

BEFORE ARBITRATOR STEVEN M. BIERIG

IN THE MATTER OF ARBITRATION BETWEEN: CITY OF CHICAGO, DEPARTMENT OF POLICE AND FRATERNAL ORDER OF POLICE, CHICAGO LODGE #7	GRIEVANT: CLASS ACTION J. ALDRICH, ET. AL. ISSUE: MARATHON OVERTIME GRIEVANCE NO. 610-08-06 ARB. NO. 08-171
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Before: Steven M. Bierig, Arbitrator

APPEARANCES:

For the Department of Chicago: Norell Cefalu, Ass't. Corporation Counsel

For the FOP: Thomas Pleines, General Counsel

Location of Hearing: Fraternal Order of Police Lodge #7
1412 W. Washington
Chicago, Illinois

Date of Hearing: February 23, 2009

Date Briefs Exchanged: March 28, 2009

Date of Award: August 5, 2009

AWARD:

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is denied. The Department did not violate the Contract when it offered overtime for the 2008 Chicago Marathon only to D-1 Police Officers (9161 Job Classification).

Steven M. Bierig, Arbitrator
August 5, 2009

I. INTRODUCTION

The Hearing in this matter took place on Monday, February 23, 2009, at the offices of the Fraternal Order of Police, Lodge No. 7, 1412 W. Washington, Chicago, Illinois. The Hearing commenced at 10:00 a.m. before the undersigned Arbitrator who was duly appointed by the parties to render a final and binding decision in this matter. At the Hearing, the parties were afforded a full opportunity to present such evidence and arguments as desired, including examination and cross-examination of all witnesses. An 84-page transcript was prepared. Both parties prepared Post-Hearing Briefs that were exchanged through the Arbitrator on or about March 28, 2009, at which time the evidentiary portion of the Hearing was declared closed. Both parties stipulated at the Hearing to this Arbitrator's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

II. ISSUE

Did the City violate the Collective Bargaining Agreement by not offering the 2008 Chicago Marathon overtime opportunity to all Bargaining Unit members, regardless of pay rate?

If so, what is the appropriate remedy?

(Tr. 8-9)

III. RELEVANT CONTRACT AND GENERAL ORDER PROVISIONS

A. Contract Provisions

ARTICLE 4 – MANAGEMENT RIGHTS

The Employer has and will continue to retain the right to operate and manage its affairs in each and every respect. The rights reserved to the sole discretion of the Employer shall include, but not be limited to, rights:

- A. To determine the organization and operations of the Department of Police;
- B. To determine and change the purpose, composition and function of each of its constituent departments, and subdivisions;
- C. To set standards for the services to be offered to the public;
- D. To direct the officers of the Department of Police, including the right to assign work and overtime;
- E. To hire, examine, classify, select, promote, restore to career service positions, train, transfer, assign and schedule officers;
- F. To increase, reduce or change, modify or alter the composition and size of the work force, including the right to relieve employees from duties because of lack of work or funds or other proper reasons,

* * * *

- I. To establish, modify, combine or abolish job positions and classifications;
- J. To add, delete or alter methods of operation, equipment or facilities; and
- K. To determine the locations, methods, means, and personnel by which the operations are to be conducted, including the right to determine whether goods or services are to be made, provided or purchased.
- L. To establish, implement and maintain an effective internal control program;
- M. To suspend, demote, discharge, or take other disciplinary action against officers for just cause;
- N. To add, delete or alter policies, procedures, rules and regulations.

Inherent managerial functions, prerogatives and policymaking rights, whether listed above or not, which the Employer has not expressly restricted by a specific provision of this Agreement are not in any way, directly or indirectly, subject to the grievance and arbitration procedures contained herein, provided that no right is exercised contrary to or inconsistent with other terms of this Agreement.

ARTICLE 9 – GRIEVANCE PROCEDURE

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Section 9.7 - Authority of the Arbitrator.

A. Except as specified in Subsection C below, the Arbitrator shall have no right to amend, modify, nullify, disregard, add to, or subtract from the provisions of this Agreement. The Arbitrator shall only consider and make a decision with respect to the specific issue or issues presented to the Arbitrator and shall have no authority to make a decision on any other issue not submitted. The Arbitrator shall submit in writing his or her decision to the Employer and the Lodge within thirty (30) days following the close of hearing unless the parties agree to an extension thereof. The decision shall be based upon the Arbitrator’s interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented, and shall be final and binding upon the parties.

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Section 9.8- Expense of the Arbitrator.

The fee and expenses of the Arbitrator shall be borne by the party whose position is not sustained by the Arbitrator. The Arbitrator in the event of a decision not wholly sustaining the position of either party, shall determine the appropriate allocation of his or her fees and expenses. Each party shall be responsible for compensating its own representative(s) and witness(es). The cost of a transcript, where requested by either party, shall be paid by the party so requesting it.

The party requesting cancellation, rescheduling or other postponement of a set hearing date shall pay the Arbitrator’s cancellation fee.

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Article 10 - Non-Discrimination

Section 10.1 — Equal Employment Opportunity

The Employer will continue to provide equal employment opportunity for all officers, and develop and apply equal employment practices.

Section 10.2 — Non-Discrimination.

In the application of the terms and conditions of this Agreement, the Employer shall not discriminate against officers, and employment-related decisions will be based on qualifications and predicted performance in a given position without regard to race, color, sex, religion, age (40-63), sexual orientation or national origin of the officer nor shall the Employer discriminate against officers as a result of membership in the Lodge. Nothing contained in this Agreement shall be deemed to preclude the mandatory retirement of any officer upon or after the attainment of age 63. Officers shall not be transferred, assigned or reassigned for reasons prohibited by this Section 10.2.

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Article 23 - Seniority

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Section 23.6 — Overtime for Pre-Planned Events

The following procedures will apply in case of events which will require the cancellation of days off and for which the Department has received a minimum of 21 days' prior notice.

In those units which have been designated to provide personnel, seniority will be the dominant factor in the selection of officers required to work their regular days off, provided that the member to be selected possesses the necessary skill or special qualifications to perform the duties required. The Employer shall seek volunteers on the basis of seniority from among those qualified officers in said unit. If there are insufficient qualified volunteers, the Employer shall select officers on the basis of reverse seniority, provided that the Employer may assign probationary officers without regard to seniority. The Employer will post a notice of such events on the unit bulletin board and officers desiring to exercise the option to work will notify their unit commanding officer within seven days of the date the notice was posted.

For the purpose of pre-planned overtime assignments, a unit may be defined as a bureau, division, district, watch, tactical team, etc.

For duty on election or primary days, seniority will be the dominant factor in the selection of members required to work their regular day off in the polling place. Those officers who work overtime will be compensated in accordance with Sections 20.1 and 20.2. For purposes of this paragraph, officers in tactical teams on their

regular day off shall be treated the same as other officers on the same watch in the same district, subject to operational needs.

For purposes of this paragraph, the Employer will select officers to work a four- (4) hour extended tour of duty on election or primary days on the basis of seniority from among those qualified officers working the affected watch who volunteer for the extended tour. If and to the extent that there are insufficient volunteers, the Employer shall select officers from the affected watch on the basis of reverse seniority.

* * * *

(Jt. Ex. 1)

IV. STATEMENT OF FACTS

A. Introduction

The instant case involves a dispute between the Fraternal Order of Police, Lodge #7 (the “FOP” or the “Union”) and the City of Chicago Police Department (the “City” or the “Department”). This is a Class Action Grievance filed on behalf of specialized police officers who were denied the opportunity to apply for and receive overtime for the 2008 Chicago Marathon (the “Marathon”). All relevant officers are covered by the Collective Bargaining Agreement (the “Contract”) between the parties. The instant dispute is a result of the Department’s determination that it would not offer overtime opportunities to said specialized officers for the 2008 Chicago Marathon. (Jt. Ex. 1, 2)

It is uncontested that all police officers who were offered the Marathon overtime opportunity fall within Title Code 9161 category and receive the D-1 pay rate and are considered non-specialized. Specialized officers fall within the following pay categories:

D-2 Pay Rate:

Police Technicians, Traffic Specialists, Canine Handlers, Explosive Detection Canine Handlers, Fingerprint Examiners, Field Training Officers, Marine Unit Officers, Mounted Unit Officers, the Armoror, Evidence Technician

D-2A Pay Rate:

Detectives

D-3 Pay Rate:

Legal Officer 1, Supervising Substance Abuse Counselor, Explosive Technician, Security Specialist, Supervisor of Latent Fingerprint, Forensic Investigator I, and Firearms Identification Technician I

(Jt. Ex. 1, Un. Ex. 1)

B. The Events Leading to the Instant Grievance

On September 19, and again on October 1, 2008, the Department faxed a message to all Department Units offering only to 9161 Officers an overtime opportunity to work the 2008 Chicago Marathon. The officers in the 9161 Title Code are compensated at the D-1 pay rate. Officers who chose to participate were instructed to sign up through the CLEAR system, which is the Department's main computer system. (Jt. Ex. 1, 5)

According to the testimony of Department Witness Commander Frank Gross, in past years, the Department has not had a need for and has not generally assigned specialized officers to work the marathon. The Chicago Marathon is a private event and was sponsored by Bank of America in 2008. As its predecessor, LaSalle Bank, had done in the past, the

Bank requested that the Department provide police services, i.e., crowd and traffic control, for the marathon. The sponsoring Bank secured a permit and paid a fee to the City for this service. (Tr. 29-32)

The Department's Special Events Unit is responsible for scheduling the manpower for the marathon. Commander Gross, the head of the Unit since April 2007, testified that in 2008, the Department solicited volunteers from the Police Department to work the Marathon. Volunteers were requested via a Department-wide message that all off-duty 9161 Officers, as well as 9171 Sergeants interested in working the Marathon sign up electronically. The Department invited D-1 Police Officers only because according to Gross, the Department felt that specialized skills and training are not necessary to perform the functions of crowd and traffic control. Further, since its goal was to provide the greatest number of officers that the sponsor's budget would allow, the Department chose not to use higher-paid officers, or those falling in pay rates D-2 through D-3A. (Jt. Ex. 1, 5, Tr. 39-42 44-45 47, 62,70-72)

According to the evidence presented, even though the Department explicitly requested 9161 Officers, there were a number of specialized officers who signed up to work the Marathon. The Special Events Unit, however, deleted the specialized officers from the volunteer list and did not deploy them to work the Marathon. Despite those efforts, the evidence shows that a handful of specialized officers did receive overtime pay for working the Marathon. Gross could not explain exactly why this happened because he did not schedule any specialized officers to work the Marathon. He could only speculate as to what may have occurred, explaining that some people "fell through the cracks" or were otherwise assigned to the Marathon for a specific purpose that arose on the day of the event. (Jt. Ex. 6, 7, Tr. 47-48, 50-55)

According to Gross, the 2008 request for volunteers was a change for the Department. In previous years, the Department assigned officers to work the marathon by

canceling each District's Tactical Teams' days off, and requiring those officers to work the marathon. The Department acquired the remaining officers from the 25 Police Districts by requesting volunteers who were willing to forego their days off for the overtime. If the number of volunteers still resulted in too few officers, the Department canceled days-off in reverse seniority. Therefore, according to Gross, the difference in staffing between 2008 and years past was that in 2008, the Department exclusively solicited volunteers because all Tactical Teams were already scheduled to work on the date of the 2008 Marathon. In addition, in the past, officers from Districts 1 through 25 were allowed to bid on the overtime; however, in 2008, all D-1 Officers in all Units including, non-District Units were allowed to bid on the overtime. (Jt. Ex. 4, 6-7, Tr. 33-37, 39-48)

FOP Vice President Greg Bella testified that in past years the opportunity to work the marathon has been open to all officers. According to Bella, a notice was sent out and placed in the CO Book in each District to be read at roll calls. Officers who were interested in working the marathon on their days off would inform the Department via telephone and those selected would receive time and a half for the hours worked. Bella is a D-2 Detective and testified that other Detectives have worked marathons in the past. (Un. Ex. 1, Tr. 18-19, 21, 24-26)

V. POSITIONS OF THE PARTIES

A. The Union

The Union takes the position that the specialized officers were unreasonably denied the opportunity to bid on overtime for the 2008 Marathon. The Union contends that pursuant

to Section 10.1 of the Contract, the City had the obligation to offer the opportunity for overtime to all members of the Bargaining Unit, including those in D-2, D-2A and D-3 pay rates.

According to the Union, it is clear that in the past, all members of the Bargaining Unit, including D-2, D-2A and D-3 Officers were given the opportunity to bid for overtime on marathons. Thus, to deny these officers the opportunity at this time is a violation of not only Section 10.1 of the Contract, but also a binding and repeated past practice.

As a remedy, the Union asks that the Arbitrator determine that the overtime selection process for the 2008 Chicago Marathon was improper under the Contract. The Union asks that the Arbitrator rule that the Chicago Marathon is an overtime employment opportunity that must be offered equally to all members of the Bargaining Unit for future Marathons.

For all the reasons outlined above, the Union asks that the Grievance be sustained in its entirety.

B. The Department

The Department takes the position that the Union did not meet its burden of proof in this case. The Department argues that it has the Management Right to determine which officers will be granted an overtime opportunity. In the instant case, the Department had a reasonable right to deny overtime to any officer in a classification above D-1. The Department made a determination that it could offer the most services simply by limiting the overtime to only those officers in the D-1 classification. This would give the Marathon sponsor the most “bang for the buck”. Contrary to the Union’s argument, the determination

that the Department would offer overtime only to D-1 Officers was neither arbitrary nor capricious.

In addition, the Department contends that while the Union alleges that it has been a past practice to allow all officers in the Bargaining Unit to apply for overtime for the marathon, this is simply not the case. In order for a past practice to be established, evidence must exist showing a clear and ongoing past practice. According to the Department, the evidence submitted by the Union does show that some officers above the level of D-1 did work past marathons. However, that evidence is insufficient to establish a binding past practice.

The Department indicates that it acted reasonably in this matter and its actions were not a violation of the Contract. For all these reasons, the Department contends that the Union has been unable to meet its burden of proof to show that the Department violated the Contract when it only allowed D-1 Officers to bid for overtime for the 2008 Marathon. The Department requests that the Grievance be denied in its entirety.

VI. DISCUSSION AND FINDINGS

A. Introduction

I find that the Department did not violate the Contract when it did not allow officers above the rank of D-1 to bid for overtime work for the 2008 Marathon. The Department acted within its Management Rights to only allow the lower-paid officers to bid on overtime opportunities. In addition, I cannot find that a past practice existed that required the Department to allow all Bargaining Unit members to bid on marathon overtime opportunities.

The Grievance is denied.

B. Discussion

The instant dispute is a result of the Department's determination that it would not offer overtime opportunities to specialized officers for the 2008 Chicago Marathon. It is uncontested that all police officers who were offered the Marathon overtime opportunity fall within Title Code 9161 category and receive the D-1 pay rate and are considered non-specialized.

On September 19, and again on October 1, 2008, the Department faxed a message to all Department Units offering only to 9161 Officers an overtime opportunity to work the 2008 Chicago Marathon.

According to the testimony of Commander Gross, in past years, the Department has not had a need for and has not generally assigned specialized officers to work marathons. Gross testified that in 2008, the Department solicited volunteers from the Police Department to work the Marathon. The Department invited D-1 Police Officers only because according to Gross, the Department felt that specialized skills and training are not necessary to perform the functions of crowd and traffic control. Further, since its goal was to provide the greatest number of officers that the sponsor's budget would allow, the Department chose not to use higher-paid officers, or those falling in pay rates D-2 through D-3A.

The evidence shows that a handful of specialized officers did receive overtime pay for working the 2008 Marathon. Gross could not explain exactly why this happened because he did not schedule any specialized officers to work the Marathon. According to Gross, the 2008 request for volunteers was a change for the Department. The difference in staffing between 2008 and years past was that in 2008, the Department exclusively solicited volunteers because all Tactical Teams, whose days-off had been cancelled in the past so as to

be available to work marathons, were already scheduled to work on the date of the 2008 Marathon. In addition, in the past, officers from Districts 1 through 25 were allowed to bid on the overtime; however, in 2008, all D-1 Officers in all Units including, non-District Units were allowed to bid on the overtime.

FOP Vice President Bella testified that in past years the opportunity to work marathons had been open to all officers. Officers who were interested in working marathons on their days off would inform the Department via telephone and those selected would receive time and a half for the hours worked. Bella testified that detectives have worked past marathons.

I have carefully reviewed the evidence in this matter. I find that the Union has successfully shown that in the past, officers other than those falling within the D-1 pay rate have been able to work marathons. It is clear that records presented from years past show that an overwhelming majority of officers who have worked past marathons were D-1 category officers. The Union has argued that there is a past practice of allowing all members of the Bargaining Unit to work overtime during marathons. I cannot find this to be true. In order to prove a valid and binding past practice, it must be shown that the practice has been unequivocal, clearly enunciated and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. *See Elkouri, How Arbitration Works*, 6th Ed. at 608, *citing Celanese Corp.* 24 LA 168, 172(Justin 1954) In the instant case, the Union has not been able to present evidence that such a binding past practice existed. Thus, that argument is rejected.

The Union has also argued that Section 10.1 requires that the Department allow all members of the Bargaining Unit to bid for overtime for marathons, *citing City of Chicago Department of Police and Fraternal Order of Police, Chicago Lodge #7. Grievance No. 129-89-*

003/104 (Canine Kennels) (Yaffe, Arb. 1990) That section of the Contract specifically indicates:

The Employer will continue to provide equal employment opportunity for all officers, and develop and apply equal employment practices.

The Union has argued that this section requires that all Bargaining Unit members shall be given the opportunity to bid on marathon overtime. The Department has responded that this section of the Contract is within the non-discrimination portion of the Contract and only requires that no officer be discriminated against. In addition, the Union has argued that the above-cited arbitration award provides that Section 10.1 is a basis for providing overtime to all officers. The Department has argued that the Management Rights Clause provides that the Department has discretion to determine which employees shall work overtime, providing that such a decision is not reached in an arbitrary, capricious or discriminatory manner.

I have carefully reviewed these arguments. I note that I do not agree with the Union regarding Section 10.1. I find that Section 10.1 is inapposite to the instant case. In spite of the Union's arguments, I agree with the Department that Section 10.1 is part of the non-discrimination section of the Contract and as such, does not generally apply to the instant case. Further, I find that the Union's argument regarding the Canine Kennels case cited above is not persuasive. In that case, Arbitrator Yaffe was looking at two groups of similarly situated officers who were not treated similarly. In this case, the Department chose to treat officers in different pay rates differently for overtime purposes; however, all officers within the same pay rates were treated similarly. Further, the determination to exclude officers above the D-1 pay rate from overtime was made on an economic basis and as such was not arbitrary, capricious, or unreasonable. For the purposes of the instant case, I cannot find that the Department violated Section 10.1. The Department presented credible evidence in the form of testimony from Commander Gross in which he indicated the reason for the

selection of D-1 Officers only. Gross explained that because no special skill sets were necessary for crowd and traffic control for the Marathon, the Department could utilize more officers for the same cost at the D-1 pay rate, than the alternative of opening up the bidding to higher-paid officers. In addition, Gross testified that in the past, only District Officers had been invited to bid for the overtime. In the case of the 2008 Marathon, all D-1 Officers, in all Units beyond and including Districts 1 through 25 were provided the opportunity to bid on the overtime. Gross testified that as a result, the bidding pool for the 2008 Marathon was expanded from past years.

I have reviewed this evidence and find that the Department's determination to allow only D-1 Officers to bid on Marathon overtime was a proper use of its Management discretion in this case. The Department changed the manner in which officers were selected for overtime. In the past, all Tactical Officers were required to work the overtime. Beyond the Tactical Officers, only District Officers were allowed to bid on overtime. Beginning in 2008, because all Tactical Officers were already working on the day of the Marathon, the Department invited all D-1 Officers, City-wide, to bid on the Marathon overtime. The Department contended that not only did more officers have the opportunity to bid on overtime, but that because only D-1 Officers were allowed to bid, the Department would be able to provide the most cost effective use of manpower for the Marathon.

After a review of the evidence in this matter, I find that the Department's 2008 Marathon overtime initiative was a proper use of the Department's Management Rights. I cannot find that the Department acted unreasonably in its procedure for selecting officers for the 2008 Chicago Marathon. The Grievance is denied.

VII. AWARD

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is denied. The Department did not violate the Contract when it offered overtime for the 2008 Chicago Marathon only to D-1 Police Officers (9161 Job Classification).

Steven M. Bierig, Arbitrator
August 5, 2009