

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

BRAINTREE POLICE OFFICERS ASSOCIATION LOCAL 365

-AND-

TOWN OF BRAINTREE

(Grievance: CSO Evening Shift Differential)

AAA Case Number: 01-15-0002-6429

Issued: January 20, 2016

Arbitrator: Timothy J. Buckalew, Esq.

Appearances: Leigh A. Panettiere, Esq., for Braintree Police Officers Association Local 365 (“the Union”); Brian M. Maser, Esq., for Town of Braintree (“the Town”).

PRELIMINARY STATEMENT

On October 29, 2015, the parties convened in Braintree, Massachusetts under the rules and auspices of the American Arbitration Association and their Collective Bargaining Agreement (“CBA”) providing for binding arbitration. This Opinion an Award is based on evidence adduced at that hearing, and arguments made at the hearing and in post-hearing memoranda filed on or before December 18, 2015.

ISSUE

The parties agreed on the issue:

Did the Town violate Article 29 “Specialists” as modified by paragraph 3 of the parties’ 2013-2016 MOA, when it failed to compensate Community Service Officers with the night shift differential?

If so, what shall be the remedy?

RELEVANT CONTRACT AND MEMORANDUM OF AGREEMENT LANGUAGE

ARTICLE 29- SPECIALISTS

Specialists appointed by the Chief and approved by the Mayor are as follows:

- A. DETECTIVES
- B. ADMINISTRATIVE AIDE TO THE CHIEF
- C. SCHOOL RESOURCE OFFICER
- D. TRAFFIC OFFICER
- E. JUVENILE OFFICERS
- F. COMMUNICATIONS OFFICER

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ARTICLE 30- NIGHT DIFFERENTIALS

Permanent and assigned officers who regularly work a night shift (between the hours of 2:30 p.m. and 6:30 a.m.) will receive a night differential of seven percent (7%). Effective July 1, 1996, the night differential shall increase to nine percent (9%). Any officer not regularly assigned to the night shift will receive said shift differential for any night shift worked.

MEMORANDUM OF AGREEMENT

- 3. Specialist: Community Service Officer

d. The position of Community Service Officer shall be developed by the Chief and added to the list of Specialist positions. The CSO will work a Monday through Friday flexible hours schedule in the same fashion currently worked by the Narcotics Unit.

FACTS

Stipulation

At the October 29, 2015, hearing the parties stipulated:

Members of the narcotics unit work flexible day and night hours Mondays thru Fridays and receive the full night shift differential for all work regardless of which hours of the day or evening are worked.

Grievance History

This arbitration arises from a grievance contesting the Town's interpretation of the meaning of paragraph 3 in their 2013-16 MOA creating the new specialist position of Community Service Officer. The October 6, 2014, grievance lists August 31, 2014, as the date of violation. The grievance states:

Nature of the Grievance: Failure to assign and pay Community Service Officers as bargained.

Factual basis of grievance: The Chief informed the Union President that he would assign Officers Meredith Golden and Edwin Woo to the new Community Service Officer position assigned to the day shift from 06:30- 14:30 Hours. The Officers are not being paid the evening shift differential and are not assigned to work the evening shift with flexible hours as was negotiated during collective bargaining. The language that was negotiated being: **"The CSO will work a Monday through Friday flexible hours schedule in the same fashion currently worked by the Narcotics Unit."**

Remedy Requested: Assign Officer Golden and Officer Woo to the evening shift, Monday through Friday, with a flexible hours schedule. Pay Officer Golden and Officer Woo

evening shift differential pay and any retroactive evening shift differential pay that would be owed to them back to the date of their assignment as CSO.

Chief Russell W. Jenkins denied the grievance in an October 17, 2014, letter. In relevant part, it states:

As this is a position proposed by the Town and specifically by me, I think I am best qualified to state what my intention was when we negotiated for the CSO's to be allowed to work a flexible hours schedule in the same fashion currently worked by the Narcotics Unit. That being that they would be assigned a specific shift, but would have the flexibility to change their work hours to address such assignments as, but not limited to, attending community meetings, possibly administer a citizen's police academy and address issues or other problems brought to their attention. In fact, in the "Town's Initial Proposals to Amend CBA with Police Patrol Officers Association," dated May 31, 2013, which you and your team were provided a copy of, a job description of sorts for the community service officer was outlined. Specifically, this job description stated, "The hours of work would primarily be Day Shift hours, with the flexibility to assign the officer to meet in the evening with a neighborhood group or address a particular problem."

Accordingly, I am denying this grievance on the grounds that the intent of the negotiations was to assign the community service officers to a Day Shift schedule and allow them the flexibility to work flexible hours as their job required.

The Town denied the grievance at Step 2 after a hearing in which Mike Coughlin, the Mayor's Chief of Staff, did not find that "Managements' [sic] actions in filling and assigning the CSO position without the provision of a night shift differential violates the MOA between the parties." This arbitration followed.

Background

The Town initially proposed the CSO position during a bargaining session for the 2013-2016 CBA on May 31, 2013. The initial proposal states:

Create a specialist position of Community Service Officer, who would be engaged in community activities and problems. The CSO would work with the School Resource Officer, or fill in when he/she is unavailable. The CSO could also assist the juvenile officer, work with the elderly, organize and work with neighborhood watch groups and other organizations. As various problems are brought to the CSO's attention, he/she could then address those problems, with or without the assistance of the traffic unit, etc. Problems such as cars speeding through the neighborhood, illegally parked cars, kids hanging out at the park, etc. The hours of work would primarily be Day Shift hours, with the flexibility to assign the officer to meet in the evening with a neighborhood group or address a particular problem.

The parties did not substantively discuss the CSO position again until the bargaining session on January 21, 2014. These discussions resulted in the language of paragraph 3 of the Draft MOA:

The position of Community Service Officer shall be developed by the Chief and added to the list of Specialist positions. The CSO will work a Monday through Friday flexible hours schedule in the same fashion currently worked by the Narcotics Unit.

Peter Morin, Town Solicitor, and Nathan Killeffer, then Union President, signed and dated the Draft MOA on April 18, 2014.

On July 24, 2014, the Chief e-mailed the Department about the new CSO position:

With the start of the new school year, I would like to fill the position of Community Service Officer. I will probably fill one position now, scheduling this officer to work the same schedule as our School Resource Officer. As the job develops, I will consider a second CSO and make a decision as to the hours of work for this second officer. They may be the same daytime hours, or they might be evening hours....

Any officer interested in this position should submit a memo or e-mail to my attention, no later than close of business on August 6, 2014. I would like to hear your ideas and

suggestions for making this position successful and beneficial to the town and the Department and I'm happy to answer questions, but as I'm sure you can see, I'm still feeling my way through this position as well.

On or about August 27, 2014, the Chief appointed Officers Edwin Woo and Meredith Golden as CSOs. On September 25, 2014, Officer Woo e-mailed Union leadership to inform them that the CSOs were not receiving the night shift differential. The parties were unable to resolve the matter and the Union filed a grievance.

Hearing Testimony

Nathan Killeffer is currently a detective in the Narcotics Unit and an executive board member of the Union. At the time of the execution of the MOA, Killeffer was the president of the Union. Killeffer testified he works "flexible hours" and this means his hours depend upon the needs of the day, but regardless of when he works he receives the night differential of nine percent (9%).

Killeffer testified regarding the CSO position that it was the Chief's idea. The parties negotiated the position as a specialist position, meaning the Chief can pick candidates without regard to seniority. The parties agreed that the Chief would formulate the exact job description at a later date. According to Killeffer, the Chief said the CSO hours would be sometimes during the day and sometimes during the night. The Chief said they would work flexible hours at night rather than overtime. The parties agreed that the hours for the CSO position would be flexible

due to needs.¹ Killeffer testified he understood that the CSO position would get the night differential.

Killeffer testified that after negotiations concluded he presented the MOA to the Union for a vote. Consistent with his understanding of the negotiations, he communicated to the Union that the CSO position would “work flex hours on a Mon-Fri basis.” He testified the Union understood that “flex hours” for the CSO position would be like “flex hours” for the Narcotics Unit.

Officer Edwin Woo works as a CSO. He interviewed with the Chief for the position in early August and testified his first day as a CSO was an August 27, 2013, meeting at Braintree High School. According to Woo, he understands “flex hours” to mean that he would work the day shift and get the night differential. Woo “just understood” he would get the night differential; the Chief did not tell him he would receive the night differential. He has not received the night differential as a CSO. Woo primarily works 9 am to 5 pm, but works 12 pm to 8 pm, or 3 pm to 11 pm, depending on the needs of the day. According to Woo, by working 9-5 he misses overtime and detail opportunities.

Officer Meredith Golden worked as a CSO from the initial meeting on August 27, 2013, until January 2015. Golden worked the 6:30 am to 2:30 pm shift as a CSO. On a few occasions she worked after 2:30 pm. At no time did she receive the night shift differential. She testified that she never discussed the night shift differential with the Chief during the interview process.

¹ Killeffer’s handwritten notes from the January 21, 2014, bargaining session state that for the CSO position the “Chief wants flex hours M-F, 5 & 2.”

Detective Charles Paris was President of the Union in 2013 and Vice President in 2014. He was part of the bargaining team that negotiated the MOA. Paris is a general detective and not a narcotics detective, so he only receives the night shift differential when he works the 3 pm to 11 pm shift. According to Paris, the Chief said during the negotiations that he envisioned something “along the lines of flex hours.” Paris testified “flex hours” is a term that is only used in relation to the narcotics unit. The parties did not explicitly discuss the differential during negotiations.

Detective Brian Cohoon is a narcotics detective assigned full-time to a federal task force. He was a member of the bargaining team for the current MOA. He works flexible hours and receives the night differential for all shifts. Cohoon testified the CSO position was one of the Chief’s “babies” and it “was new to us.” According to Cohoon, the Chief presented the CSO schedule as “flex hours,” and the only people that work flexible hours are the detectives in the narcotics unit, who are paid the night shift differential due to their flexible hour schedule. Cohoon testified his impression was that the CSO position would involve working day and evening hours.

Sergeant Robert Joseph is a narcotics detective and was a member of the bargaining team. He testified the CSO negotiations contemplated a Monday through Friday schedule with flexible hours like the narcotics unit depending on when they were needed. He assumed the CSO position would receive the night differential due to the reference to “flex hours.” The parties did not explicitly discuss compensation.

Karen Shanley has been the Director of Human Resources for the Town for seven years. She negotiated the MOA on behalf of the Town. According to Shanley, the Chief wanted the right of assignment over for the CSO position and also wanted flexible hours to attend night meetings if needed.² The parties did not discuss a night differential for the CSO position. On cross-examination, Shanley testified she did not become aware that the Narcotics Unit received the night differential until after negotiating the MOA.

Chief Jenkins testified the Department has a twenty year practice of narcotics detectives working flexible hours. Detectives work an eight hour shift, but the shift begins depending on the needs of the day. They receive the night differential regardless of when they work and are carried on the evening shift.

The Chief testified he developed the CSO position because he felt the Department needed a stronger presence in the community beyond the presence of the School Resource Office. The CSO would work in schools, support the SRO, work with the elderly population, and maintain a neighborhood presence. The CSO would work primarily days, but the Chief wanted the flexibility to have them working at night. The Chief did not consider the night differential when proposing the CSO position because the hours would be primarily day hours.

The Chief testified the language of the MOA gave clarity to the concept of working flexible hours. The Town, according to the Chief, did not intend the language to include the night shift differential.

² Shanley's handwritten notes from the January 21, 2014, bargaining session state: "Chief wants Flexible hours for CSO. It would administrative M-F with (5 and 2) Flexible hours"

ARGUMENT

The Union

The Union argues the Town violated Article 29 of the CBA, as modified by paragraph 3 of the MOA, when it failed to compensate CSOs with the night shift differential. The parties agreed that CSOs would work a flexible hours schedule like the Narcotics Unit, and be paid the night shift differential like the Narcotics Unit. The Union offers four reasons supporting its interpretation.

First, the Union argues requiring night shift differential pay for the CSO is the most reasonable interpretation of the MOA. In a police setting, a contractual reference to “hours of work” can reasonably be expected to cover the pay for those hours, particularly where there is a pay differential for night work. In light of the language of the MOA, it would be contrary to principles of contract interpretation to conclude that the parties agreed on the hours of work, but not the rate of pay. The Chief stated CSOs would work flex hours like the Narcotics Unit in response to Killeffer asking him if CSOs would receive overtime for working outside their regular schedule. The Chief can reasonably be said to have conveyed that CSOs would receive the night shift differential like the Narcotics Unit instead of overtime.

Second, the Union argues the term “flexible hours schedule” is an industry term of art known to both parties, and it should be given its generally accepted meaning. The term refers to the unpredictable schedules of the Narcotics Unit officers. According to the Union, everyone at the bargaining table understood “flexible hours” to mean working a flexible schedule in exchange for the night shift differential. If the Town meant otherwise, it should have stated as much in the MOA.

Third, the Union argues the Town has paid the night shift differential to officers working a flexible hours schedule for twenty years, and this practice is binding. To hold otherwise would allow the Town to change a binding past practice without any clear and unambiguous language demonstrating the parties bargained for such a change.

Finally, the Union argues the bargaining history leading to the 2013-2016 MOA supports the Union's interpretation. The Union did not at first want to accept the proposal because the position would be filled by the Chief, instead of by seniority, and because the hours were unpredictable and the incumbents would not receive overtime. The Town convinced the Union to accept the proposal because the CSO would receive the night shift differential that Narcotics officers receive. The Union would not have accepted the new position without the differential because doing so would have required a sacrifice of its interests without obtaining a benefit in return. The Chief's representation could only give rise to the understanding that "flex hours" meant what it had always meant: being paid the night shift differential regardless of what hours are worked.

As a remedy, the Union seeks an order requiring the Town to compensate the CSOs at the night shift rate, retroactively and with interest.

The Town

The Town initially argues it did not violate Article 29 of the CBA because Article 29 does not require the Town to pay the night shift differential to Community Service Officers. There is no reason to consider extrinsic evidence because the language of the agreement is clear and unambiguous and not susceptible to the Union's interpretation. The existence of an ambiguity

must be determined from the four corners of the instrument without resort to extrinsic evidence.

Citing Arbitrator Kerrison, the Town argues,

Where one party meant what the contract clearly says and the other intended something else, the former should be adopted. The parties are presumed to have understood the terms used, and there can be no relief to one because he failed to realize the full implication of the language used. Where the language of the contract is plain and unambiguous that language must govern.

The agreement is limited to the type of schedule that CSOs would work. The reference to the Narcotics Unit, according to the Town, merely provides that the CSOs schedule would be in the “same fashion” as the Narcotics Unit. The agreement does not reference a night differential or any additional compensation. No reasonable interpretation of this language would require the Town to pay any additional compensation to CSOs for working such a schedule.

No ambiguity requires considering extrinsic evidence in this case. If the parties agreed and understood that CSOs would receive the night differential then this would have been reflected in the express terms of the agreement. It is highly improbable the parties would have neglected to include any provision in the agreement regarding a significant amount of additional compensation. Instead, the language focuses exclusively on the type of schedule to be worked.

The Union is attempting to include terms in the agreement never discussed during negotiations. The Union seeks to create an ambiguity in order to achieve what it could not achieve through collective bargaining. No such ambiguity exists.

The Town next argues its evidence compels a finding that CSOs are not entitled to the night shift differential. According to the Town, the Union failed to prove its claim that a binding past practice requires the Town to pay the Night Shift Differential to any bargaining unit member

working a flexible schedule. The Union attempts to expand a limited benefit that historically only the Narcotics Unit has received, and there is no evidence the parties agreed to modify or extend any existing past practice. Furthermore, a binding past practice cannot apply to the CSOs because the position did not exist when the Town began paying the night shift differential to members of the Narcotics Unit. The Town could not possibly have anticipated paying the night shift differential to CSOs or any other position that might work a flexible schedule in the future.

The Town next argues the Union failed to communicate its understanding or seek clarification regarding the night shift differential during negotiations. The Town's proposal did not mention the night shift differential and the parties never discussed it during their months of bargaining. The proposal indicated the Town intended the position to work primarily during the day shift with the School Resource Officer. The work of the Narcotics Unit, on the other hand, is inherently different from the CSO. The fact that the Narcotics Unit receives the night shift differential does not mean that all employees working a flexible schedule are similarly entitled to it.

The Town next argues the Union's interpretation is unreasonable and would lead to an unduly harsh and absurd result. The only reasonable interpretation of the language is the literal interpretation of the language: that the parties agreed to allow the CSOs to flex their schedules. The Union's interpretation that the Town must pay the night shift differential in perpetuity simply because CSOs flex their schedules is unreasonable, unduly harsh, and burdensome. The Town should not be required to pay such additional compensation where there was clearly no agreement or meeting of the minds regarding said compensation.

Finally, the Town argues the Arbitrator does not have the authority to add to or otherwise amend the parties' CBA. The CBA does not require the Town to pay the night shift differential to CSOs, and any order obliging the Town to do so would exceed the scope of the Arbitrator's authority.

DISCUSSION

As the party bringing the grievance, the Union bears the burden of proof in this matter. The totality of the evidence supports the Union's interpretation of the language in paragraph 3 of the MOA. I therefore sustain the grievance.

The language at issue states: "The position of Community Service Officer shall be developed by the Chief and added to the list of Specialist positions. The CSO will work a Monday through Friday flexible hours schedule in the same fashion currently worked by the Narcotics Unit." As I read it, the meaning of the second sentence depends upon the answer to two questions. First, what does "flexible hours schedule" mean within the Braintree Police Department? Second, what does "in the same fashion currently worked by the Narcotics Unit" mean within the Braintree Police Department?

The evidence establishes that the Department has a longstanding practice of allowing Narcotics Unit officers to work a flexible hours schedule. Rather than work overtime, they are allowed to "flex" their schedule so as to align their work hours to coincide with the demands of the job on any given day. To compensate the narcotics officers for their varying schedules, the Town carries them on the night shift and pays them the night shift differential regardless of the shift they work.

Given that the evidence establishes that only the Narcotics Unit works a flexible schedule, the meaning of the term must derive from the only context in which it exists within the Department. As applied to the CSO position, flexible hours means that rather than work overtime, the officers in the position will be allowed to flex their schedules to meet the demands of the job on any given day. This approach makes sense given that as late as July 24, 2014, little more than one month before the position became active, the Chief was still undecided as to what shift the CSOs would work. In fact, his e-mail explicitly contemplates a scenario where a second officer might work evening hours instead of day hours. It states, "As the job develops, I will consider a second CSO and make a decision as to the hours of work for this second officer. They may be the same daytime hours, or they might be evening hours." Both parties contemplated that the position would require flexibility in scheduling.

If the language of the MOA stated only that the CSOs would work a "flexible hours schedule" then the Town's position might prevail. The MOA, however, says more. The Town's position reads out of the sentence the final phrase "in the same fashion currently worked by the Narcotics Unit." As I read it, this provision of the MOA obliges the Town to compensate the CSOs with the night differential.

The "fashion" in which the Narcotics Unit officers work their flexible schedules is that they are carried on the night shift and earn the differential regardless of the shift they work. This language entitles the CSO position to the same benefit. To read the entire sentence as providing only that CSOs could flex their schedule, and not receive the differential, ignores the "same fashion" language referencing the Narcotics Unit.

As the Town argues, the meaning of the language and not the subjective intent of one party must control. The Chief may not have intended to provide the night shift differential, but the MOA says otherwise. The language of the MOA, and not the Chief's intent, must control.

I note that this matter involves the longstanding practice of compensating Narcotics Units officers with the night shift differential, but the right of CSOs to also receive the differential derives from the language of the MOA and not simply from the practice. Although this outcome does result in the incongruous scenario in which the CSO, a support position to the SRO, receives the differential while the SRO does not, it results directly from language in the MOA. Neither the CBA nor the MOA provide that the SRO will work a "flexible hours schedule in the same fashion currently worked by the Narcotics Unit." The MOA thus sets the CSO position apart from the SRO, and if the Town finds this unacceptable, it can seek to modify the language at a future date.

I also find persuasive the Union's argument that it would not have agreed to the position without receiving some kind of bargained for exchange. As the Union notes, the CSO position is filled by the Chief without regard to seniority. The position is largely ineligible for details and overtime work. In fact, Killeffer testified the Chief told him CSOs would work flexible hours instead of overtime. If all the Union gained from agreeing to the position was that the CSO could work flexible hours without the differential, then the Union gained nothing. The Union did not agree to the position until the end of the negotiations after the Town offered flexible hours in the same fashion as the Narcotics Unit. The evidence suggests this language, proposed by the Town, meant the same thing to every member of the Union who heard it. If any confusion arose over the choice of words, it is not the fault of the Union.

In sum, the language in the MOA regarding the CSO position means what it says. CSOs will work a flexible hours schedule in the same fashion as the Narcotics Unit. They will be carried on the night shift and receive the differential regardless of the shift they work. If this were not the case, they would not be working flexible hours in the same fashion as the Narcotics Unit.

AWARD

I sustain the grievance. The Town violated Article 29, as modified by paragraph 3 of the 2013-2016 MOA, when it failed to compensate CSOs with the night shift differential. As a remedy, the Town must compensate the CSOs with the night shift differential retroactive to their first day on the job. So long as the language of the MOA remains part of the CBA, the Town must likewise compensate CSOs with the night shift differential for shifts they will work in the future.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Timothy J. Buckalew". The signature is written in a cursive, flowing style.

Timothy J. Buckalew, Arbitrator