some thirty instances where "holes" in the day tour were not filled in this manner, but filled differently. On those occasions, Captains on the midnight tour whose normal reporting time was 11:00 PM were told to report at 5:00 AM for a 5:00 AM to

1:30 PM tour or at 6:30 AM for a 6:30 AM to 3:00 PM tour. For the time between those start times and 7:00 AM (the beginning of the usual day tour), they were given no duties, then assigned to a normal day post at 7:00. They thereafter worked, not until 1:30 PM or 3:00 PM, the end of their assigned tours, but until 3:30 PM, the end of the day tour and were paid overtime for the hours worked beyond 1:00 or 3:00--in these examples, two hours or 1/2 hour.

What occurred is illustrated on Union Exhibit 1, a compilation of schedules for the period in question. An example is the schedule for Monday, March 10, 1986. Four tours and four Captains are listed under the 11PM-7:30 AM heading; "039 Tour Commander-Hooper," "001 Housing A-Gunther," "056 Central Control-Washington," and "Miscellaneous" (without a numerical designation), next to which is "Porter 6:30." Then, under the 7AM-3:30PM day tour listings, we find "056 Central Control-Porter." (The numerical designations are given when a tour and its attendant duties are authorized by the Chief of Operations.) The example demonstrates that Captain Porter, who had been rotated to and scheduled for the midnight tour along with the others, actually came in at 6:30, but was given no assignment until posted to Central Control at 7:00 to relieve Captain

Washington and to work the day tour. His overtime for the day, since he came in at 6:30 AM and worked until 3:30, was 1/2 hour. If he had come in at 11:00 PM and worked until 3:30, he would have worked 8 hours at overtime.

#### The Contentions of the Parties

The Union concedes that a tour beginning as late as 6:30 AM is within the above-cited statutory definition of the midnight tour in that it begins after 8:00 PM and before 7:00 AM. It further concedes that it would not complain if the tours at issue here had been "authorized," i.e., if they had written specifications and specific duties, such as the post-grievance "miscellaneous receiving room" or "mess hall" 5:00 AM to 1:30 PM tours. Its complaint is the assignment to what it considers an "unauthorized" "combination miscellaneous [night time] do-nothing [tour] and day assignment tour," one which the statute does not contemplate or the Contract permit.

It argues that the City could not have filled the gaps in its daytime schedule by reassigning those on midnight tours to the vacant 7:00 AM-3:30 PM posts, for to do so would be the

"rescheduling of . . . tours of duty" solely to avoid payment of overtime and that what it has done under the guise of a miscellaneous tour, though that preserves some overtime, is equally objectionable because the elimination of the bulk of the overtime patently violates the intent and spirit of the provision.

The Union asks therefore that the City be ordered to cease and desist violating the Contract and that the Captains deprived of overtime by past violations be made whole by the payment of all overtime lost as a direct result of the City's rescheduling.

In the City's view, this is not, as the Union contends, a "rescheduling" case, but a "scheduling" case and one in which it has acted within the bounds of the Collective Bargaining Agreement and the Administrative Code. The City's starting point is the statutory definition of the three basic tours and the discretion given to managers to create other tours within that framework. It then notes the Union's concession that the Code treats the tours in question as midnight tours. Taking these things together, the City maintains that it has not rescheduled tours from midnight tours to day tours, but has done no more than change the start time of certain midnight tours, which it can do,

under the Contract and the Code, in order:

"to serve the needs of a particular correctional facility, as long as the starting time falls within the tour, as defined by the Administrative Code, to which the individual is assigned."

This right is bolstered, the City maintains, by Section 12-307(5) (b) of the Collective Bargaining Law, which preserves to the City the right "to direct its employees," "maintain the efficiency of governmental operations" and "exercise complete control and discretion over its organization," all of which necessarily includes the "right to establish commencement times for tours which would best serve the needs of the Department."

The City concedes that those Captains whose start times were changed performed tasks normally performed by those assigned to days, but argues that "the propriety of the duties being performed" is not the issue and that the sole question is whether "their tours of duty were changed in violation of Article III." On this score, the City contends that the Captain Job Specification does not differentiate between day duties and night duties, but speaks of Captain duties generally irrespective of when they might be performed.



Discussion and Analysis

The City has agreed that there "shall be no rescheduling of tours of duty." Does this only mean, as the City contends, that it cannot reschedule a Captain from, say, a midnight tour to a day or evening tour? Or does it in addition mean, as the Union maintains, that the City cannot avoid the payment of overtime by changing the start time of a statutory midnight tour when the sole work that Captain will perform is work ordinarily performed by someone assigned to the day tour?

The Collective Bargaining Agreement does not define "tours of duty." Nor does it tell us what is meant by "rescheduling." The arbitration decision submitted by the City (Arbitrator Grossman's June 22, 1987 decision in COBA v. City of New York [OCB 2291-85]) is similarly unenlightening, for it does not reach what is disputed here, but only decides what is not in contention, i.e., that a rescheduling from a 12:00AM-8:00AM midnight tour to an 8:00AM-4:00PM day tour violates the pertinent provision.

The City relies on the Administrative Code, but the issue is not whether a warden can create miscellaneous tours. Under the statute, she or he clearly can. Rather, the question is

whether the ad hoc creation of such tours and the consequent assignment of Captains to them in the described circumstances, as occurred here, is a prohibited rescheduling within the meaning of Article III, Section 2.

On balance, I'm persuaded that such assignments do constitute prohibited rescheduling and are thus violative of the clause. The creation of the tours, as stated, was ad hoc and did not follow the customary pattern of authorization and approval as those miscellaneous tours that preceded and followed them. Moreover, they were not created, as were the others previously mentioned, to fill new needs arising during a period spanning the midnight and day tours, but solely to fill gaps on the day tour, with the obvious and undenied purpose of reducing overtime through the ". . . anticipatory reassignment of personnel . . . ." In my judgment, their creation and start times were not a bona fide operational decision, but merely a device, which, while paying lip service to the technical definitions in the Code, was purposefully designed to skirt the Agreement.

While the City's desire to reduce costs is both understandable and laudatory, that desire cannot prevail over

contractual obligations. In agreeing to Article III, Section 2, the City was not agreeing merely to abide by "the letter of the Administrative Code." Its commitment was broader than that, i.e., "to preserve the intent and spirit" of the provision on overtime compensation. On this Record, its conduct did not satisfy that promise.

While I have found a violation, I am not prepared to fashion a remedy, primarily because the City has not been heard on that subject. I am therefore issuing this Interim Award and giving both Parties an opportunity to address the remedy issue in writing within the time frame set forth below.

The Undersigned, acting as the Arbitrator and having duly heard the proofs and allegations of the Parties on the substantive issue, therefore renders the following

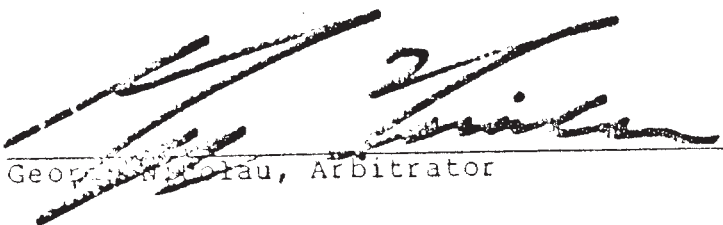
I N T E R I M  
A W A R D

For the reasons expressed in the foregoing Opinion, the assignment of Captains to the miscellaneous tours complained of in

the grievance constituted a prohibited re-scheduling of tours of duty within the meaning of Article III, Section 2 of the applicable Collective Bargaining Agreement between the Parties.

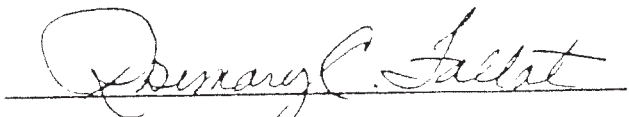
The City shall cease and desist from such violations.

The Undersigned will retain jurisdiction to determine the monetary remedy, if any. The Parties may submit their respective contentions on that question in writing within 30 days from the date of this Interim Award.

  
George Nicolau, Arbitrator

STATE OF NEW YORK )  
                          ) SS.:  
COUNTY OF NEW YORK)

On this 26th day of December, 1987, before me personally came and appeared George Nicolau, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

  
ROSEMARY C. GALLAT  
Commissioner of Deeds  
City of New York No. 1-1057  
Certificate filed in New York County  
Commission Expires April 1, 1989