

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

In the Matter of the Arbitration Between the

Township of Middletown

And

PBA Local 124

Before: Thomas D. Hartigan, Arbitrator

PERC Docket No. AR- 2011-248 – Issue: M. Kenney
AR- 2011-307 – Issue: E. Volkland

Appearances:

For the Township: Matthew Giacobbe, Esq.
Adam S. Abramson, Esq. – on the brief
Cleary Giacobbe Alfieri Jacobs LLC

For the Union: Kevin McGovern, Esq.
Mets, Schiro & McGovern

In accordance with the arbitration agreement between the parties and the rules of the NJ Public Employment Relations Commission, I was selected by the parties and designated by the Commission to hear and decide the matter set forth herein on October 27, 2010. A hearing was held on February 16, 2011 at the Municipal Building at which time the parties were presented full opportunity to present any testimony, evidence or argument in support of their positions. The parties agreed to argue the matter by way of Briefs. March 21, 2011 was set as the original postmark date for briefs to be submitted. The Employer requested and was granted an extension for the

filing of briefs with April 13, 2011 being accepted as the final briefing date. The Association's brief was received on April 8, 2011. The Employer's brief was received by on April 15, 2011. The record was deemed closed on April 15, 2011.

ISSUE

Did the employer, Middletown Township, violate the Collective Bargaining Agreement by failing to compensate the grievants (Volkland and Kenney) for their attendance at a psychological examination associated with their promotion? If so, what shall be the remedy?

BACKGROUND

The Township of Middletown (hereinafter, the Township or Employer) and the PBA Local 124 (the Union) are parties to a Collective Bargaining Agreement (CBA) for the period of January 1, 2004 through December 31, 2007 (P BA) and January 1, 2005 through December 31, 2008 (SOA). Article I of the Agreement recognizes the Township of Middletown PBA Local 124 "as the exclusive negotiating agent". A grievance was filed for Local 125 on August 5, 2010 and for SOA on August 3, 2010.

Grievance Statement for Local 124 states, "Ptlm. (I/SGT) Kenney was advised by Chief Oches to attend a psychological examination while off duty on July 22, 2010. Chief Oches advised Ptlm. Kenney that he would not be compensated for going".

Grievance statement for SOA states, "I/Lt. Volkland directed by Department Memo to attend a psychological examination while off duty on July 21, 2010. Officer denied compensation when O/T card submitted".

RELEVANT CONTRACT PROVISIONS

PBA Local 124

ARTICLE XI – OVERTIME

- A. The employer agrees that overtime consisting of time-and-one-half (1 ½) shall be paid to all employees for hours worked in excess of the normal work day of eight (8) hours and for any normal work week in a seven day period or more than forty (40) hours.

ARTICLE XXI – GRIEVANCE PROCEDURE

- A. In order to provide for an expeditious and mutually satisfactory settlement of grievances, the procedure hereafter set forth shall be followed. A grievance is hereby defined as any controversy arising over the application of, or adherence to the terms and conditions of this agreement as it affects the members of the Association as Police Officers, including minor disciplinary action of five (50 days or less, including written reprimands. A grievance may be filed by an individual, the Association on behalf of an individual, a group of individuals, or the employer.

STEP 3:

- B. If the grievance has not been settled by the parties in Step 3 of the grievance procedure, or if no answer in writing by the Mayor, Township Committee or Administrator has been received by the Association within the time provided above, the aggrieved party shall have the right to make a firm choice of submitting such grievance to arbitration or avail themselves of all legal remedies at his disposal as provided by Title 34 of the Revised Statutes of New Jersey. The aggrieved employee shall make an election in writing as he is not entitled to pursue both remedies. This written election of remedy shall be transmitted by the President of the Association, or his duly authorized representative, to the Township Administrator.

ARTICLE XXII – ARBITRATION

- A. If a grievance is not settled under Article XXI, such grievance shall, at the request of either the Association or the employer, be referred for binding arbitration to the State Board of Mediation

and/or P.E.R.C. for the selection of an arbitrator according to its rules.

- B. The arbitrator shall be bound by the provisions of this agreement and restricted to the application of the facts presented to him involving the grievance. The arbitrator shall also be bound by applicable Federal and State law in cases. He shall have no authority to add to, modify, detract from, or alter in any way the provisions of this agreement or any amendment or supplement thereto.

Superior Officers Association

ARTICLE XI – OVERTIME

- A. The employer agrees that overtime consisting of time and one-half (1-1/2) shall be paid to all uniformed officers. Lieutenants not regularly assigned to rotating shifts in the Patrol and Traffic Divisions and Detectives covered by this agreement shall be paid time and one-half (1-1/2) for hours worked in excess of the normal work day of eight (8) hours and for any normal work week in a seven (7) day period of more than forty (40) hours.

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POSITION OF THE PBA

In the summer of 2010, then Sergeant (Sgt) Volkland was conditionally promoted to Lieutenant (Lt). As a condition of the promotion he was required to attend a psychological examination. The requirement to complete a psychological exam is a condition placed on the employee by the Township. It is not a Civil Service requirement for promotion.

Interim Lt. Volkland received a letter from Township Chief of Police Robert Oches on July 1, 2010 informing him that he had been scheduled for the exam at Comprehensive Psychological Services (CPS) at 6 a.m. on July 21, 2010. (Union Exhibit 1) The Memo from Chief Oches was directed, not only to Lt. Volkland, but also to Interim Lt. Dollinger, Interim Lt. McKnight and Sgt. Kaiser.

On July 1, 2010 Interim Sgt. Kenney also received a letter directing him to CPS for a psychological exam at 6 a.m. on July 22, 2010. Also notified to attend the exam on July 22, 2010 were Interim Sgt. Werner, Officer Sweeney and Detective (Det) Hall.

Police officers in the Township work a rotating schedule. At the time of his appointment at CPS Lt. Volkland was assigned to the 4 p.m. to midnight shift. He was scheduled to work that shift on July 20th, the day before his scheduled exam, but was not scheduled to work on July 21st. Knowing that he had to be at CPS in Clarke, NJ, by 6 a.m. he took three hours of comp time so he could be rested for the exam. He approached Chief Oches about compensation for the time taking the examination as he would be on off-duty during this time. While the Chief refused the request for compensation, he did offer to provide Lt. Volkland with three hours of award time in lieu of using the comp time but Lt. Volkland turned down the offer.

As noted earlier three other officers were assigned to take their psychological exam on July 21st with Lt. Volkland. Two of the officers, Dollinger and Kaiser, were scheduled to work the day of July 21st and were paid for their time attending CPS. Lt. McKnight was scheduled to work the overnight shift (midnight to 8 a.m.) but was given the shift off with pay. Meaning that Lt. Volkland was the only one of the four attendees on July 21st who did not receive compensation for his time at the exam.

Sgt Kenney was off-duty from his 8 a.m. to 4 p.m. shift on July 22nd, the date of his exam. Interim Sgt Werner and Sgt Hall were also assigned to the 8 a.m. to 4 p.m. shift and both were scheduled to work on July 22nd. They were both compensated for their time at the exam. Sgt Sweeny was on light duty at that time and was paid a full day's wages for his time at the exam. Like Lt Volkland, Sgt Kenney was the only one of the four officers taking the exam that day who did not get compensated for his time.

Sgt Kenney testified that he was the last of the four officers to be tested on July 22nd and he returned to headquarters approximately 2 p.m. Upon his return, he did not see any of the vehicles belonging to the other three officers. While he did not see the others leave, it appeared to him that they had not returned to headquarters even though their shift ended at 4 p.m.

Both the PBA and SOA have contractual language, noted above, on the issue of overtime and the language is very similar. Each provides for payment "for hours worked" beyond eight (8) hours in a day or forty (40) hours in a week. One question presented here is whether the grievants "worked" during the time that they spent on the psychological exam. If the time spent on the exam was work time, then they deserve to be compensated for the time.

A simple answer to the question above is that "the same task performed at the same time by two different people cannot be considered work as to one and not work as to the other." (Union brief, page 5) If an employee performs a task at the direction of the Employer and is compensated for the performing the task, then that task constitutes work. As this task constitutes work, it must constitute work for any employee assigned by the Employer to perform said task. Yet this is what the Township has done in this matter.

Eight employees were directed by the Employer to attend a psychological exam on either July 21 or 22 of 2010. Six of the eight were compensated for performing the task (five were on duty at the time of the exam and being paid as part of their shift and one was given the prior shift off with pay). By paying the six employees for performing the task of taking the Township required exam, the Employer was marking the exam time as work time. If six of the employees were at work during this time, how is it possible that the other two were not at work during the same time, at the same place, doing the same task.

In his response to Lt. Volkland's grievance, Chief Oches noted that the "contract refers to time beyond tour and hours worked, which doesn't apply as this was his day off and there was no work involved." (J-3a) Yet three officers were on duty getting paid for doing the same thing at the same location. On cross examination the Chief stated that the exam was sufficiently work related to warrant compensating the three officers on duty. However, if taking the exam was sufficiently work related for the officers on duty, how is it not sufficiently work related for Lt. Volkland who was off-

duty. The same situation with the same results happened the following day with Sgt Kenney. In fact six officers were compensated for working during their time at CPS for the same test while two were considered not working while at CPS for the same test.

Beyond what happened on July 21 and 22, 2010, the Union presented the testimony of Sgt Fred Deickmann who stated that he had been compensated for attendance at the psychological exam while he was off-duty. While this occurred before Chief Oches took command, it still shows that the Township has considered this time worked and compensated others for the time spent.

While this relates only one instance, Sgt Dieckmann noted that the Township attempts to schedule employees to take the exam while on duty and as such they are paid for the time of the exam. He noted further that since officers rotate shifts it is possible to schedule them for the exam at a time that they are on the day shift. This resulting scheduling of an officer to take the test when on duty makes it the rare occasion when an officer is off duty at the time of the exam as happened to him. This rare occurrence is the reason that the Union could present only one incident. It must also be noted that employees like Lt. McKnight who work the overnight shift are given time off with pay in advance of their schedule exam.

The Township's argument that since it does not pay off-duty officers to attend the written exam it has no obligation to pay them when they attend the psychological exam misses key points. The written exam is part of the civil service requirement for any officer seeking promotion. Without taking the written exam, there is no promotion list and no one can be certified for promotion. The process of the written exam is handled by Civil Service who determines where and when the exam will be administered. The Township has no say in this process. The PBA acknowledges that it would be unfair to require the Township to compensate officers to take a test offered by a third party and to which the Township has no input. However, the psychological exam is not a requirement of the Civil Service. It is a Township requirement. The Employer directs that the officer must take the exam; it establishes the time and date of the exam in cooperation with the doctor, of course; the Employer can and has coordinated the scheduling of the exam to the officer's day shift as officers rotate shifts to ensure that they are on duty when they take the exam.

As the Township chooses to require the psychological exam for promotion and handles the scheduling of the date and time of the exam, it is clear that this situation is different from the written exam which is required by Civil Service who determines the date and time of the exam. Therefore, the fact that the Township does not pay for the time taking the written exam is not controlling of the time for the psychological exam.

The grievants are not seeking payment for the time in question but compensatory time pursuant to Article XI. If the Township does not replace the grievant during the comp time, there is no cost to the Employer when comp time is taken.

POSITION OF THE EMPLOYER

On August 3 and August 5, 2010 PBA 124 and the Middletown Township SOA filed grievances alleging very similar violations of their respective contracts. Each dealt with a member's attendance at a psychological examination related to their promotions. On August 4 and August 17, 2010 Chief Oches denied the respective grievances which were also denied at the Township Administrator level. The parties agreed to consolidate the matters within this arbitration.

Neither contract involved herein contains contractual language providing compensation for attendance at a psychological exam. The Unions could not specify any clear provision in their CBAs that provide such compensation. They were unable to provide any testimony that such compensation had been negotiated between the parties. Indeed, if the parties had intended to provide compensation under such terms, they would have expressed their intent in the contract. They were also unable to indicate any instance of Chief Oches approving overtime or compensation for attendance at a promotional examination.

The language to which the parties have agreed and have placed into their contracts provides compensation "for hours worked" in excess of a normal workday or workweek. Attendance at a psychological exam is not hours actually worked. Township Code, Chapter 44, Section 8(E) provides, "a patrol officer may during an assigned tour of duty, on foot or in an automobile or appropriate assigned vehicle, patrol a designated area to provide assistance and protection for persons, to safeguard property, to

assure observance of the law, and to apprehend lawbreakers, and does related work as required.” Attendance at a psychological exam does not fall within the above definition of work. The fact that some officers were on duty when required to take the exam does not make the process of taking an exam work.

The choice to seek a promotion is a voluntary one and the fact that the Township requests a psychological exam does not change the fact that the process is voluntary. An officer within the Middletown Township Police Department who chooses to seek a promotion is well aware of the requirements needed to accomplish the promotion. They advance into the process knowing that it will require hours of study time, enrolling in a study class, taking a written examination and a psychological exam. They also enter the process knowing that none of this time will be compensated by the Township. They use their off-duty time in study and preparation without compensation but despite the choice being voluntary, they now seek compensation for off-duty time for one aspect of the process, attendance at the psychological exam. On this basis alone, that the decision to seek a promotion is totally voluntary, the grievance should be denied.

The Unions’ attempt to claim a past practice must also be rejected as it does not meet the understood requirements of a past practice. As stated in Great Atlantic and Pacific Tea Co., 46 LA 372, 274 (Schreiber, 1966), “In the absence of a written agreement, past practice is to be binding on both parties, but be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.” The Unions’ presentation of one officer who claims to have been paid for attendance at the exam some ten years ago does not meet the requirements of a past practice. Over the ten year period there have been numerous promotions but the Union can point to only this one instance which is clearly insufficient to establish a practice.

Article XXII, Section C of the Grievance and Arbitration Procedure states that the arbitrator “shall have no authority to add to, modify, detract from, or alter in any way the provisions of this agreement or any amendment or supplement thereto.” To accept the Unions’ argument requires the arbitrator to exceed his authority by adding to or modifying the parties’ overtime provision. Article XXII, Section C expressly prevents the arbitrator from doing so.

The Unions' seek compensation for time that is not work and does not conform to the requirements of the overtime provision. They also seek to turn a completely voluntary process into one requiring compensation for their voluntary choice. They ask the arbitrator to exceed his authority. For all of these reasons, the grievance must be denied.

DISCUSSION AND ANALYSIS

The facts in this case are not in dispute. The grievants took a psychological exam on the dates appointed as required by the Township as part of its promotional process. Each grievant was accompanied at the exam by three other Middletown Police officers. All of the examinations were conducted by CPS in Clarke, N.J. All began at 6 a.m. on either July 21st or July 22nd, 2010. It is also uncontested that three of the officers each day were compensated in some form for the time spent around the process of taking the psychological exam and that the grievants did not receive any compensation for their time. The grievants were both on their scheduled days off when they took the exam. Lt Volkland worked from 4 p.m. to midnight on July 20, 2010 and was scheduled to be off on July 21st, the date of his examination. Sgt Kenney was scheduled off on July 21 and July 22, the date of his exam.

Article XI, A of the SOA agreement states, "Lieutenants...shall be paid time and one-half (1-1/2) for hours worked in excess of the normal work day of eight (8) hours and for any normal work week in a seven (7) day period of more than forty (40) hours." In the case of Lt Volkland the time spent with the psychological exam was beyond his normal work week. Similarly, Article XI of PBA 124's contract states, "for hours worked in excess of the normal work day of eight (8) hours and for any normal work week in a seven day period or more than forty (40) hours." Sgt Kenney was likewise working beyond his normal forty (40) hours in attending his examination on July 22nd. In each case the employee is paid if the employee is working beyond the normal work week. The dispute herein is whether the grievants were working during the time spent with the psychological exam.

The Employer argues that the time spent as part of the psychological exam is not work time. It argues that the process of seeking a promotion is voluntary and therefore any part of the process is voluntary time, whether studying, taking a promotional course, the Civil Service exam or the psychological

exam. The Unions argue that all time spent in pursuing a promotion as required by Civil Service is voluntary time and requires no compensation from the Employer. However, it distinguishes the time spent on the psychological exam as this is solely a Township requirement. Additionally, it argues that the Township controls the time and date of the exam and directs the employee where and when the exam will be taken.

It is uncontested that six of the officers taking the psychological exam on July 21 and July 22, 2010 were compensated in some form. Five were on duty at the time of the exam and being paid as part of their shift (Lt Dollinger, Sgt Kaiser, Sgt Werner, Officer Sweeney and Det Hall) and one (Lt Mc Knight) was given the prior shift off with pay. The distinguishing feature for the grievants was that took the exam on their scheduled day off.

As noted both overtime articles refer to payment for time worked over the normal day or week. The Employer also argues in its brief that the Township Code, Chapter 44 E(8) defines the work of a patrol officer and that time spent at the psychological exam does not fit into the definition. However, the Section E(8) ends that the officer “does related work as required.” In his testimony at the hearing Chief Oches in explaining the rationale behind granting employees on duty the time to attend the exam with pay noted that the exam was sufficiently work related to allow for this. Therefore, the exam as work related fits into the definition of Section E(8)’s “related work as required.”

The Town notes that it does not pay or compensate employees for the voluntary process of seeking a promotion. It does not pay for study materials, promotional courses, or the taking of the Civil Service exam or the psychological exam. The Union does not dispute this as to those expenses related to the Civil Service requirements for promotion. It states in its brief “neither the PBA or SOA is seeking compensation for time spent by officers taking the written promotional examination” and “it would be fundamentally unfair to require the Township to pay its off-duty employees for taking a test required by a third party...and over which the employer has no control regarding scheduling.” However, as noted the psychological exam is not a requirement of a third party, it is solely the prerequisite of the Employer. The Memos from the Chief, U-1 and 2, state, “You are scheduled for a promotional psychological examination...” The Township not only requires the exam but it schedules the date and time of the exam. The memos do not offer an alternative nor do they reference compensation. But

in each occasion noted herein, July 21 and 22, it compensated those employees on duty or coming off duty for their time at the exam.

As the Township compensates employees who are on duty for taking the exam and it considers this sufficiently work related to do so, it cannot declare the time as non-work related simply because the employee is off-duty. Article XI. D of the PBA contract states, "In the event any employee is called into duty other than for his normal assignment...." Article XI. D of the SOA agreement notes, "Any officer...called into duty other than his scheduled assignment shall be paid...." As the Township has considered the exam to be sufficiently work related to compensate those on duty for their time and as the Township scheduled the grievants to take the exam at a time other than their normal assigned time, and as the assignment of attending the exam fits into the Township's code of "related work as required", the grievants are entitled to compensation for the time spent taking the required psychological exam.

The Township's argument that the testimony of Sgt Dieckmann does not establish a past practice is well taken. It is common in arbitration to follow the concepts outlined by the Employer in its brief. The Unions' explanation of the time between promotions that may affect the off-duty question is also of interest. However, having found the time of the exam to be work related there is no need to go into the past practice argument. It should be noted that while Chief Oches stated that no officer had been paid for attending the psychological exam when off-duty under his watch, the Township did not produce any specific cases in which an off-duty officer was sent to the exam and not paid. Given Sgt Dieckmann's explanation it is wholly possible that the situation of an off-duty officer being sent to the exam had not come about until the time of the grievants.


It is noteworthy that the Township schedules the officers for the time and date of the exam. This provides the Employer with the ability to schedule an officer to take the exam during the officer's work time and as the officers rotate their shifts this can be arranged so that the officer takes the exam on a date when the officer is scheduled to work the day shift as happened with five of the six officers involved herein who were compensated. This is not to suggest that this is an easy task as the Township must work with the doctor on scheduling but it is within the Employer's hands to work the scheduling to fit its needs.

The Employer's argument that the arbitrator is barred from finding for the grievants as this would constitute a modification of the parties agreement is not accurate. The determination made here in an interpretation of the parties intent in Article XI as to compensation for hours worked as related to the facts provided herein.

AWARD

For all of the reasons and analysis above, I find that the grievance is sustained.

The Unions in their brief notes, "with respect to remedy, the grievants are not seeking payment; they are merely asking for compensatory time pursuant to Article XI..." Lt Volkland testified that he got back to Middletown at 12:30 p.m. As the exam called for his attendance at 6 a.m. Lt Volkland's work time would be six and one-half hours. Sgt Kenney testified that as the last of the four officers examined, he did not return until 1:30 p.m. his work time would be seven and one-half hours. While both Article XIs speak in terms of pay, the Union has clearly stated that it does not seek payment but compensatory time and such should be the form of the compensation.

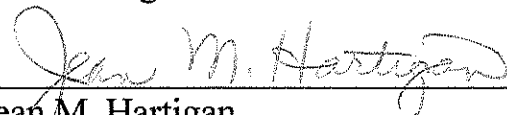


Thomas D. Hartigan, Arbitrator

Dated: May 29, 2011
Hamilton, NJ

State of New Jersey }
County of Mercer }ss:

On this 29th day of May 2011, before me personally came and appeared Thomas D. Hartigan to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.



Jean M. Hartigan

Notary Public of New Jersey
My commission expires 6/29/14