

**STATE OF OHIO
VOLUNTARY RIGHTS ARBITRATION**

In The Matter of Arbitration Between:

**OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE STATE
HIGHWAY PATROL,**

EMPLOYER,

and

OHIO STATE TROOPERS ASSOCIATION,

UNION.

**GRIEVANCE: MARK D. GROVES OVERTIME
GRIEVANCE NO. 15-00-981120-0163-07-15**

**Arbitrator's Opinion and Award
Arbitrator: Dr. David M. Pincus
Date: February 15, 2000**

Appearances

**For the Employer
Lt. Susan M. Rance
Renee Macy
S/Lt. Rob Young
Lt. Robert Stanton**

**Position
Advocate
Second Chair OCB
Witness
Witness**

**For the Union
Wayne McGlone
Elaine Silveira
Bob Stitt
Sgt. Mark Groves
Herschel Sigall
Bill Watkins
Scott Hartage
Mike Stein
Dana Steele**

**OSTA Staff Representative
OSTA Legal Assistant
OSTA President
Grievant
Advocate
Witness
Witness
Witness
Witness**

I. Issue

Did the Employer's change of the grievant's schedule on November 13, 1998 violate Articles 26.01 and 27.03 of the labor agreement? If not, what shall the remedy be?

II. Introduction

This is a proceeding pursuant to a grievance procedure in a collective bargaining agreement between the State of Ohio, Department of Public Safety, Division of Highway Patrol (the Employer) and the Ohio State Troopers Association, Inc. (the Union). The parties had selected Dr. David M. Pincus as the arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties have submitted post-hearing briefs in accordance with the guidelines agreed to at the hearing.

III. Pertinent Contract Provisions

26.01-Permanent Shifts

Permanent shifts shall be established for all facilities working in a continuous operation. Shift assignments shall be made by the facility administrator, on the basis of seniority. In accordance with this Section, shift assignments will be permanent and no rotation of shifts will occur . . . Shift assignments will be bid in three (3) month scheduling blocks. Shifts shall be bid between forty (40) and thirty (30) days prior to the beginning of the new assignment.

27.03-Overtime Opportunities

It is understood and agreed that determining the need for overtime, scheduling overtime and requiring overtime are solely the rights of the Employer. The Employer will not change member's schedule or scheduled shift starting time to avoid the payment of overtime without the members' consent. Mandatory overtime, assigned by the Employer, shall be assigned to the most junior employee at the facility. In the event of multiple overtime assignments reverse seniority shall be used.

IV. Case History

The grievant, Sergeant Mark Groves, is a fourteen year veteran of the Ohio State Highway Patrol. He is currently assigned with the Patrol in the Aviation Section as a pilot. He is qualified as both a fixed wing and helicopter pilot.

Troopers assigned to Aviation, however, do not exclusively serve as pilots but are often used as uniform deputies like any other road trooper. Under most circumstances, a trooper working solely as a pilot would typically only fly 3.5 to 4 hours of actual flight time. The other time spent is in pre-flight and post-flight preparations, lunch, re-fueling and other required maintenance of the plane or helicopter. The rest of the shift could be as a road trooper.

Since February, 1999, the troopers in Aviation, working the night shift, had been working the road as their primary function and flying only when there was a request to fly. As of October, 1999, Aviation no longer worked the night shift. In November, 1998, the grievant was assigned to the 8:00 p.m. to 4:00 a.m. shift.

The parties' collective bargaining agreement has very restrictive language on the Employer's ability to unilaterally change a trooper's work schedule. Essentially, unless a trooper agrees to do so voluntarily pursuant to a HP-30 waiver form, schedules cannot be unilaterally changed outside of the three month scheduling bid blocks:

Permanent shifts shall be established for all facilities working in a continuous operation. Shift assignments shall be made by the facility administrator, on the basis of seniority. In accordance with this Section, shift assignments will be permanent and no rotation of shifts will occur . . . Shift assignments will be bid in three (3) month scheduling blocks. Shifts shall be bid between forty (40) and thirty (30) days prior to the beginning of the new assignment.

In addition, clear and unambiguous restrictions exist on the Employer's right to change a trooper's work schedule to avoid overtime:

It is understood and agreed that determining the need for overtime, scheduling overtime and requiring overtime are solely the rights of the Employer. The Employer will not change member's schedule or scheduled shift starting time to avoid the payment of overtime without the members' consent. Mandatory overtime, assigned by the Employer, shall be assigned to the most junior employee at the facility. In the event of multiple overtime assignments reverse seniority shall be used.

On November 11, 1998, the Employer received a request for a helicopter pilot to assist with an enforcement of a sting operation. The sting was to take place on November 13, 1998. The pilot would have to fly to Wooster, Ohio for a briefing at 3:00 p.m. and assist with the mission during the evening hours. It was unknown how long the pilot would be needed.

The grievant was scheduled to work at 8:00 p.m. on November 13, 1998, in accordance with his normal schedule. On November 12, 1998 at 9:00 a.m., the Employer called the grievant and advised him of the special detail and ordered him to report for duty on November 13, 1998 at 1:00 p.m. instead of his regular 8:00 p.m. shift.

The grievant reported to work on November 13, 1998 at 1:00 p.m. and handled the special assignment. He finished the detail at 10:00 p.m. and received one hour of overtime. He was not allowed to complete his regular 8:00 p.m. to 4:00 a.m. shift.

On November 13, three pilots existed that were on time off, Sergeant Mike Stein, Sergeant Randy Boggs, and Trooper William Watkins. All of these individuals were available for the November 13 assignment, but it would have required the Employer to pay overtime. Requiring the grievant to show up at 1:00 p.m. on November 13 would apparently eliminate or minimize the need for overtime for the assignment.

The Union thus filed a grievance claiming a violation of Articles 26.01 and 27.03 of the parties' Agreement. The Union alleges Article 26.01 has been violated because the Employer unilaterally changed the grievant's shift in violation of that article. It claims Article 27.03 has been violated because the grievant was ordered into work at 1:00 p.m. on November 13 instead of his normal 8:00 p.m. starting time that day for the sole purpose of avoiding overtime.

IV. The Merits of the Case

The Employer's Position

The Employer argues that Article 26.01 regarding shift assignments does not apply to the grievant because that language only applies to a

continuous operation. The Employer alleges that Aviation is not a continuous operation. The grievant therefore does not have an absolute contractual right to be scheduled in accordance with Article 26.01.

The Employer also argues that Article 27.03, regarding overtime opportunities, implicitly allows the Employer the right to change schedules. The Employer emphasizes that language restricts management's rights to change shifts *just* to avoid the payment of overtime. Emphasizing that the restriction on management's rights to schedule is just when it would effect overtime opportunities, the Employer infers that it can otherwise change a trooper's schedule if overtime is not going to be affected.

The Employer also points out the irony that the Union complains about its members not having enough time off and having their time off interrupted and yet insists that troopers on time off should have been called in here on an overtime basis to fill the assignment on November 13. The Employer made the most efficient assignment which required a trooper to come in early on his normal assigned shift without having to interrupt any other trooper's time off. In the final analysis, the Employer's decision to call the grievant in early and not interrupt other troopers' time off and to minimize overtime was a sound business decision.

The Union's Position

Articles 26.01 and 27.03 are clear and unambiguous. The Employer is restricted from unilaterally changing a trooper's work schedule outside of the bidding process. The Employer is further restricted from changing a trooper's schedule to avoid the payment of overtime.

The only way that an exception can be made to the restrictions of Articles 26.01 and 27.03 is for the grievant to execute a HP-30 form, which

is a trooper's waiver of a contractual right. No such HP-30 form was executed here. The Employer's decision was strictly unilateral and a breach of the parties' Agreement.

The Employer's argument that the grievant was the most qualified pilot for the assignment on November 13 is unfounded. The three other troopers were all equally qualified to perform the assignment. The only conceivable reason that the grievant was called in to work at 1:00 p.m. on November 13 instead of his normal 8:00 p.m. starting time was to avoid paying the grievant overtime or calling other troopers in and paying them overtime.

V. The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, and a complete and impartial review of the record, including pertinent contract provisions, and the parties' briefs, it is this Arbitrator's opinion that the Employer changed the grievant's work schedule on November 13, 1998 to avoid paying overtime. The Employer's conduct thus is a violation of Articles 26.01 and 27.03 of the parties' Agreement.

The strict limitations on the Employer's right to change a trooper's shift are clearly and unambiguously outlined in Article 26.01 of the parties' Agreement:

Permanent shifts shall be established for all facilities working in a continuous operation. Shift assignments shall be made by the facility administrator, on the basis of seniority. In accordance with this Section, shift assignments will be permanent and no rotation of shifts will occur . . . Shift assignments will be bid in three (3) month scheduling blocks. Shifts shall be bid between forty (40) and thirty (30) days prior to the beginning of the new assignment.

Article 26.01 establishes permanent shifts and requires that no unilateral changes can be made in a trooper's shift assignments outside of the three month scheduling blocks. In addition, also clear and unambiguous, is the restriction on the Employer's right to change a trooper's schedule to avoid overtime:

It is understood and agreed that determining the need for overtime, scheduling overtime and requiring overtime are solely the rights of the Employer. The Employer will not change member's schedule or scheduled shift starting time to avoid the payment of overtime without the members' consent. Mandatory overtime, assigned by the Employer, shall be assigned to the most junior employee at the facility. In the event of multiple overtime assignments reverse seniority shall be used.

The grievant's normal work schedule is from 8:00 p.m. to 4:00 a.m. On November 13, 1998, the Employer changed the grievant's work schedule by requiring him to report to work at 1:00 p.m. that day instead of 8:00 p.m. The grievant was ordered to work this schedule and no voluntarily waiver in accordance with an HP-30 was executed. The grievant's work schedule was thus modified in violation of Article 26.01 of the parties' Agreement.

The Employer's reason for changing the grievant's schedule on November 13 was because of a sting operation. The Employer was aware of the need for a pilot for this operation on November 11, 1998. On November 13, at least three other qualified pilots were available for the assignment but that would have required the Employer to pay overtime. In addition, if the grievant had been allowed to finish his normal 8:00 p.m. shift on November 13, after having reported to work at 1:00 p.m., the Employer would have incurred seven hours of overtime.

Hence, no matter how you cut it, the Employer was faced with the payment of overtime for the sting operation if other pilots were called in for the detail or if the grievant was called in early and allowed to complete his regular shift. This Arbitrator can draw no other reasonable conclusion from the facts and circumstances here that the Employer's sole motivation for changing the grievant's starting time on November 13 was to avoid payment of overtime to handle the sting operation.

Indeed, at the arbitration hearing, the Employer failed to offer one persuasive business reason for changing the grievant's work schedule on November 13. Although the Employer initially claimed that the grievant was the most qualified person for the sting operation, it ultimately conceded that three other qualified pilots were off duty and could have been called in on an overtime basis.

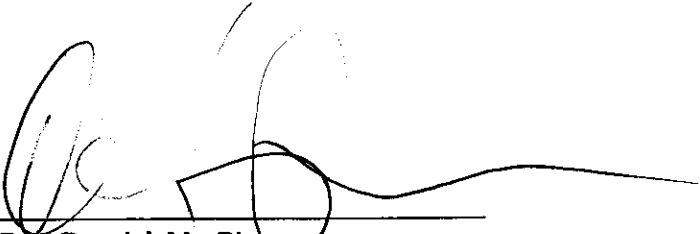
Neither does the Employer's argument that Article 27.03 implicitly allows the Employer to unilaterally change work schedules so long as it does not affect overtime have any merit. Article 26.01's unambiguous restrictions on the Employer's right to unilaterally change work schedules trumps any inferences that can be drawn from the Employer's interpretation of Article 27.03.

In summary, the Employer failed to offer any meaningful business justification as to why none of the other three troopers could not have been called in for the assignment on November 13 or as to why the grievant had to be sent home prior to the end of his normal shift because he was ordered to report to work early. The only rational conclusion from the facts and circumstances was that the Employer was trying to avoid the payment of overtime under any circumstances. The clear and unambiguous language of Articles 26.01 and 27.03 prohibits the Employer from doing so.

VI. The Award

The grievance is sustained. The grievant shall be awarded seven hours of regular overtime and the Employer is directed to refrain from the practice of changing schedules to avoid the payment of overtime in the future.

Moreland Hills, Ohio
February 15, 2000



Dr. David M. Pincus