

IN THE MATTER OF AN ARBITRATION UNDER THE *CIVIL SERVICE COLLECTIVE
BARGAINING ACT*

BETWEEN:

**NOVA SCOTIA GOVERNMENT AND GENERAL
EMPLOYEES UNION**

(the "Union")

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF NOVA SCOTIA**

(Department of Justice – Sheriff Services)

(the "Employer")

Re: Overtime for Relief Deputy Sheriffs

<u>Arbitrator:</u>	Susan M. Ashley
<u>Heard at:</u>	Halifax, Nova Scotia
<u>Counsel for the Union:</u>	George Franklin
<u>Counsel for the Employer:</u>	Katie Roebathan
<u>Date of Hearing:</u>	September 23, 2021 September 24 (scheduled but not used)
<u>Date of Award:</u>	November 19, 2021

1. This matter concerns a policy grievance filed by the Union against the Employer, the Department of Justice (Sheriff Services), concerning the payment of overtime to relief employees. A personal grievance was also filed, and the parties have agreed to put that aside pending the outcome of the policy grievance. They have also agreed that should I allow the grievance, I retain jurisdiction over the remedy to allow the parties the opportunity to find an appropriate resolution.

2. The grievance was heard in Halifax on September 24, 2021. The Union called evidence from Monique Drummond and Jacob Stark – both Deputy Sheriffs – and Dustin Rioux, Employee Relations Officer. The Employer's witnesses were Andrew Lantz, at the relevant time, Manager of Policy and Programming, and Cody Zielle, Superintendent, Operations Support and Risk Management. There were no objections to my jurisdiction to proceed, and no preliminary matters were raised.

3. The dispute between the parties boils down to proper interpretation of the collective agreement. The policy grievance is in the form of a letter from Mr. Rioux on October 19, 2020 to Josh Ewener, Employee Relations Consultant at the Public Service Commission, and reads as follows:

Please be advised by way of this letter that the Nova Scotia Government and General Employees Union is hereby filing a Policy Grievance pursuant to Article 29.09 ... of the collective agreement between Her Majesty the Queen in the Right of the Province of Nova Scotia (Civil Service Master Agreement) and the Nova Scotia Government and General Employees Union.

The dispute giving rise to this grievance concerns the Employer's method of applying Article 7 (Management Rights), Article 19 (Overtime), Article 40 (Part-

Time Employees), Article T1 (Hours of Work), Memorandum of Agreement #3 (Relief Employees), and any other relevant articles of the collective agreement.

This dispute relates to how the Department of Justice has changed the way it is paying overtime to Relief and Part-time Deputy Sheriff's within the province. The Employer came to the Union in an attempt to change how Relief Employees would receive overtime. The Union would not agree to the Employers' interpretation of the articles nor would we agree to the change sought by the Department. Our position was clear that Memorandum #3 gives Relief Employees the rights and benefits of the collective agreement, including Articles 19 and 40.

The department decided to implement the new way of paying overtime for its Relief and Part-time employees and began communicating with Employees in October. This was done as a clear violation of the agreement and without further discussions or notice to the Union. The Employer states to employees

Effective October 11 relief staff will no longer earn OT after 7 hours a day as had been the practice in the past. Going forward from that date, OT will be earned after relief staff have worked in excess of 35 hours per week, inclusive of the weekend. This will not affect full-time staff. This change is linked to the changes to the Transport section going to 12 hours shifts and is a budgetary mitigation step as well.

It is clear the department has made their decision to violate the various articles of the collective agreement, while totally disregarding the serious impact this will have on employees.

....

Relevant Provisions of the Collective Agreement

ARTICLE 7 – MANAGEMENT RIGHTS

7.01 Management Rights

The management and direction of employees and operation is vested exclusively in the Employer, and any matter arising out of this shall not be the subject of collective bargaining. All the functions, rights, power and authority which the Employer has not specifically abridged, deleted or modified by this Agreement are recognized by the Union as being retained by the Employer.

...

ARTICLE 19 – OVERTIME

19.01 Definitions

In this Article and Article 22:

- (a) "overtime" means authorized work in excess of an employee's regular work day or regular work week as specified in the applicable appendix.

19.05 Overtime Eligibility

An employee must work at least twenty (20) minutes beyond their normal shift before being eligible for overtime compensation.

...

APPENDIX 3

TECHNICAL AND SERVICE BARGAINING UNIT (TS)

ARTICLE T1 – HOURS OF WORK

T1.01 Hours of Work

- (a) The normal work week shall be thirty-five (35) hours per week exclusive of meal breaks, except as provided in (b) and (c) below. When because of the operational requirements of the service, hours of work are scheduled for employees on a rotating or irregular basis, the employees shall work an average of seventy (70) hours exclusive of meal breaks, on a fortnightly basis.

.....

T1.02 Variance in Hours

The Employer may vary the scheduled hours and days of work in a position, the duties and nature of which require varied hours and days of work.

T1.03 Posting of Shift Schedules

The Employer agrees to post shift schedules at least two weeks in advance and that there will be no change in the posted shift schedules except with the consent of the employee(s), or in the event of an emergency or as provided in Article T1.07.

...

T1.05 No Guarantee of Hours

An employee's scheduled hours of work shall not be construed as guaranteeing the employee minimum or maximum hours of work.

MOA #3 refers specifically to relief employees:

MEMORANDUM OF AGREEMENT #3 RELIEF EMPLOYEES

Section 1 – Relief Employee Status

- 1.01 Relief assignments are periods of work not regularly scheduled and less than 39 weeks in duration. They include, but are not limited to, backfill for vacation, statutory holidays, sick leave, Short Term Illness, LTD, secondments, leaves of absence, hiring gaps, employee training, unpredictable or temporary requirements like jury or high-risk trials, increased short-term demand for service, or increased short-term client needs at residential facilities.
- 1.02 A relief employee is an employee who is not regularly scheduled by the Employer, but who works relief assignments on an as needed basis as operational requirements demand. A relief employee does not have a designation or guaranteed hours of work. A relief employee must work an average of 40% of full-time hours, as defined in this section, or meet the requirements of Article 11.18 in the Civil Service Master Agreement, in order to maintain bargaining unit status.
- 1.03 A relief employee progresses from casual relief status (which is not covered by the terms of the Master Agreement) to temporary relief status in the bargaining unit provided the employee has worked continuously for more than ten (10) consecutive weeks and for at least 40% of fulltime hours during each week, or has been so employed in the same department for a total of more than ten (10) weeks for at least 40% of full-time hours during each week, but less than thirty-nine (39) weeks in a fifty-two (52) week period. Temporary relief employees shall be paid the applicable Collective Agreement rate of pay plus eleven per cent (11%) biweekly in lieu of benefits. Temporary relief employees are also entitled to benefits in accordance with Article 11.06 of the Master Agreement.

...

Section 3 - Scheduling of Relief Employees Seniority Roster

3.01 Relief assignments will be scheduled and/or offered to part-time employees and relief employees at each workplace according to a roster system based on seniority. A workplace for the purpose of a relief roster may include multiple locations in a geographic location as defined in 37.22.

...

Distribution of Relief Assignments

3.04 Relief assignments will be scheduled and/or offered first to employees with a part-time designation, in order of seniority, such that employees are scheduled up to their part-time designation.

3.05 ...Part-time employees and relief employees must be available for such shifts; there is no option to decline scheduled relief shifts. Should a part-time or relief employee seek to leave from a scheduled shift, the usual protocols for the request and approval of leaves shall apply.

....

Evidence

4. Marjorie Drummond is a Deputy Sheriff II stationed in Truro. She described her duties as prisoner transport, security for the court, and service of certain documents. She has been full-time since 2004. In her time, she has 'acted' as Deputy III, which included scheduling. Her typical day starts at 8.30 a.m. The schedule is posted two weeks in advance, and they receive their assignment for the day on the day before. Relief employees also receive bi-weekly schedules. She testified that when she was responsible for scheduling, she would not send a full-time Sheriff to transport to Amherst, for example, as that would go over their 35 weekly hours; she would send a relief employee.

5. She works a set number of hours per week (35) and per day (7); that has been in place since 2008-09. She testified that prior to the change, relief employees would get overtime if they worked more than seven hours/day. Following the change, they get it only if they work more than a 35 hour week. Relief employees' regular hours are 8.30 a.m. to 4.30 p.m., If they worked in excess of those hours, they would get overtime. She felt that the change caused stress and resentment in the office, as relief workers do not want to work past 4.30 p.m. if they are not compensated for it.

6. In cross-examination she agreed that in her office, Sheriffs do all of the tasks of the job, and not just one, as is the case in larger centres. She has done some overtime since the change in 2020.

7. Jacob Stark is a Relief Deputy Sheriff stationed in Digby and has been in the position for two years. He has also worked in Corrections for a number of years. His typical shift starts at 8.30 a.m. He would be there at least four hours, though it is sometimes unpredictable, because of such things as court delays. They receive schedules in advance, as well as the daily assignment for the next day. This tells them where to go, who to report to, but does not indicate hours. He is expected to show up at 8.30 a.m. If, for example, he had to cover court, or transport a prisoner to Annapolis, he would have to leave prior to 8.30 a.m. There is no end time listed on the schedule. Sometimes they could be there for the full seven hours. He testified that he often works more than a seven hour day.

8. He testified that they were told in October 2020 that relief employees would no longer get overtime after working seven hours, but only after thirty-five hours are worked in the week. As a result, overtime is much less frequent.

9 . He testified that when he worked as a Corrections Officer, the regular shift was twelve hours, and they would get overtime if they worked beyond twelve hours. He understood that is still the case.

10. He testified that the loss of fairly regular overtime has had a financial impact on him, as he had depended on that extra money, which has placed a strain on his work and personal life. Prior to the change, they could refuse an overtime opportunity. Now, there is no right to refuse because if you refuse straight time, you are refusing work. When he was hired, he was told he had to be available Monday to Friday, 8.30 a.m. to 4.30 p.m. There was a guarantee of forty percent of seventy hours bi-weekly.

11. In cross-examination he agreed that following the change in 2020 he has done some overtime, where he has worked more than thirty-five hours/week. He could not dispute that he worked thirty-five overtime hours between March and October 2020, and twenty-five since the change.

12. Dustin Rioux has been ERO for the NSGEU for five years, and prior, had been a Deputy Sheriff II for fourteen years, during which time had had 'acted' as Deputy Sheriff III which included scheduling and hours. He testified that he was very familiar with how relief Deputy Sheriffs were scheduled for overtime, and recalled the casual conversion, whereby casual Sheriffs came into the Union. He was on the bargaining committee when the MOA concerning relief employees was negotiated, which recognized work outside of regular hours and the unpredictable nature of the work. A further 'relief memo' is attached to the current collective agreement as MOA #3, which was negotiated in 2016. Part-time and relief employees fall under the Master Agreement; part-time employees have the right to relief work beyond their shift. He has been on the

bargaining committee for all collective agreements since 2008-09 which the first 'casual conversion' occurred.

13. Prior to the overtime change in dispute, if full-time Deputies worked beyond their regular seven hour day or thirty-five hour week, they would get overtime. After the change, permanent and part-timers still get overtime if they work more than a seven hour day. Relief Deputies prior to the change, received overtime if they worked beyond their seven hour day or thirty-five hour week; after, they only receive overtime if they work beyond thirty hours/week. The practice for relief Deputies, prior to the change, was consistent across the province, and had been in place since 2008.

14. He was aware that the Employer had spoken to another ERO regarding the metro Sheriffs, especially the transport division, and that the Employer wanted transport to move to a twelve hour shift. The Union felt this was inconsistent with the collective agreement, and the policy grievance was filed on October 19, 2020.

15. He referred to the email communicating the change to Sheriffs, dated October 7, 2020:

Just to bring you all in the loop, effective October 11 relief staff will no longer earn OT after 7 hours a day as has been the practice in the past. Going forward from that date, OT will be earned after relief staff have worked in excess of 35 hours per week, inclusive of the weekend. This will not affect full-time staff. This change is linked to the changes to the Transport section going to 12 hour shifts

and is a budgetary mitigation step as well. I have chatted with our relief staff ... to make them aware. If anyone has questions, please let me know.

16. He testified that prior to the change, the Employer never communicated to the Union that it disagreed with the long-standing interpretation of the collective agreement concerning overtime for relief staff, and the question of overtime for relief employees was never raised in bargaining. His understanding was that relief employees were paid consistently across the civil service prior to 2020, and that the change regarding relief Deputy Sheriffs has not been applied elsewhere.

17. In cross-examination he agreed that full-time staff are scheduled for thirty-five hours/week, which means that they would get overtime if they worked beyond seven hours on any day, in any event.

18. The Employer called as a witness Andrew Lantz, who is currently Sheriff Inspector at the Department of Justice. He was Policy and Programme Manager for the Department from April 2017 until November 2020. He testified that there are currently 197 front-line Deputy Sheriffs, including full-time, part-time and relief, as well as thirty management. They work in fifteen facilities across the province. Staffing levels vary depending on the size of the office. There are eighty-five to ninety in the metro area. In metro, the bulk of the Sheriffs are assigned to court security, and some do transport. In the rural areas, Sheriffs may perform all three duties – court security, transport, and document service – in one day.

19. There are two dedicated transport units, in HRM and Pictou, whose responsibility it is to ensure the vehicle is in order, do the paperwork, search the inmate, put them in the vehicle, and transport them to court or to an institution, or wherever required. There are fourteen full-time Sheriffs assigned to transport in HRM, and one staff sergeant. Relief staff in metro operate as a pool, and can cover off all duties. In the Pictou transport unit, there are four full-time, two part-time, and two relief employees, and a bargaining unit supervisor. The majority (80%) of the transport work in the province is done in metro.

20. Metro transport can be called to any court house in the province, to provide transportation from one correctional facility to another or to a federal institution outside the province, and to transport to required medical or other care. The runs are organized in a 'corridor'. Efficiency is very much a factor when runs are scheduled. They try to have everything move in one direction, that is, they can access other courthouses on a trip to avoid duplication. In metro, there are three longer runs and two shorter (cleanup) runs, per day. The cleanup runs deal with things that occur late in the day. He described that on the longer runs, there may be an inmate in the Central Nova facility who needs to be in court in Yarmouth, for example, at 9.30 a.m. Transport would have to wait until the court appearance is over, and drive the inmate back to Burnside. While waiting at the courthouse, they are available to assist other courthouses in the area. Every courthouse has its own vehicle, so they can return an inmate at the end of the day.

21. Prior to October 2020 transport staff worked seven hour shifts. In the fall of 2020 there was a change for transport from the seven hour shift to a blended work week, so that they can work longer shifts to make a thirty-five hour week. At the end of the two week period, they would still have worked seventy hours. This affected the metro transport unit, as well as relief staff.

22. The change happened as a result of an efficiency review, where it was realized that the length of the shift had to be extended. The issue first arose in early 2020. Transport staff were frequently exceeding seven hours/day, which resulted in high overtime costs. The employees were not happy, and concerns were raised because of the unpredictability of work hours, in being available for time off, and burnout.

23. He gave a power point presentation to staff in July 2020 explaining the factors behind the change. The presentation was done twice on July 30, covering only metro transport workers. Concern for employees was a factor in making the change; some had indicated they would have to schedule a day off for a medical appointment, and had difficulty planning personal time. He testified that the Union had indicated to him that the changes were appropriate, with the proper notice. At that point, the decision had not been made to extend the overtime change to relief employees across the province. That decision was made in August.

24. The new schedule for the metro transport unit was put in place in October 2020, which gave a regular rotation for twelve, 11.5 hour, and seven hour shifts. It resulted in more predictable work and allowed staff more flexibility in managing their time. The new schedule also applied to those Deputies assigned to do relief in the metro transport unit. The new transport schedule did not affect the Pictou transport staff. In metro, the shift change only affected transport, and not those assigned to court security or document service.

25. He referred to his notes for a managers meeting August 26, 2020, mainly involving Sheriff Inspectors; the notes outline what he intended to say regarding the change to relief overtime:

5 Change to Relief OT

- a. Relief employee will only accumulate OT after 35 hours of work, not 7 hours of work.
- b. That is in accordance to the MOA and CBA
- c. PSC and NSGEU have been consulted and are on board
- d. Need to communicate this with staff in a positive manner, and explain why the changes are needed and that we have been in contravention of the MOA and CBA as a result

26. In cross-examination he agreed that the purpose of relief work was to backfill for illness, vacation and other leaves of full-time employees. If the absence is known in advance it will be in the relief staff's schedule, though there may also be assignments that are not on the schedule. He did not know if the relief worker could refuse such shifts.

27. He confirmed that there was no formal agreement with the Union concerning the changes. He agreed that relief staff in metro could be assigned from the pool to court security or document service doing seven hour shifts, or to transport, where they could do seven, 11,5 or twelve hour shifts. If a full-time transport employee worked beyond one of the rotational shifts, they would receive overtime. He did not make the decision to extend the change in overtime to all relief employees in the province. When they were considering the issue, they did not consider paying overtime if a worker worked in excess of the 11.5 or twelve hours.

28. In redirect he explained that full-time transport staff received overtime if they worked beyond the longer shift, because it would bring them beyond their guaranteed thirty-five hours/week.

29. Cody Zielle became Superintendent, Operations Support and Risk Management in March 2019, dealing with the transport and operations centre, scheduling, and risk management. He described relief employees as Deputy Sheriffs who fill in for full-time employees and fill other operational needs as they arise. Part-time employees are scheduled on a part-time basis, as a percentage of full-time hours. There are eighty to ninety relief Deputy Sheriff, with approximately forty in metro. In metro, the job duties for relief workers are the same as full-time workers, i.e. court security, transport, and document service. It is the same outside of metro. He was aware of the schedule changes for transport, in Halifax, from five seven hour shifts weekly, to a rotational shift

including twelve, 11.5, and seven hour shifts, totalling thirty-five per week. This had an impact on relief employees in metro; with the change to blended shifts for transport, relief staff assigned to transport would also be doing the blended shifts, which resulted in longer shifts. This also impacted the way relief Deputy Sheriffs received overtime.

30. This decision was made concerning overtime for relief employees because they realized that without the change, when a relief worker covered for transport in metro, the Employer may be paying five hours of overtime when covering a twelve hour shift, which would be unsustainable. He felt the new interpretation aligned with the collective agreement, which spoke of a thirty-five hour week.

31. He confirmed that the power point presentation outlining the changes was presented to full-time transport employees in metro, and then to relief Deputies in HRM. He attended both sessions. He agreed that overtime entitlement for full-time Deputies was not impacted; they are salaried employees on the basis of a thirty-five hour week.

32. He referred to an email to all relief Deputy Sheriffs dated October 14, 2020, regarding overtime eligibility, which states as follows:

This Memorandum is to serve as notice that Sheriff Services at the Department of Justice will be standardizing the application of overtime for Relief Deputy Sheriffs to be in line with T1.01 – Hours of Work in Appendix 3, Article 19.01 and the Relief MOA in the Civil Service Master Agreement. Past practice has not been consistent in properly allocating overtime for Relief Employees in accordance with these articles. By way of this Memorandum, the Division will be

correcting any inconsistencies and correctly applying the provisions in the collective agreement.

Under Article 19.01 (a) "overtime" means authorized work in excess of an employee's regular work day or regular work week as specified in the applicable appendix", and in accordance with T1.01 – Hours of Work, the normal work week is to be considered to be thirty-five (35) hours in a week – a regular work day is not defined for the TE classification. Therefore, effective immediately in order to be eligible for overtime Relief Employees will be required to have worked a minimum of thirty-five (35) hours in the week before being eligible to accrue overtime. In practical terms this means that the Employer will be ceasing its practice of incorrectly providing overtime on any relief shift that is in excess of even (7) hours in a day.

This change should not have any impact on full-time or part-time Deputy Sheriffs and will be applied consistently across the division.

33. He testified that the Employer had never expressly agreed to the prior practice of granting overtime to relief employees, not had it promised to continue the practice. The change was made to affect all relief deputies in the province, not just those in metro doing transport, because otherwise there would be different rules in different areas of the province.

34. In cross-examination, he agreed that the changes did not affect part-time employees, because the collective agreement says they get overtime for work in excess of the scheduled shift. He confirmed that transport Deputies in metro still get a bi-weekly schedule, but that it is the regular repeating rotation. He testified that he was involved in the decision to change to the rotating shift, and that one of the reasons was that it was not feasible to pay overtime on a seven hour shift which often went much longer. They did not consider paying overtime after the seven, 11.5 or twelve hour shift. He was not

aware if other departments allot overtime to relief employees or on what basis, or if Corrections Officers do twelve hour shifts.

35. In redirect, he confirmed that part-time employees do not work transport shifts in metro.

Argument

36. Counsel for the Union argued that the term "regular work day" in Article 19.01 means the day associated with the assignment the relief worker is given, using the generally accepted principles of interpretation: *Re Nova Scotia Teachers' Union and Atlantic Provinces Special Education Authority (Jamieson)* (June 2020, Ashley); *C.E.P. Local 777 and Imperial Oil Strathcona Refinery* 2004 CarswellAlta 1855 (Elliott). Appendix 3 uses the term "normal work week", consistent with Article 19.01 (a); 'regular work day' is not defined in the Appendix. This cannot be interpreted as meaning that Deputy Sheriffs do not have a 'regular work day'. This means that the Employer has the flexibility to change the regular work day outside of the regular hours. This is reflected in T1.02 and T1.05. For example, the Employer must post the shift schedules two weeks in advance (T1.03), and the shift that is on the schedule is the regular work day, of seven hours. The term 'regular work day' means the shift for which the relief worker is scheduled.

37. Article 19.05 contemplates that one must work at least twenty minutes beyond the normal shift to be eligible for overtime, which contemplates a regular work day. Overtime for part-time employees (Article 40.03) reflects the wording of 19.01 in referring to regular work week and day, as does Article 40, dealing with job sharing. Together, these provisions make clear that regular work day means the hours associated with the employee's assignment.

38. MOA #3 confirms that while relief employees are not "regularly scheduled", they still receive the bi-weekly schedule, and their daily assignments. They enjoy the benefits of the collective agreement, including Article 19.01. When scheduled they cannot decline the work (Section 3.04, 3.05, 3.06). Relief employees are scheduled into an assignment. According to Article 19.01, relief employees get the schedule and are backfilled into assignments with a regular work day.

39. The Employer's decision in July 2020 to change the historic interpretation of overtime does not change the principle of how overtime is determined, according to the requirements of the collective agreement. For example, in metro, when relief Sheriffs are assigned to a twelve hour shift, that becomes their 'regular work day'.

40. He argued that the language as a whole, and its context, renders the meaning of "regular work day" clear, and the provisions apply to full-time and relief employees. Even if the language were ambiguous, there is clear evidence of past practice: **Re**

I.A.M. Local 1740 and John Bertram and Sons Co. 1967 CarswellOnt 782 (Weiler), Brown and Beatty, *Canadian Labour Arbitration*, 3:4430.

41. Counsel for the Union argued, in the alternative, that even if the Union's interpretation is incorrect, the Employer is estopped from applying the change at least until the current collective agreement ceases to apply: Brown and Beatty, *Canadian Labour Arbitration*, 2:2221, ***Re OTIS Canada Inc. and IUEC Local 82 (Gough)*** 2019 CarswellBC 3331 (Somjen), ***Re Oak Bay Police Board and Oak Bay Police Association*** 2002 CarswellBC 3324 (Glass). There is a longstanding past practice, and the Employer's current argument that that practice was inconsistent with the collective agreement was never raised, to the detriment of the Union's ability to raise the issue in bargaining.

42. Counsel for the Employer argued that the Employer's decision on how overtime is allotted to relief employees is consistent with the collective agreement, and does not constitute a violation. Giving overtime after thirty five hours worked is supported by the language of the agreement, and is clear and unambiguous, therefore, reference to extrinsic evidence such as past practice is not required.

43. The evidence of Mr. Lantz and Mr. Zielle is clear as to the rationale for the change, which was reasonable and within the Employer's purview. The change had been considered over many months, and was articulated to the employees in advance,

including some consultation with the Union. She noted that the past practice of paying overtime to relief employees after seven hours was not in the collective agreement, and the Employer decided to enforce the clear language of the agreement as of October 2020. While the initial problem arose from the metro transport unit issue, the Employer decided that it would be extended across the province so that the agreement would be applied consistently.

44. She agreed to the principles of interpretation as stated by the Union: ***Re Unifor Local 504 and Housing Help Centre for Hamilton-Wentworth*** 2020 CarswellOnt 11018 (Nyman), ***Re Rouge Valley Health System and O.N.A.*** 2009 CarswellOnt 10035 (Johnston), ***Re Teamsters Local 419 and Sysco Central Ontario*** 2019 CarswellOnt 12596 (Rogers).

45. She referred to MOA #3 – Relief Employees, which defines their work, hours, and nature of the assignments. Article 19.01 speaks to “regular work day”, by reference to the appropriate appendix, which is Appendix 3. Article T1.01 sets out the hours of work for relief employees, which is thirty-five per week. She argued that according to this plain language, they are entitled to overtime after thirty-five hours. She noted Mr. Lantz’ evidence that full-time Deputies do get overtime after seven hours, because they are guaranteed a thirty-five hour week.

46. Appendix 3 does not refer to the "regular work day" of relief employees, unlike other Appendices in the collective agreement. In the absence of such a reference here, the reference must be taken to mean the "regular work week". There is no language in the collective agreement that entitles relief employees to overtime after seven hours, unlike part-time employees (Article 40.03 (b)). She argued that if the parties intended that full-time and relief Sheriffs received overtime when they worked beyond the hours in the shift, they could have used similar language to that in Article 40.03 (b).

47. Counsel for the Employer referred as well to the management rights clause (Article 7.01). There is no right to overtime work, and the Employer can choose to allocate the work so as to avoid overtime: *Brown and Beatty, Canadian Labour Arbitration*, 5:3220.

48. With regard to the Union's estoppel argument, she noted that there has been no clear and unequivocal representation, and neither did the Employer promise to continue the practice; there has been no detrimental reliance. Further, the Employer is entitled to revert to the clear terms of the collective agreement: ***Re Domglass Ltd. and U.G.C.W. Local 203*** 1980 CarswellOnt 1205 (Burkett). The Union is using estoppel as a sword and not a shield, which is inappropriate: ***Re Cape Breton District School Board and CUPE Local 781*** 1990 CarswellNS 748 (MacDougall), ***Re Marriott Corp. of Canada Co. and C.B.R.T. and G.W. Local 605*** 1990 CarswellNS 737 (MacDougall), ***Re Crossley Carpet Mills Co. and C.B.R.T. and G.W. Local 612*** 1990 CarswellNS 747 (MacDougall).

49. In reply, counsel for the Union noted that there is no evidence that the Union was "on board" with the changes. With regards to the regular work day, unless a Sheriff is doing transport in metro, the regular work day is seven hours. The Union relies on Article 19.01 concerning "regular work day", when read with the Appendix. The absence of direct reference to daily hours means that the Employer has the ability to change those hours. With regards to estoppel, he noted that the Union brought the grievance, and is relying on it as a shield against the Employer's conduct

Analysis and Award

50. This dispute between the parties arose because of a change in the shift schedules of those doing transport of prisoners in the metro area. Prior to the change in October 2020, the shifts of Deputy Sheriffs were of seven hours duration. This caused difficulties both with the employees and the Employer. Because many of the transport shifts are unpredictable in terms of how long they could take, some employees had identified problems with inability to schedule off-work time, and burnout issues. For the Employer, it meant having to pay overtime after a seven hour shift, often for many hours. With the change to rotating shifts for full-time Deputies assigned to transport in metro, they could work seven, 11.5, or twelve hour shifts, depending on the expected length of the run. The aim was that this would reduce the amount of overtime. This is a rotating schedule, giving the metro Sheriffs doing transport their guaranteed thirty-five hour week.

51. It is worth mentioning at this point that the role of Deputy Sheriffs province-wide is to do *all* of the duties of the regular Deputy Sheriff - transport, court security, and document service. It is only in the metro area where there is a unit dedicated to transport. Even though a significant amount of transport is done from the Pictou area, the shifts were not changed there. Unlike in the metro area, the shifts of full-time Deputies are seven hours long.

52. Relief Deputies are employed province-wide. Since they can perform any of the three functions of Sheriffs, they would be advised of their particular assignment, i.e. transport, security, or document service, by their bi-weekly schedule, updated just prior to the workday.

53. There is no dispute that the Employer is entitled, as a management right, to change the number of hours in a shift; having said that, it cannot unilaterally change the number of hours per week, which is governed by the collective agreement. Nor is it disputed that the Employer may attempt to reduce the amount of overtime being claimed and paid, for legitimate business reasons. There is no right to overtime, subject to the provisions of the collective agreement.

54. Metro has a number of relief employees available for backfilling absences. Operating from a pool, they could be assigned to court security or service of documents, doing a seven hour shift, or to transport, where they might be placed in a seven, 11.5, or

twelve hour shift, depending on the assignment of the person they were replacing. Prior to the change, they received overtime after their regular seven hour shift; after, they do not receive overtime, if they work beyond any of the rotating shifts, until such time as their weekly hours reach thirty-five.

55. While the shift changes for transport only affected the metro area, it had an impact farther afield. The Employer decided to import the new overtime rule to Deputy Sheriffs province-wide, even though they did not have a dedicated assignment to transport and were not subject to the longer shifts and the concerns regarding the shorter regular shift that had triggered the changes. That is, while the shift change in metro arose from the Employer's need to accommodate longer shifts for the transport group, it was being applied province-wide to Deputies, though they do not do the longer, rotating shifts. The Employer's justification was that this would have the same rules apply to all relief Sheriffs in the province, even though they are in a quite different situation. Of course, the desire to save money spent on overtime was a significant factor, as well.

56. The Employer does not dispute that there was a past practice, going back at least to 2008-09, that overtime would be paid to relief Sheriffs if they worked beyond their seven hour shift. The Employer's position is that it reverted to the correct interpretation of the collective agreement, as it was permitted to do, in October 2020, ending the "incorrect" practice which had gone on for at least twelve years.

57. Both parties argue that the collective agreement provisions are clear and unambiguous, despite the fact that each interpretation leads to a different result. I must attempt to analyse the provisions with fresh eyes, looking at their plain meaning, purpose and context. An arbitrator's analysis of a collective agreement is to attempt to objectively determine what the parties had intended to bargain.

58. Article 19 defines "overtime" in relation to an employee's "regular work day or regular work week", as specified in the applicable appendix, which in this case is Appendix 3. That Appendix defines the "normal work week" as thirty-five hours per week. By Article T1.02, the Employer may vary the scheduled hours and days of work, subject to the above. The work of relief employees is governed by MOA #3, which sets out the hours requirements for relief workers who are assigned to backfill for whatever reason. There is no other reference to "regular work day" or even a "regular work week" in the Appendix. Relief Sheriffs are, however, covered by the terms of the collective agreement, including Article 19. They, as well as full-time and part-time Sheriffs, receive bi-weekly schedules (T1.03), containing their projected daily assignments, which are updated/clarified prior to the day's work.

59. It is the Union's position that because a relief worker, by definition, steps into the assignment of whomever they are replacing, that assignment becomes their "regular work day", whether that be a seven, 11.5, or twelve hour shift. Thus, the "regular work day" for the relief Sheriff is the shift for which he or she is scheduled.

60. The Employer, on the other hand, argues that T1.01 sets the hours for relief employees, which is thirty-five per week, and since there is no plain language in Appendix 3 or the agreement, it is appropriate for the Employer to look to the words “regular work week” in Article 19.01 in conjunction with T1.01 of the Appendix, to permit overtime when a relief employee works beyond the thirty-five hour/week limit.

61. In looking at the collective agreement as a whole, it is relevant to consider Article 40.03 (b) dealing with overtime for part-time employees, which states that

40.03 Overtime

(a) Part-time employees will be entitled to overtime compensation in accordance with the collective agreement when they work in excess of the normal full-time weekly hours, except where the applicable hours of work are on a bi-weekly basis in which case overtime will be paid when the part-time employees works in excess of the normal full-time bi-weekly hours.

(b) Part-time employees who are scheduled for a shift of seven (7) or more hours will be entitled to overtime compensation for time worked beyond the scheduled hours.

Article 40.03 (b) contains specific wording which permits overtime where the part-time employee works beyond a seven hour shift. There is no such clear wording regarding relief Sheriffs.

62. Article 40 deals with job sharing and provides that

41.08 Regular Work Hours

For the purposes of the collective agreement, an employee’s regular work day or regular work week will be the employee’s scheduled hours of work under the job-

sharing arrangement. A day on which an employee is not scheduled to work will be considered as the employee's rest day. Time worked by an employee outside their scheduled hours of work will be compensated as overtime in accordance with Article 19 of the Agreement, with the employee's bi-weekly rate being determined on the basis as if they were working the normal full-time hours.

This article refers to "regular work day" and "regular work week", and permits overtime in accordance with Article 19.

63. There is no clear evidence on how the Employer deals with relief employees in other areas of the civil service, though such evidence would have been helpful. There was some reference by Mr. Stark to Corrections Officers, but he admitted that his personal knowledge may not be current.

64. Overall, my interpretation of the collective agreement supports the Employer's position. The agreement has no clear language to allow overtime at the end of the shift, rather than the week. This can be compared to the provisions applicable to part-time Sheriffs, which does contain such language. Such clear language is not present in the relief Sheriffs' situation. I cannot "read in" words that are simply not there.

65. There is no dispute that there has been a past practice going back to at least 2008, and spanning collective agreements. It is permissible for an arbitrator to consider past practice to determine the intention of the parties when the usual interpretive principles do not resolve the issue. However, there is no necessity to consider past practice for that purpose, in this situation.

66. Past practice can also be considered as an element suggesting that the equitable doctrine of estoppel should apply. There must be a representation, intentional or otherwise, by one party that it would not rely on its legal rights, the other party must have relied upon that representation, and suffered harm or detriment if the first party were allowed to change its position.

67. It is highly unlikely that one or other of the parties thought that the interpretation being applied for many years was incorrect, at the time. But it is clear that a representation was made, by the conduct of the parties over many years. Overtime claims would have been submitted by relief employees, approved by supervisors/managers, and processed by staff. The Employer was well aware that this was happening. Staff relied on that representation in filing and continuing to file those overtime claims. While the Employer announced its intention to change its approach as of October 2020, this is quite different from raising the proposed change in bargaining, which would give the Union the opportunity to make alternative proposals. The Union has suffered detriment in that it missed the opportunity to bargain the issue, to the extent it could. Relief Sheriffs have also suffered a detriment, particularly those outside of metro, as the result to them was disproportionate (as well as those in metro who do not do transport shifts) in that the change was applied to them in the absence of any changes to their shifts. The change was announced in October 2020, when the term of the six year collective agreement had almost expired, and where the opportunity to bargain would not have been far away.

68. In all of these circumstances I find that the equities support the Union. I am not convinced by the Employer's "sword versus shield" argument, which is not a factor in the more recent jurisprudence.

69. While I dismiss the policy grievance on the merits, I allow the estoppel argument, and order that such estoppel continues until the expiration of the current collective agreement. I retain jurisdiction in regards to any remedial/implementation issues.

Dated this 19th day of November, 2021



Susan M. Ashley, Arbitrator