

Federal Mediation and Conciliation Service

In the matter between

Gator Lodge 67, Fraternal Order of Police

-and-

City of Gainesville, FL

FMCS # 061212-59052-3;

Gr: Holidays

Before: Mark M. Grossman, Esq. – Arbitrator

Appearances:

For the Union – Paul A. Donnelly, Esq.

For the City – Elizabeth A. Waratuke, Assistant City Attorney

BACKGROUND

The parties in this case are the City of Gainesville, Florida (the “Employer” or the “City”) and Gator Lodge 67, Fraternal Order of Police (“FOP” or the “Union”). The arbitration hearing in this case was held on June 25, 2007 at the Gainesville City Hall. At that time, both parties were given a full opportunity to state their positions and to present testamentary and documentary evidence. After the conclusion of the hearing, the parties submitted written arguments.

The City's Police Department includes 274 sworn officers (approximately 230 in the bargaining unit) who are placed within three bureaus: Investigative, Operations, and Administrative and Technical Services. This case is about whether employees can be prevented from working on a holiday which falls on their regularly scheduled work day. There are three types of work days: 1) regularly scheduled; 2) scheduled; and 3) unscheduled. A regularly scheduled work day is one that is regular and predictable months in advance. A scheduled work day includes additional, non-regular, work days that are scheduled to staff an upcoming event, such as the University of Florida's Homecoming. These are days that were to be scheduled days off, but employees were told in advance that they were required to work. Unscheduled work days occur when employees are held-over, or called-in, to work because of an emergency or staff shortages.

For the purposes of this case, the Investigative Bureau has two divisions: the Criminal Investigative Division (CID) – for major crimes, and, the Special Investigations Division (SID) – for narcotics. The Investigative Bureau has a number of different work schedules for detectives. Most detectives in the Investigative Bureau work rotating shifts Monday through Friday, while others work evenings and nights.

The Operations Bureau consists, primarily, of patrol officers. However, there are a few detectives who handle property crime. The Operations Bureau has three rotating shifts: the day shift is 7:30 a.m. to 5:30 p.m., the evening shift is 5:00 p.m. to 3:00 a.m., and the midnight shift is 10:00 p.m. to 8:00 a.m. The shift assignments rotate every four months. The regularly scheduled days are Monday to Thursday or Thursday to Sunday. Everyone comes to work on Thursdays. That day is used for training and catching up on paper work.

The Administrative and Technical Services Bureau (the "Administrative Bureau") generally schedules employees for Monday through Friday. Ray Weaver is a captain in the Administrative Bureau. He usually speaks to the Union on behalf of the Chief of Police. The following language was added to the 2004-2007 collective bargaining agreement at the insistence of Captain Weaver: "Employees assigned to administrative duties shall observe the managerial holiday schedule." When the language was

added, those employees in the Administrative Bureau were no longer given the choice of working or not working on a holiday.

In mid-spring of 2006, the Department discovered that it had used its overtime budget for the entire year, even though they were only near halfway through the year. The Department began to look for ways to save money and/or reduce the use of overtime. It determined that it had the right to set hours of work, and commanders were instructed not to permit more employees to work holidays than they actually needed. It was up to the commanders to determine the level of staffing was needed. It was understood that, in some divisions, it might be possible to save the overtime pay generated on some holidays, while it might not be possible to reduce overtime on other holidays, due to staffing needs.

In May 2006, the City permitted only a limited number of detectives in the Investigative Bureau to work on a regularly scheduled holiday: Memorial Day. All other detectives in the bureau were required to take off the holiday. The Union filed a grievance challenging the City's action. When the grievance was denied by the City, this arbitration case was initiated by the Union.

While the grievance was pending, the City did not permit some employees in the Operations Bureau to work on a holiday that was a regularly scheduled work day for them. When the Union complained, the City responded that the matter was in the grievance/arbitration process as a result of the challenge to the City's decision to not permit some detectives to work in the Investigative Bureau on Memorial Day.

At the arbitration hearing, the Union presented witnesses who testified that all employees regularly scheduled to work on a holiday had always been permitted to work if they chose to do so. The City presented witnesses who testified that the practice varied in different bureaus. According to the City's witnesses, there was a greater problem getting employees to work the holiday, than forcing employees to work. The City sought to ensure staffing needs were met and, at the same time, employees had an opportunity to choose to work or not. The City permitted employees, who volunteered to work on their regularly scheduled work days and, if they needed additional staff, other employees would be told they were needed to work. These

additional employees usually cooperated in reporting for work, and there was generally no need to order employees to work.

ISSUE

The parties could not agree upon the precise wording of the issue. The Union suggested that the issue be framed as follows:

Did the City violate the contract by prohibiting employees in the Operations and Investigative Bureaus of the police department from working holidays that fall on their regularly scheduled work day? If so, what shall be the remedy?

The Employer preferred the issue be worded as follows:

Did the City violate the collective bargaining agreement when it scheduled detectives to work, or not work, on a holiday? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 4 MANAGEMENT RIGHTS

4.1 It is the right of the Employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public and exercise control and discretion over its organization and operations.

4.2 In addition, the FOP recognizes the sole and exclusive rights, powers and authority of the Employer further include, but are not limited to, the following: to direct and manage employees of the City; to hire, promote, transfer, schedule, assign and retain employees, to suspend, demote, discharge or take other disciplinary action against employees for just cause; to relieve employees from duty because of lack of work, funds, or other legitimate reasons; to maintain the efficiency of its operations including the right to contract and subcontract existing and future work; to determine the duties to be included in job classifications and the number, types and grades of positions or employees assigned to an organizational unit, department or project; to assign overtime and to determine the amount of overtime required; to control and regulate the use of

all its equipment and property; to establish and require employees to observe all its rules and regulations; to conduct performance evaluations; and to determine internal security practices. The Employer agrees that, prior to substantial permanent lay-off of FOP bargaining unit members, it will discuss such with the FOP.

ARTICLE 10 HOLIDAYS

10.1 The City observes the following paid holidays but reserves the right to schedule work on those days. Regular full time employees covered by this Agreement are entitled to twelve (12) paid holidays as listed in this section (A. and B.) and 10.2:

A. New Year's Dday	January 01
Martin L. King, Jr.'s Birthday	Observance Date
Memorial Day	Last Monday in May
Independence Day	July 04
Labor Day	First Monday in September
Veteran's Day	Observance Day
Day after Thanksgiving	Friday after Thanksgiving
B. Thanksgiving Day	Fourth Thursday in November
Christmas Day	December 25

Holidays shall be observed on the observance date as established by the City, except for those employees who are scheduled to work on a Saturday or Sunday on which the actual holiday falls; they shall observe the actual date.

Employees assigned to administrative duties shall observe the Managerial Holiday schedule.

10.2 ...

10.3 Whenever a holiday as listed in section 10.1 A and B occurs on an employee's scheduled day off and the employee does not work thereon, the employee shall receive another day off with pay within the same fiscal year or within 120 days after said holiday, whichever is later. Hours compensated will match the scheduled holiday work hours of the employee.

10.4 A. Whenever a holiday as listed in section 10.1 (A) occurs on an employee's regularly scheduled work day or the employee is required to work on a holiday on his/her scheduled day off, the employee shall receive straight time for the hours worked and receive another day off with pay, or the employee may elect to receive two times their regular straight time pay for the hours worked with no day off. Unless the employee declares seven calendar days prior to the holiday that they want to receive two times their regular straight time pay for the hours worked, they shall receive their straight time rate of pay and another day off. The day off shall be taken within the same fiscal year or within 120 days after said holiday, whichever is later. There shall be no pyramiding to this section in the computation of overtime.

10.4 B. Whenever a holiday as listed in section 10.1 (B) occurs on an employee's regularly scheduled work day or the employee is required to work on a holiday on his/her scheduled day off, the employee shall receive one and one half times their regular straight rate of pay for the hours worked and receive another day off with pay, or the employee may elect to receive two and one half times their regular straight pay for the hours worked with no day off. Unless the employee declares fourteen (14) calendar days prior to the holiday that they want to receive two and a half times their regular straight time pay for the hours worked, they shall receive one and one half times their regular straight time rate of pay and another day off. The day off shall be taken within the same fiscal year. There shall be no pyramiding to this section in the computation of overtime.

ARTICLE 11 HOURS OF WORK AND OVERTIME PAYMENT

11.1 The provisions of this article are intended to provide a basis for determining the number of hours of work for which an employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such employee of any specified number of hours of work either per day or per week or as limiting the right of the City to fix the number of hours of work either per day or per week for such employee. The City

has the authority to establish shifts and to use any method in establishing a shift as well as change, increase, decrease, initiate, restrict and cancel a shift in order to meet the needs of the department and provide superior services to the community.

11.2 Beginning October 1, 1998, the work period may consist of a period of fourteen (14) consecutive days for any employees as determined by the Chief of Police. The work period for all employees covered by this agreement, and not otherwise designated by the Chief of Police, shall consist of a period of seven (7) consecutive days. For purposes of this Agreement, a shift means the time during which an employee is on assigned duty. A shift for employees covered by this Agreement will be those prescribed by the Chief of Police or his/her authorized designee. If there is any change in the normal weekly work schedule of an employee, he/she will receive, when possible, one (1) week prior notification. If there is a change in the normal weekly work schedule of an employee due to a group shift change, the group shall receive at least two (2) weeks prior notification. Members who receive specialty pay may receive shorter notice due to circumstances, in which as much notice as reasonably practicable will be given.

11.4 Vacations, holidays and all other paid leaves, except sick leave, shall count as hours worked for the purpose of computing overtime. However, all above paid leave shall not count as hours worked for the purposes of computing overtime when the entire regularly scheduled workweek is charged as either vacation, holiday or any type of paid leave or any combination of paid leave. All vacation leave shall count as hours worked when an employee is required to work overtime.

11.10 Uniform patrol positions (as distinguished from other elements like the mounted unit, aviation unit, etc.) presently scheduled to normally work four shifts of approximately ten hours each per week will not have the 4/10 feature substantially modified unless they are provided an opportunity to bargain in accordance with Chapter 447, Florida Statutes, concerning the change.

UNION POSITION

The Employer violated the Agreement when it prohibited employees in the Operations and Investigative Bureaus of the Police Department from working holidays that fell on their regularly scheduled work days. Subsection A and B of Article 10.4 give employees the right to choose how they will be compensated for working holidays that fall on their regularly scheduled work day. The contract presumes the employees will work their regularly scheduled work days, absent an approved leave request initiated by the employee.

Testimony provided by Union witnesses established that, several years ago, Captain Carrell tried to require employees to take leave on holidays that fell on their regularly scheduled work days. When the employees objected, the Employer conceded the point and continued to allow employees the choice of working, or not working, on the holidays. Captain Carrell's failure to testify on this issue creates a negative inference that his testimony would not have been favorable to the Employer.

The parties' bargaining history supports the Union's petition. In negotiations for the current contract, the parties agreed to require administrative employees to follow the Managerial Holiday Plan and take off work days that are holidays. The parties did not change holiday work and compensation for other employees. The proposal of the contractual exception for administration employees undermines the Employer's position that it has always had broad power to make all employees take off regularly scheduled work days that are holidays.

The long-established and consistent past practice of allowing employees to work the holidays which fall on their regularly scheduled work days is consistent with the clear language of the contract. There has been no evidence presented in this case that the Employer has ever prohibited an employee from working a regularly scheduled work day that was a holiday.

EMPLOYER POSITION

The grievance in this case involves a matter of contract interpretation. Therefore, the burden of proof is on the Union to establish the alleged contractual violation.

The contract language is clear and unambiguous. A holiday in the context of the collective bargaining agreement is a day off work. The City gives bargaining unit members 12 specified, paid holidays. Obviously, in light of the nature of the Police Department, the City cannot give all bargaining unit members the day off. The City reserves the right to select bargaining unit members to work on a holiday falling on a regularly scheduled work day, if needed.

A collective bargaining agreement, like any contract, must be read in its entirety. No plausible reading of the Agreement can bring one to conclude that a bargaining unit member has the unilateral right to decide if they are going to work a holiday if it falls on his/her regularly scheduled work day. The Union takes one sentence in 10.4 out of context. Even then, it is a big stretch to argue that the language giving an employee a choice of compensation means the employee has a right to work.

Reading the clear and unambiguous language of the Agreement as a whole, the City has retained the power to unilaterally schedule its employees in the manner it sees fit, with the exception of some circumstances that have been specifically and clearly set forth in the Agreement.

The right of management to schedule work is a basic, fundamental right. The scheduling of work is a normal and customary function of management which would not ordinarily be deemed limited or waived, except by some express provision of the Agreement.

The Union argues that the past practice has been that employees were unilaterally able to decide whether to work on a holiday. Past practice, however, even if established, cannot be used to change the explicit terms of a contract. The mere failure of the City to exercise a legitimate function of management is not a surrender of the right to start exercising such right.

Further, the evidence presented at the hearing was that there was not a past practice of the City allowing employees to decide unilaterally whether

they would work a holiday. The evidence at the hearing established that different practices existed throughout the police department, depending on the bureau, the time period, and, apparently, even the commander. Captain Weaver testified that since 1994, when he first had scheduling responsibilities, all sworn personnel in the Administration Bureau took the holiday off unless there was a reason he needed them to work. Except in rare circumstances, Special Investigation Detectives (SID) did not work holidays if they fell on their regularly scheduled work days. Under different commanders, even the practice as to the Criminal Investigation Detectives (CID) varied. Captain Weaver, Captain Book, and Lt. Hoffman testified that the commanders in patrol determined the staffing levels on holidays. The only past practice in patrol has been that management has historically been unable to accommodate all the employees who wanted the holidays off. This inability to accommodate everyone who wanted the holidays off led to the practice of sign-up sheets and the elaborate procedure for determining who got which holiday off.

ANALYSIS AND OPINION

The first matter to be addressed is the scope of the issue before the Arbitrator. The dispute in this case arose when the Union challenged the City's right to prohibit detectives, in the Investigative Bureau, who were regularly scheduled to work, from working on May 29, 2006, Memorial Day. The Union filed a grievance challenging the City's action. On September 19, 2006, Union President McAdams wrote to the City that, it had been brought to his attention that staffing for all future holidays for operational personnel (specifically patrol) will be reduced to a minimum level. He went on to demand bargaining over the issue. Captain Weaver responded for the City to McAdams' email. Captain Weaver made it clear that the City would be applying the same contract interpretation to all holidays that it did to Memorial Day. He noted that the matter had been grieved and that, if the matter went to arbitration, the City would "respond accordingly."

There is no doubt from this exchange that the City had asserted its right to only schedule a minimum number of Union employees on holidays

and require all other employees to take the holidays off, and that the Union was objecting. It is equally clear that the matter had been raised in the grievance procedure and, if it was not resolved, it was going to arbitration. The parties' exchange clearly applied department-wide and was not limited to the Investigative Bureau.

There was no reason for the Union to file an additional grievance over the same dispute in another unit. The dispute was over whether the City could require employees to take holidays off. The fact that the City's first application of its new policy was limited to the Investigative Bureau did not limit the scope of the grievance. The parties' collective bargaining agreement applies to the entire department and any interpretation in arbitration would apply to the entire department. When the Union specifically objected to employees in units, in addition to the Investigative Bureau, being required to take a holiday off, the City's response was that there was no reason to pursue the matter as the City had already responded and the matter was in the grievance process.

Under these circumstances, it is determined that the issue before this Arbitrator is not limited to the Investigative Bureau, but applies to the entire department.

Attention is now turned to the merits of the dispute. The Union argues that the practice of the parties has been that, when detectives were scheduled to work on a holiday, they were given the choice of taking the day off with pay or working the holiday and receiving a day's pay for working as well as a day's holiday pay. (There are different rates for the different holidays.) The Union asserts that the dispute arose previously. When the Union objected to the City not permitting employees to work on a holiday that fell on the employees regularly scheduled work day, the City relented and permitted the employees to work. According to the Union, the City's action acknowledged that the City had no power to prohibit employees from working a holiday falling on the employees regularly scheduled work day.

The City maintains that there was no past practice and that, in the past, employees were prohibited from working on a holiday. Clearly, some employees wanted to work a particular holiday and others wanted to not work that holiday. It is not easy to determine, at this time, whether

employees who did not work a scheduled holiday had sought to work and were not permitted to do so or whether the employees voluntarily took off the holiday. Certainly, it appears that few, if any, employees were ever denied the opportunity to work on a holiday that fell on their regularly scheduled work day.

In this case, the contract language is clear. Therefore, even if there were a clear past practice (which there is not), it would most likely have no impact on the contract interpretation. The Union points to Article 10.4 as the controlling provision of the collective bargaining agreement. The City agrees that Article 10.4 tends to favor the Union's interpretation, but urges that Article 10.4 must be read in conjunction with Article 11.1 and that, together, these provisions establish the City's authority to require employees to take off holidays.

Article 10.4 A applies to those holidays that are compensated at straight time for working and an additional day off (or at the employees' option, receive double time). Article 10.4 B applies to those holidays that are compensated at time and a half for working and an additional day off (or at the employees' option, receive two and a half times compensation). In all other relevant respects, the provisions are identical and will be discussed as simply Article 10.4.

Article 10.4 requires that employees who are regularly scheduled to work on a holiday are to receive their regular pay plus holiday compensation. It presumes that the employees will be working the holiday if the holiday falls on their regularly scheduled days of work. There is no circumstance, covered by Article 10.4, in which an employee scheduled to work on a day designated as a holiday may not be permitted to work, thereby reducing the amount of compensation, pursuant to Article 10.4. This contract provision totally and unequivocally supports the Union's position.

Article 11.1 states that it is intended to relate to overtime. Article 11.1 specifically declares that it should not be construed as a guarantee of any specific number of hours or days of work. The Union is not basing its claim to holiday pay on Article 11.1.

Article 11.1 does not authorize the City to prevent employees from working their regularly scheduled days, it merely relates to the holiday

compensation due the employees. Article 11.1 is not relevant to the issue of whether an employee scheduled to work on a holiday must be permitted work on that holiday. The City has established shifts and the shifts delineate who is scheduled to work on a holiday. Article 10.4 governs whether, and how, employees are to be compensated for working on a holiday. Article 10.4 requires that employees scheduled to work on a holiday be compensated for the holiday in a particular manner. Article 11.1 does not conflict with Article 10.4.

Article 10.4 requires that employees regularly scheduled to work on a holiday are to be compensated for the designated day, plus additional compensation. The conclusion is that the City violated Article 10.4 by not permitting certain employees to work holidays that fell on their regularly scheduled work days.

Attention is now turned to the remedy. The City asserts that, in this case, there is no way to determine which bargaining unit members would have chosen to work the holidays, rather than having the holidays off. The fact is that the employees, who were scheduled to work, had the right to work the holidays. The City did not permit the employees to choose whether or not to work the holidays. Every employee who was wrongfully denied the opportunity to work on holidays is due a remedy. These employees received a day's pay and were required to take the holidays off. They should have been permitted to work. Had they worked, they would have received a day's pay in addition to holiday compensation. That is the remedy that shall be ordered.

AWARD

The City violated Article 10.4 by not permitting certain employees, whose regularly scheduled work days fell on holidays, to work those holidays. As a remedy, employees not permitted to work on holidays since May 2006 shall be compensated as if they had worked and be permitted their choice of compensation under Article 10.4.

This Arbitrator retains jurisdiction to provide more specificity as to the remedy ordered. If neither party makes a request for such specificity within three months, said retention of jurisdiction shall automatically terminate.

Dated: September 13, 2007



Mark M. Grossman, Esq.