

IN THE MATTER OF ARBITRATION

STATE EMPLOYMENT
RELATIONS BOARD

BEFORE

2003 MAR 19 A 10:31

NORMAN R. HARLAN, ARBITRATOR

THE FRATERNAL ORDER OF POLICE (FOP)
OHIO LABOR COUNCIL, INC.

AND

BELMONT COUNTY (OHIO) 9-1-1

) CASE NO. 02-MED-01-0079
) GRIEVANT: OHIO LABOR COUNCIL
) RE: INTEREST DISPUTE; COM-
POSITION OF THE BARGAIN-
ING UNIT***
) HEARING; FEBRUARY 26, 2003
) AWARD: MARCH 17, 2003

APPEARANCES

UNION

Patrick J. Daugherty, Sr., Ohio Labor Council, FOP
Chad Zambori, Local President

EMPLOYER

Mike Kinter, H.R. Administrator, Belmont County D.J.F.S.
Darlen Pempek, Clerk, County Commission
Cliff Sligar, Director, Belmont County 9-1-1
Robyn Marshall, Belmont County 9-1-1 Administrative Assistant

THE ISSUE (STIPULATED BY THE PARTIES)

ARE PART-TIME Employees members of the Bargaining Unit?

CONTRACTUAL REFERENCES

ARTICLE 1 - PREAMBLE/PURPOSE

ARTICLE 2 - UNION RECOGNITION

SECTION 1. *****

SECTION 2. "The Bargaining unit include all full-time dispatchers who are regularly scheduled more than 8 hours per week, as set forth in the certification issued by the Ohio State Employment Relations Board as described in the bargaining unit listed below.

Excluded from inclusion in this bargaining unit is (sic) all management level employees, confidential, supervisor, seasonal, and casual employees and all other employees specifically excluded by the Ohio Collective Bargaining Act."

ARTICLE 5 - MANAGEMENT RIGHTS

SECTION 1. "The Employer possesses sole ritht to operate the department and all management rights repose in it. The Employer's exclusive rights shall include, but shall not be limited to, the following, except as limited by the terms and conditions set forth in this Agreement or in O.R.C. 4117.

- A. Determine matter of inherent managerial policy which include but are not limited to areas of discretion or policy as functions and programs of the department, standards of services, its overall budget, utilization of technology, and organizational structure;
- B. Directs, supervises, evaluates, or hires employees;
- C. Maintain and improve the efficiency and effectiveness of operations and programs;
- D. Determine the overall methods, process, means or personnel by which operations are to be conducted;
- E. Suspend, disciplines, demotes, or discharges for just cause;
- F. Determine the hours of work, work schedules, and to establish the necessary work rules, policies and procedures for all employees;
- G. To determine the size and composition of the work force (sic), staffing patterns, and each departments (sic) organizational structure, including the right to lay off employees from duty due to lack of work, lack of funds, or a job abolishment due to lack of funds;
- H. Determine the adequacy of the work force; (sic)

- I. Determine the mission of the department as a unit of government;
- J. Effectively manages the work force;
- K. Take actions to carry out the mission of the department as a government unit.

SECTION 2. The F.O.P. Ohio Labor Council recognizes and accepts that all rights and responsibilities of the Employer not specifically modified by this Agreement shall remain the function of the Employer."

ARTICLE 7 - GRIEVANCE PROCEDURE

Step 3: Arbitration

"If the grievance is not satisfactorily settled in Step 3, the F.O.P. OHIO LABOR COUNCIL may make written notification that the grievance will be submitted to binding arbitration....."

"The arbitrator shall limit his decision strictly to the interpretation, application or enforcement of those specific Articles in this Agreement. He may not modify or amend the Agreement."

".....All costs directly related to the services of the arbitrator shall be equally divided between the Employer and the F.O.P. OHIO LABOR COUNCIL....."

ARTICLE 9 - RULES AND REGULATIONS

SECTION 1. Work Rules: "The Employer shall ensure that all current permanent work rules, policies and procedures are reduced to writing and made available to all bargaining unit members in advance of their enforcement.

SECTION 2. New Work Rules. The Employer agrees that new work rules adopted after the effective date of this Agreement shall be reduced to writing and provided to all bargaining unit members in advance of their enforcement.

SECTION 3, Effect of Work Rules: A work rule or policy that is in violation of this Agreement shall be the proper subject of a grievance, as is a work rule not having been applied uniformly to all employees. No employee shall be disciplined for an alleged violation of a work rule, which has not been promulgated as set forth in Section I and/2 of this Article.

BACKGROUND

Belmont County is located in south-central Ohio. It is bordered on the east by the Ohio River; on the north by Jefferson County; on the northwest by Harrison County; on the south by Monroe County and on the west by Guernsey County. The County seat of Belmont is St. Clairsville.

County government is managed by a County Commission comprised of three (3) elected Commissioners. The County provides a variety of services for residents, to include Emergency Services commonly referred to as 9-1-1. Management officials of 9-1-1 include the Director, Administrative Assistant and three (3) Shift Supervisors. The Ohio Labor Council, Inc. - F.O.P. - conducted an organizing campaign in 2001. On October 24, 2001, the STATE EMPLOYMENT RELATIONS BOARD (SERB) certified the FOP as the Exclusive Representative. The ORDER states in part:

"Pursuant to Ohio Revised Code Sec. 4117.07(C), the Board conducted a secret ballot election on September 12, 2001, for employees of Belmont County 911 (Employer) in this appropriate unit:

Included: All full-time dispatchers and those part-time dispatchers who are regularly scheduled more than 8 hours per week.

Excluded: The Director, Administrative Assistant, all shift supervisors and all other supervisors, managers, or confidential and casual employees as defined in O.R.C. 4117.01." Jt. Ex. 3.

In late January, 2001 SERB issued a **NOTICE TO NEGOTIATE**, received by the Employer January 31, 2002. Shortly thereafter Management and the Union began negotiating their first COLLECTIVE BARGAINING AGREEMENT (CBA). Negotiations continued through February and March but no agreement was reached.

On April 1, 2002 SERB appointed the Undersigned as Factfinder under Ohio Revised Code (ORC) Section 4117.14 (C)(3). Under ORC Rule 4117.9-05(G) the Parties agreed to extend Factfinding. In January, 2003 the Undersigned was contacted by the Union and Management and was advised they desired to set a Hearing. Next the Parties advised they had only one issue and it would serve their interests to receive a final decision, rather than a recommendation. They framed the Issue:

ARE PART-TIME DISPATCHERS MEMBERS OF THE BARGAINING UNIT?

They jointly contacted SERB and asked if it was permissible to proceed to binding arbitration to resolve the Issue. Approval was granted and they signed an Agreement February 26, 2003, which appears at the end of the Award as APPENDIX A.

By agreement of the Parties and with the concurrence of the Arbitrator the Arbitration Hearing was set for Feb. 26, 2003 at the 9-1-1 Center, located about 5 miles west of St. Clairsville. The Parties were afforded full and fair opportunity for the examination and cross examination of Witnesses; the introduction of Authority

and Exhibits; and oral argument. They declined to file Briefs but were given the opportunity to send a brief argument. The Employer submitted a Summary of its primary position which was received Feb. 27, 2003.

DISCUSSION

Part-Time Dispatchers have been employed for several years to cover for scheduled absenteeism such as vacations and for incidental absenteeism. Most of the Part-Time (PT) Dispatchers are employed Full-Time as Firefighters in the immediate area. The part-time work supplements their regular income. Prior to being hired applicants were asked to indicate their availability for all shifts. Many were not available to work the midnight shift. In addition, once hired, PT Dispatchers essentially worked at their will. They were not scheduled by Management as scheduling is commonly understood and practiced; i.e., they were asked if they would work. They could and did refuse work, with no consequences. None worked any regular schedule, such as Monday and Tuesday of each week. None regularly worked a certain number of hours. None were "regularly scheduled more than eight (8) hours per week." In fact, some weeks PT Dispatchers worked no hours at all.

All Witnesses were candid and credible. Very little is in dispute. Director Sligar interviews prospective employees and hires Department personnel, subject to final approval by the County Commission. Director Sligar testified:

- a. Part-Time Dispatchers have not historically been scheduled to work unless they agreed.

- b. PT Dispatchers are requested to work. They may accept or refuse.
- c. No PT Dispatcher works or has worked a regular schedule.
- d. No PT Dispatcher regularly works more than 8 hours on a weekly basis. "They tell Management when they are available. Sometimes they call and cancel. All have full-time jobs."
- e. Another Full-Time Dispatcher was added recently to help cover absenteeism.

EMPLOYER POSITION

- 1. PT Dispatchers have been hired over the years to cover for absenteeism.
- 2. PT Dispatchers who have been hired are available only on a limited basis because they have full-time jobs with other employers.
- 3. Basically PT Dispatchers work when they want to do so. It has been difficult to cover the midnight shift.
- 4. The **Ohio Administrative Code** includes the definition of an "Intermittent appointment." It states:

"Intermittent appointment" -- means an appointment where an employee works on an irregular schedule which is determined by the fluctuating demands of the work and is not predictable and is generally characterized as requiring less than one thousand hours per year." Employer Ex. 2, OAC 123:1-47-01.

This definition is more appropriate for the PT Dispatchers than any other.
- 5. "As a follow up to yesterday's arbitration hearing I would like to offer the following thoughts regarding the issue of part-time dispatchers in the bargaining unit.

*Again, please allow me to emphasize the point that management is in agreement with the SERB definition of the classifications which are to be represented by the bargaining unit (i.e., full-time dispatchers and part-time dispatchers

regularly scheduled more than eight hours per week). Management's contention is that the current employees working less than full-time should not be considered part-time by SERB's definition.

*During yesterday's discussion, we all speculated at length as to what SERB meant by the definition of bargaining unit employees in section 5 on the 'Notice to Negotiate' form. What we did not do is address what SERB **did not** write. SERB **did not** say all part-time employees are members of the bargaining unit nor did SERB say part-time employees working one thousand hours or less (definition of intermittent) are not members of the bargaining unit. SERB's Definition is very specific and precise and, in my opinion, this was done to exclude the current 'part-time' employees due to the manner in which they work. As noted in yesterday's hearing, these employees pick which days they wish to work and often cancel or change days with little or no notice. This situation works at the present time due to the fact that there are no rules or specific policies such as those that would have to be implemented if union seniority became a factor. These employees currently pick up those shifts which full-time employees do not wish to work.

As was stated yesterday, although they are referred to as 'part-time' employees, they tell management what shifts they would be able to work and management schedules them, if needed. If this manner of employment is not synonymous with 'casual employment' I don't know what else it would be called.

In summary, management believes that SERB's definition is specific for good reason. It was intended that the current employees who are not full-time should not be included in the bargaining unit due to the fact that, logically, the manner in which they are employed does not lend itself to union representation nor should it.

Thank you for your patience and consideration regarding this difficult issue."

Sincerely,

/s/

Michael Kinter
H.R. Administrator

UNION POSITION

1. Part-Time Dispatchers have been employed by 9-1-1 for many years.
2. PT employees are interviewed and selected by Management.
3. Historically Management has hired as PT Dispatchers individuals who are employed full-time elsewhere.
4. The Employer has permitted PT Dispatchers to work at their convenience even though it has the right to set the work schedules for PT and FT Dispatchers.
5. The Union and 9-1-1 negotiated for months. SERB certified the Bargaining Unit on the NOTICE TO NEGOTIATE as being comprised of "14" people.
6. The SERB definition of a Part-Time Dispatcher does not correspond to the hours worked over the years by PT Dispatchers. None worked regularly. Basically they worked when they wanted and Management hired them knowing they would not work regularly.
7. Under ORC 119.12 both the Union and Management had the right to appeal SERB's Decision. Neither did so.
8. Clearly Part-Time Dispatchers are Bargaining Unit members and the Union requests this finding to be made by the Arbitrator.

OPINION

The Parties have presented an extremely interesting Issue. It is undisputed:

- a. This is the Parties' first CBA.
- b. They bargained for about a year and resolved all Issues except for the Issue to which they stipulated, supra, p. 1.
- c. Historically there have been 12-14 Dispatchers on the payroll; 7+ Full-Time and 5-7 Part-Time.

- d. Management exercised its right to manage the facilities and direct the workforce under the ORC. These rights are retained under the proposed LABOR AGREEMENT.
- e. SERB certified the bargaining unit as approximately "14." (fourteen)
- f. SERB included in the bargaining unit:
"All full-time dispatchers and those part-time dispatchers who are regularly scheduled more than 8 hours per week.
- g. Historically PT Dispatchers have not been "regularly scheduled 8 hours per week."

STANDARDS FOR INTERPRETING CONTRACT LANGUAGE

Before proceeding we believe it will be helpful to discuss certain "STANDARDS" which are germane to the resolution of the Issue before us.

To Express One Thing Is to Exclude Another

"Frequently arbitrators apply the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. To expressly state certain exceptions indicates that there are no other exceptions. To expressly include some guarantees in an agreement is to exclude other guarantees. Similarly, where an employee had 20 years of service with the company but less than one year in the bargaining unit, the fact that the agreement specifically allowed credit for all service with the company in determining entitlement to vacation benefits was held to indicate that only bargaining unit service could be credited for earning sick leave.

The hazards of this rule of construction, known as "**expressio unius est exclusio alterius**," in some instances lead parties to use general rather than specific language, or to follow a specific enumeration with the statement that the clause is not to be restricted necessarily to the things listed. Elkouri & Elkouri, HOW ARBITRATION WORKS, 5ed, BNA, Wash. DC, 1997, p. 497.

Doctrine of "Ejusdem Generis"

It is axiomatic under the doctrine of ejusdem generis that where general words follow an enumeration of specific terms the general words will be interpreted to include or cover only things of the same general nature or class as those enumerated, unless it is shown that a wider sense was intended. Arbitrators apply this doctrine.

For instance, it was held that a clause providing that seniority shall govern in all cases of layoff, transfer, "or other adjustment of personnel" should not be construed to require allocation of overtime work on the basis of seniority. The doctrine has been held inapplicable, however, where the specific words preceding the general words embrace all objects of their class since, except for this qualification, the general words that follow the specific enumeration would be meaningless. *Id.*, 497-498.

Specific Versus General language

Unless a contrary intention appears from the contract construed as a whole, the meaning of a general provision should be restricted by more specific provisions. "In general, Arbitrators hold that when an exception is stated to a general principle, the exception should 'be strictly though, to be sure, properly construed and applied.' ' Where two contract clauses bear on the same subject, the more specific should be given precedence.

For example, where a contract contained a general provision stating that the company should 'continue to make reasonable provisions for the safety and health of its employees' and another provision stating that 'wearing apparel and other equipment necessary properly to protect employees from injury shall be provided by the Company in accordance with practices now prevailing * * * or as such practices may be improved from time to time by the Company,' it was held that the employer was not obligated to furnish rain clothes to employees where such had not been furnished or required in the past; the arbitrator said that had the general clause stood alone he would have been required to determine whether the furnishing of rain clothes was reasonable necessary for the safety and health of the employees.

Arbitrators also may be expected to rule that, when an exception is stated to a general principle, the exception should prevail where it is applicable." *Id.*, 498-499.

Taken literally, it is possible to interpret SERB's definition of Part-Time Dispatchers as not including current Part-Time Dispatchers. This is Management's primary contention since historically none of them were "scheduled regularly more than 8 hours per week." On the other hand, the Union stresses the **NOTICE TO NEGOTIATE** defines the bargaining unit as approximately "14" employees. This is the dilemma presented here.

Both Parties discussed "Intermittent appointed", supra, p. 7. The Employer argues strongly "Intermittent" fits the PT Dispatchers since:

- a. They worked an irregular schedule; and
- b. worked less than 1,000 hours per year.

The FOP disagrees. It stresses the employees in question have always been identified as Part-Time Dispatchers and have never been called "Intermittent." It notes even though Management had and retains the right to direct the workforce, to include the right to schedule employees, it permitted Part-Time Dispatchers to set their working conditions. And, it points out in view of the fact PT Dispatchers were never regularly scheduled more than 8 hours per week, SERB's definition conflicts with the past practice of 9-1-1.

The Arbitrator does not know what information was presented to SERB. Neither does he know why the Board defined the bargaining unit as "those part-time dispatchers who are regularly scheduled more than 8 hours per week," while at the same time counting current part-time Dispatchers among the "14" who comprise the bargaining unit.

Taking into consideration the proposed LABOR AGREEMENT as a whole is appropriate here, remembering 9-1-1 and the FOP successfully negotiated all other Issues. The language found in Section 2 of ARTICLE 2 parallels the SERB NOTICE. supra, p. 2. As previously noted under the CBA the Employer retains the right to; "Effectively manage the workforce." see ARTICLE 5-J, supra, p. 3. ARTICLE 7 limits the authority of the Arbitrator. supra, p. 3. ARTICLE 9 addresses current Work Rules and New Work Rules. supra, p. 3. It also discusses the Effect of Work Rules. supra, p. 4. In ARTICLE 13 - Seniority, the Parties agree to a pro-rata system of seniority if seniority is considered for Part-Time employees. Except for ARTICLE 1 the first 14 ARTICLES note at the top-right corner "FULL TIME - PART TIME." ARTICLES 15A, 16-A and 17-A state FULL TIME; 15-B, 16-B and 17-B state PART TIME. The remainder of the ARTICLES show FULL TIME (FT) and/or PART TIME (PT).

<u>ARTICLE</u>	FULL TIME AND/OR PART TIME
18	FT & PT
19-A	FT
19-B	PT
20	FT & PT
21	FT
22-A	FT
22-B	PT
23	FT & PT
24	FT & PT
25	FT & PT
26	FT
27-A	
27-B	PT
28	FT & PT
29	FT & PT
30	FT & PT
31, 32, 33, 34, 35	No Designation

It is apparent the Parties distinguished between Part Time Dispatchers and Full Time Dispatchers.

The size of the bargaining unit; i.e., "14," is based upon information supplied by the Parties to SERB. It is an approximate number based upon historical facts. This is how SERB established the unit size.

No information was supplied during the Hearing to explain how SERB arrived at its definition of Part-Time Dispatchers. "Regular" means on a recurring basis; here, week after week after week. The Parties agree this never happened. "Scheduled" means being assigned work days and work hours by Management which then requires employees, here Part-Time Dispatchers, to report for work as determined solely by Management. However, here the Parties agree Part-Time Dispatchers have never been scheduled as the term is commonly understood and as it is applied. The 9-1-1 Center advised Part-Time Dispatchers of the available shifts and the PT Dispatchers decided if they would accept the work. Most assuredly Management has not historically scheduled PT Dispatchers. Why Management chose to passively direct PT Dispatchers is not clear. The Arbitrator is aware there are certain licensing requirements. However, considering the high rate of unemployment in eastern Ohio and northern West Virginia there should be an ample supply of prospective PT Dispatchers.

We find it appropriate to discuss Practice and Custom or Custom and Practice. In ARTICLE 33, PAST PRACTICE, the Parties agreed:

Any past benefit or practice that has been continuous, known, and sanctioned by the Employer, but not

incorporated into this Agreement, that affects wages, hours, terms or conditions of employment, shall not be altered until and unless good faith negotiations between the Employer and the F.O.P. OHIO LABOR COUNCIL take place and said alteration is put in writing and signed by the parties."

The first task is to determine if a practice existed relevant to the instant Issue. Obviously Management had a practice of essentially permitting PT Dispatchers to work at their will and pleasure. This is not an indictment; this simply reflects the testimony of Director Sligar.

The next task is to determine if it is a binding practice.

"The line between practices that are binding and those that are not may well be drawn on the basis of whether the matter involves methods of operation or direction of the working force, or whether it involves a 'benefit' of peculiar personal value to the employees (though also involving the employer's purse).

Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. For example, such hesitance was evidenced by Arbitrator Whitley P. McCoy:

But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties have themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. If a Company had never, in 15 years and under 15 contracts, disciplined an employee for tardiness, could it thereby be contended that the Company could not decide to institute a reasonable system of penalties for tardiness? Mere non-use of a right does not entail a loss of it." Id, 635.

"Arbitrators frequently...have recognized wide authority in management to control methods of operation and to direct the working forces, which authority includes the right without penalty to make changes if these do not violate some right of the employees under the written contract." Id, 637.

The fact Management **waived** certain rights to schedule and direct the workforce; i.e., PT Dispatchers, **does not** constitute a **forfeiture**.

"It is a familiar principle that the law abhors a forfeiture. If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture." Id, 500.

Scheduling the workforce is a fundamental right of Management and this right is retained by the Employer the tentative LABOR AGREEMENT and the OHIO REVISED CODE.

The Employer's interpretation of Part-Time Dispatchers, based upon the SERB language and Section 2 of ARTICLE 2, leads to the conclusion that current Part-Time Dispatchers are not part of the bargaining unit. We previously stressed the entire AGREEMENT must be considered.

"It is said that the 'primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relations to all other parts or provisions.' " Id, 492.

"If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination will be to use the interpretation that would give effect to all provisions...." Id, 493.

If credibility is to be placed in the interpretation of Contractual language, such interpretation must illustrate reasoned judgment which leads to a rational conclusion.

"When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used....." Id, 495.

CONCLUSIONS

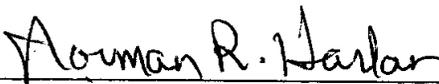
It is abundantly clear to the Arbitrator but for the language used by SERB identifying the bargaining unit as "those part-time dispatchers who are regularly scheduled more than 8 hours per week" there would be no Issue. The Employer's contention that current Part-Time Dispatchers are not members of the bargaining unit cannot be accepted for a number of reasons.

- a. It is inconsistent with construing the CONTRACT as a whole.
- b. It conflicts directly with the size of the bargaining unit as determined by SERB; i.e., "14," which includes current Part-Time Dispatchers.
- c. The exclusionary language in Article 2, Section 2, does not include current PT Dispatchers.
- d. Management retains broad rights under the proposed CBA and the O.R.C.
- e. Such a finding would be harsh, absurd and nonsensical.
- f. Management has the express right under the O.R.C. and under Articles 5 and 9 of the proposed CONTRACT to hire, discipline, layoff and schedule the workforce as needed to carry out its mission of providing emer-

gency services to the residents of Belmont County.
This right includes requiring all employees to work
when and where directed.

AWARD

Part-Time Dispatchers are members of the Bargaining Unit.



Norman R. Harlan, Arbitrator

March 17, 2003

Steubenville, Ohio

Harlan Arbitration Services
P.O. Drawer 420
Montgomery, WV 25136



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*Dale A. Zimmer, Administrator -
Bureau of Mediation - 5 E R B
65 East State Street - 12th Floor
Columbus, Ohio 43215-4213*