

NIGHT DIFFERENTIAL

COUNTY OF NASSAU
Public Employment Relations Board

-----X

In the Matter of the Arbitration

- between -

ARBITRATOR'S

THE COUNTY OF NASSAU

OPINION

- and -

&

PATROLMEN'S BENEVOLENT ASSOCIATION
of the Police Department of the County
of Nassau, Inc.

AWARD

RE: A. Campaniello Grievance

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Before: Edward Levin, Arbitrator

APPEARANCES

For the County of Nassau:

Peter A. Bee, Esq.; Deputy Chief Robert P.
Yaccarino, Police Department

For the Patrolmen's Benevolent Association:

Michael D. Axelrod, Esq.' Police Officer Antonio
Campaniello, Grievant

* * * * *

In accordance with the provisions of the collective bargaining agreement between the Police Department ("Department") of the County of Nassau ("County") and the Patrolmen's Benevolent Association ("PBA"), the undersigned was designated Arbitrator to hear and determine the following issue and render a non-binding award:

Was section 8.14-2 A and B of the collective bargaining agreement between the County and PBA

violated by the refusal to pay Police Officer Campaniello night shift differential effective July 8, 1987?

If so, what shall be the recommended remedy?

A hearing was held on June 15, 1988 at the Office of Employee Relations, Old Courthouse Building, 1550 Franklin Avenue, Mineola, New York, at which time the parties were accorded the opportunity to present documentary evidence, testimony and oral argument in support of their respective positions.

APPLICABLE CONTRACT LANGUAGE

Section 8.14 Night Differential

....

8.14-2

(A)

Except as otherwise required by law, employees who are on authorized leave due to illness or injury or bereavement only, shall likewise receive the additional differential compensation provided for herein, if such employee, by reason of his/her work schedule, would otherwise have worked during such hours for which the said additional differential compensation would be paid in pursuance of this subdivision.

(B)

An employee who is placed on restricted or light duty and assigned to a day tour because of a line-of-duty injury or an extended illness, shall continue to receive the same night differential which he/she would otherwise receive by reason of his/her regular work schedule, but the Commissioner of Police shall have the power, in his discretion, to direct such employee to submit to medical re-evaluation at such intervals as he may determine and to discontinue payment of night differential whenever, in his judgment, such action is warranted.

- 8.14-3 Any employee whose tour of duty is temporarily switched for the convenience of the Police Department, shall continue to receive the same night differential which he/she would otherwise receive by reason of his/her regular work schedule.
- 8.14-4 An employee who is on sick leave due to a line-of-duty injury shall, for a period of 60 days, be continued in the same squad and receive all benefits to which he/she would otherwise ordinarily be entitled had he/she still been on active duty. This shall include, but not be limited to, continuation of the additional holiday compensation which the employee would have received had he/she been scheduled to actually work on a holiday.

PBA POSITION

Police Officer Antonio Campaniello's last day of work prior to going on sick leave was June 16, 1987. On July 8, 1987, P.O. Campaniello was notified that his night shift differential would be stopped and he received his last check containing night differential pay on July 16, 1987. On August 14, 1987, P.O. Campaniello was changed to the day tour and then subsequently retired on March 10, 1988. In a response dated March 22, 1988 to P.O. Campaniello's third step grievance filed on or about December 10, 1987 in which P.O. Campaniello alleged a violation of the contract between the County and the PBA related to a denial of payment of night differential, Commissioner of Police Samuel J. Rozzi informed P.O. Campaniello that his grievance was denied pursuant to Section 8.14-2 (B) of the contract which grants the Police Commissioner the

discretion "...to discontinue payment of night differential whenever, in his judgment, such action is warranted."

The PBA notes that this grievance is the fourth grievance relative to this section of the contract. The first such grievance was decided by Arbitrator Marilyn Levine who found that:

In order for the grievant to continue receiving the night differential, he would have had to have demonstrated that the reason for the transfer was line of duty injury. Such was not the case.

In a similar case involving Police Officer Charles Thomas in which P.O. Thomas was transferred within his command, resulting in the elimination of night differential payments, the case was settled with the PBA prior to arbitration.

Once more in a case involving Police Officer Robert J. Peeples in which P.O. Peeples, as a result of an on-duty injury was placed on light duty, night differential pay was discontinued by Police Commissioner Rozzi based on his judgment the action was warranted. This case was appealed to arbitration and Arbitrator Phillip Ruffo concluded that:

"... the Police Commissioner's power under the cited section is not absolute or unfettered, as the County contends, but subject to his promulgating and publishing guidelines delineating those factors which he will consider in determining to discontinue night shift differential pay."

However, Arbitrator Ruffo limited his award solely to the facts in that case.

The PBA also relies on the language contained in Arbitrator Jack Tillem's opinion, in the Untermeyer case. In that case, Arbitrator Tillem observed that while an arbitration award might not be considered too significant in a dispute arising under the same agreement, after a new agreement is bargained and the disputed clause remains unchanged the award may be deemed to have been made a part of the contract itself.

Thus, the PBA argues that a standard was established in the Metz case when Arbitrator Levine stated in her opinion that in order to continue receiving night differential a Police Officer,

would have had to have demonstrated that the reason for the transfer was line of duty injury.

The Thomas case reaffirmed the Metz principle which was further fortified when Arbitrator Ruffo found the County violated the collective bargaining agreement when it discontinued night differential for Police Officer Peeples.

In the instant case, P.O. Campaniello was out a long time as a result of his injury and received night differential pay. P.O. Campaniello never changed his shift. Then on July 8, 1987 the Police Commissioner, arbitrarily, and without any reason or standard (as per Ruffo award) took P.O. Campaniello's night differential from him. Because no reason was given based on any published guidelines, the County violated the collective bargaining agreement with the PBA.

The PBA claims that the argument raised by the County based on Section 8.14-4 has never been raised prior to the hearing and has no bearing to this case.

The PBA believes the action of putting P.O. Campaniello on the day tour was an after the fact action that shows County wrongdoing and an admission that P.O. Campaniello is entitled to night differential for the period. The PBA notes that P.O. Campaniello never returned to work and the action of the Commissioner was patterned to meet a specific objection and should therefore be ignored.

COUNTY POSITION

The County points to Section 8.14-4 which guarantees that a Police Officer who is on sick leave due to a line of duty injury shall remain on the same squad for sixty days. However, after sixty days the guarantee no longer exists and then may only continue on night differential under the conditions contained in Section 8.14 2 B. At this point, if a Police Officer is on restricted or light duty and assigned to a day tour because of injury or illness, the Police Commissioner has the power in his discretion to direct an employee to submit to medical re-evaluation, and to discontinue night differential whenever in his judgment such action is warranted.

In this case P.O. Campaniello was on the day tour and on light duty when the Police Commissioner determined in his judgment to discontinue the payment of night differential.

The County takes issue with Arbitrator Ruffo's requirement for guidelines by which the Commissioner will exercise his judgment. The County does not believe that the contract so limits the Commissioner in the exercise of his judgment with regard to discontinuance of night differential pay.

The County argues that it bargained for the opportunity to limit its liability for the payment of night differential pay when it feels it is appropriate. The County met the contractual conditions in this case and questions Arbitrator Ruffo's justification to require more. The County believes that this is inappropriate and not consistent with the language of the contract. Accordingly, the County asks that the grievance be denied.

ARBITRATOR'S OPINION

The Arbitrator rejects the PBA's argument based on the settlement of other grievances settled between the PBA and the County. It is a well established principle that settlements are not precedents since they would serve to discourage the parties from entering into settlements since such settlements would be used against them in future instances. This would in reality be disruptive to good labor management relations, causing all disputes to be brought to arbitration rather than settled by the parties in a practical manner. However, arbitration on the same issue and contract language are given greater consideration by arbitrators and if they are not without reason are taken into consideration.

The Metz arbitration award appears to be distinguishable from the instance case in several significant factual details. This case involves a Police Officer who was transferred to a day tour assignment for reasons other than his line of duty injury. The reasoning contained in that award appears to be confined to the facts contained in that case and to arbitrarily abstract a sentence of the award and elevate it to a principle that should govern in this case would be inappropriate and misleading.

However, Arbitrator Ruffo's award in the Peeples' case bears scrutiny and consideration. The Arbitrator is impressed by Arbitrator Ruffo's analysis upon which he bases his judgment that:

...the Police Commissioner's power under the cited section is not absolute and unfettered, as the County contends, but subject to his promulgation and publishing guidelines delineating those factors which he will consider in determining to discontinue night shift differential pay.

Without such published guidelines, Arbitrator Ruffo concludes, the exercise of such power may be said to be capricious. Arbitrator Ruffo notes that there is an implied requirement of good faith performance in every collective bargaining agreement and informing Police Officers of the factors the Commissioner will consider in terminating night differential pay is therefore not inconsistent with his powers under Section 8.14-2B of the collective bargaining agreement.

The Arbitrator in this instance finds this reasoning persuasive and applicable in this case. Therefore the applicability of Section 8.14-4 claimed by the County does not alter the County's need to promulgate guidelines for the discontinuance of night differential pay and make those guidelines known to the men.

While the Arbitrator finds that Arbitrator Ruffo's reasoning is applicable in this instance, the Arbitrator notes that this award is solely limited to the facts of this case that a different set of facts could conceivably lead to a different outcome. Accordingly, this grievance is sustained.

ADVISORY AWARD

The undersigned, after receiving and giving careful consideration to the testimony, documentary evidence and arguments of the parties regarding the submitted issue, awards as follows:

1. Section 8.14-2 A and B of the collective bargaining agreement between the County and PBA was violated by the refusal to pay Police Officer Campaniello night differential effective July 8, 1987.
2. Mr. Campaniello shall be paid night differential from July 8, 1987, the date it was discontinued, to the date of his retirement.

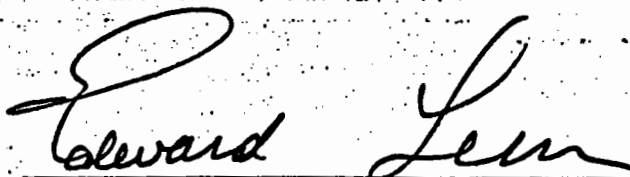
STATE OF NEW YORK

SS:

COUNTY OF NEW YORK

I, Edward Levin, hereby affirm that I am the individual who executed this instrument which is my Award.

August 2, 1988



Edward Levin
Arbitrator