Arbitration Decision and Award

Arbitrator: Jack Buettner
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In the Matter of:	)
	)
The Ohio State Troopers	)
Association, Inc.	)
	)
and	)
	)
The Ohio Department of Public	)
Safety Division of Ohio State	)
Highway Patrol	)

Case No.: DPS-2020-00338-01 and DPS- 2020-00337-15

Grievants: Sgt. Paul Mercer, Trp. Bryan Cox and Trp. Joshua Newman

Date of Meeting: October 19, 2022

Post Hearing Briefs Received: November 17 and 21, 2022

Date Decision Issued: December 16, 2022

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Appearances for the Employer:

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Joint Exhibits:

#1 Contract between The State of Ohio and the Ohio State Troopers Association, Unit 1 & Unit15, 2018-2021

#2 Grievance Trail
- a. Bryan Cox, et. al Grievance
- b. Bryan Cox Step 2 Response
- c. Paull Mercer Grievance
- d. Paul Mercer Step 2 Response

Union Exhibits:

#1 Payroll Entry Summary, Paul Mercer

#2 Calendar and Duty Assignment, January 5-18, 2020

#3 Ohio State Highway Patrol, Policy OSP-203.20-001: Division Weapons

#4 Payroll Entry Summary, Bryan C. Cox
#5 Ohio State Highway Patrol, Policy OSP-500.20: Overtime

#6 Contract between The State of Ohio and The Fraternal Order of Police Ohio Labor Council, Inc., Unit 1, 1986-1988

Management Exhibits:

#1 Opinion and Award of Arbitrator, Harry J. Dworkin, March 9, 1987

#2 Opinion and Award of Arbitrator, Robert Brookins, June 4, 1999

#3 Opinion and Award of Arbitrator, Dr. David M. Pincus, March 16, 2005

Background:

Sergeant Paul Mercer worked from 2:00 p.m. until 10:00 p.m. on January 15, 2020 and reported for his next shift consisting of in-service training at 8:00 a.m. on January 16, 2020, which equaled eighteen (18) hours in between shift starting times. Trooper Bryan Cox worked from 2:00 p.m. until 10:00 p.m. on January 13, 2020 and reported for his next shift consisting of in-service training at 8:00 a.m. on January 14, 2020, which equaled eighteen (18) hours in between shift starting times. Trooper Josh Newman worked from 2:00 p.m. until 10:00 p.m. on January 12, 2020 and reported for his next shift consisting of in-service training at 8:00 a.m. on January 13, 2020, which equaled eighteen (18) hours in between shift starting times. On January 30, 2020, they filed grievances on behalf of the Ohio State Trooper Association (hereafter referred to as "OSTA" or the "Union") regarding double back pay. The Ohio Department of Public Safety (hereafter referred to as the "Employer") denied the grievances.

The undersigned was duly appointed by SERB to serve as Arbitrator in the matter of the Ohio State Troopers Association, Inc. and the State of Ohio pursuant to OAC 4117-9-5(D).

As a result of phone conversations and email exchanges, the Parties agreed to hold an arbitration hearing on October 19th at the Office of the Ohio State Troopers Association (OSTA) in Columbus, Ohio. The Parties agreed that the issue was properly before the Arbitrator and agreed to waive service of the Fact Finder's report via overnight delivery and agreed upon service via email.

Issue:

Did the Employer violate Article 26.07 of the Collective Bargaining Agreement by denying the Grievants double back pay? If so, what shall the remedy be?

Union Position:

The Union contends that Article 26.07 of the Collective Bargaining Agreement was violated. It states, "At any time when the starting times of shifts worked by a member are less than twenty (20) hours apart, the members will receive one and one-half (1-1/2) times his/her hourly rate, including premium pay for second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article." (Joint Exhibit #1) Each of the three Grievants worked shifts with eighteen hours in between shift starting times as evidenced in Union Exhibit #2. None were given double back pay.

The Employer contends that Article 37, Educational Incentive and Training, must be considered in conjunction with Article 26.07. Article 37, however, was not grieved. Thus, the Union argues that the arbitrator is confined to the language of Article 26.07 since that is the only article alleged to have been violated. The Union further argues that the language of Article 26.07 is clear and unambiguous. Any time a member's starting time is less than twenty hours apart, he/she is entitled to time and a half for the second shift worked.

While the Employer cites previous arbitration decisions concerning double back payment, the Union asserts that those decisions are irrelevant. Article 20.08(5) states that, “the umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this agreement.” (Joint Exhibit #1) Thus, the arbitrator needs to look at the negotiated language of the CBA as it pertains to this arbitration and to a violation of Article 26.07.

The Union contends that Arbitrator Dworkin’s decision in 1987 was not based on the language in the CBA. His decision was based on the idea that training is excluded from double back payments, yet nowhere in the agreement is this stated. The two decisions that followed Arbitrator Dworkin’s decision were based on his conclusions.

The Union states that the CBA does include evidence in multiple places where an exclusion of a particular contractual right occurs. In this instant case, however, no exclusion was negotiated between the Parties regarding training and double back payment. The language has remained unchanged since 1986, and no attempts have been made to codify the arbitration decisions even though the Parties have negotiated for successor agreements twelve (12) times since 1986.

The Union argues that Ohio State Highway Patrol Policy OSP-500.20, Overtime, provides guidelines for overtime compensation earned by an employee. 500.20(B) addresses double backs (Union Exhibit #5). It states:

> See applicable labor agreement for compensation for bargaining unit employees. A shift worked immediately following a report back will not be considered a double back.

The only exclusion listed in policy and in Article 26.07 is for a shift worked immediately following a report back. No exception is made in the agreement or in policy that excludes training from double back pay. Thus, the Union argues that the language of the contract clearly and unambiguously supports the grievance.

Employer Position:

The Employer contends that the Union's interpretation of the contract is incorrect. The Grievants are not entitled to double back pay because of Article 37, Education Incentive and Training, when their shift is considered a training session. The Grievants reported for in-service training which consisted of classroom and hands on practical training.

The Employer argues that this has been a thirty-five year past practice that was established after a 1987 arbitration award by Arbitrator Dworkin. The language remains relatively unchanged, and the Union has not provided any evidence to prove they have attempted to modify the issue of training and double back pay through the negotiation process.

The Employer cites three opinions by three different arbitrators to support their case of past practice.

The first case was by Arbitrator Dworkin in 1986. He stated that Article 37, Educational Incentive and Training, specifically addresses and governs attendance at training programs. The double back provision is a section under Article 26, Hours of Work and Work Schedule, and is more general. Arbitrator Dworkin ruled that, "Article 37 establishes a separate system of compensation for officers attending training programs, and that such specific language prevails over general language including the "double back" provision" (Employer Exhibit #1, p. 26). Further, he stated that Article 37 governs training and that training is dealt separately and apart from the provisions applicable to permanent shifts.

The Employer also cited Arbitrator Brookins's decision in 1999 (Employer Exhibit #2). The Union attempted to apply Section 20.08, Arbitration, which states, "The umpire have no power to add to, subtract from or modify any of the terms of this agreement, nor shall the umpire impose on neither party a limitation or obligation not specifically required by the language of this agreement." (Employer Exhibit #1, p. 11). Arbitrator Brookins concurred with Arbitrator Dworkin's decision and found his decision to be "well

within the realm of reason" (Employer Exhibit #1, p. 14). He found the specific language of Article 37 controlling over Article 26. He cited past practice that had been implemented for twelve years at that time. Further, he noted that the Union failed to address the language in both Article 26 and 37 during negotiations.

Lastly, the Employer cited Arbitrator Pincus's award in 2005 (Employer Exhibit #3). The issue in the Pincus arbitration was the exact issue in the current arbitration. Arbitrator Pincus ruled that double back pay was unwarranted since training sessions are governed under Article 37. He stated, "This finding is further reinforced when one analyzes the contents of Article 37. Again, this provision is specifically applicable to training programs and must, therefore, prevail over Article 26, which deals with work schedules." Arbitrator Pincus also noted the importance of negotiating this issue during the collective bargaining process. The Union presented no evidence that it bargained a material change to this language that would require overturing the prior arbitration decisions.

The Employer argues that double back pay is paid in accordance to the CBA with regard to Article 26 when the employee is not training. Union Exhibit #1 shows Trooper Cisco being granted double back pay.

The Employer further argues that this issue should be addressed during the bargaining process rather than to use an arbitration to change a practice that has been implemented and consistently interpreted for thirty-five years. There has been no material change to the contract language that would justify a new interpretation.

Arbitrator's Decision and Award:

There is no dispute that the Grievant's scheduled shifts are less than twenty hours apart. There is no dispute that the day in question was a day of training. The issue is whether Article 26.07 was violated.

The Union contends that Article 26.07, Double Backs, was violated and that the language of the article is clear and unambiguous. It states:

> ***At any time*** (emphasis added) when the starting times of shifts worked by a member are less than twenty (20) hours apart, the members will receive one and one-half (1-1/2) times his/her hourly rate, including premium pay for the second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

This language allows only two (2) exceptions to the rule: local emergency situations and shifts worked immediately following a report-back. It clearly does not exclude in-service/training days.

The issue states a violation of Article 26.07, and this is the language that this Arbitrator must consider. The "plain meaning rule" states, "…if the words are plain and clear, conveying a distinct idea, there is no reason to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." [May, K. (Ed.). (2016). Elkouri & Elkouri: How Arbitration Works. Bloomberg BNA] Since the Grievants were not involved in a local emergency or working shifts following a report-back, the clear interpretation would be that they are entitled to double back pay.

The Employer and other arbitrators used Article 37 as a justification for not issuing double back pay. Article 37, Education Incentive and Training, was never referenced in the grievance. The arbitrators argued that Article 37 was a more specific article explicitly

addressing training days whereas Article 26.07 was a more general article. Therefore, Article 37 should prevail. A look at the language, however, does not show any reference to double back pay. Article 37.01 recognizes the befit of continued education and training. Article 37.03 addresses trading shifts to accommodate education and/or training and reimbursement of tuition. Article 37.04 addresses the triton, seminar, and conference fund. Article 37.05 addresses secondary education benefits for dependent children. Article 37.02 is the only part of the article that addresses compensation. It reads:

> In addition to the basic training provided at the Academy, advanced, specialized or individual training may be provided as needed. The reasons for training may include, but are not limited to, the overall improvement of skill and efficiency; changes in laws or duties and responsibilities; changes in equipment or technologies; and to qualify for positions of the greater responsibilities.
>
> The work day for all training programs shall be from 8:00 AM to 5:00 PM unless otherwise specified, with one (1) hour for lunch and time for breaks as the program allows. Employees assigned to attend training programs will adopt the schedule of the program.
>
> Employees required to participate in official duties or classes that extend beyond an eight (8) hour work day may be compensated according to the overtime provisions of this contract.
>
> Staying or sleeping overnight at a /particular location during a training program shall not give rise to the accumulation of overtime.
>
> Travel time to and from training programs shall be considered as on-duty hours and compensated appropriate.

The language clearly states that employees may be compensated for time over eight hours and for travel time to and from training programs. It clearly states that staying overnight during a program will not be considered for overtime. Certain parameters for training days are set, and nowhere in the article does it say that those hours will not be eligible for double back pay.

The Employer argues that the contract must reviewed as a whole and not just as one article. Numerous decisions have supported this idea. Elkouri and Elkouri states:

> The primary rule in construing a written agreement is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. [May, K. (Ed.). (2016). Elkouri & Elkouri: How Arbitration Works. Bloomberg BNA. p. 9-35].

Taking that into consideration and reviewing both articles, double back pay is a section under Article 26, Hours of Work and Work Schedules. Trainings are part of the work schedule, and employees are assigned to training. Time spent in training constitutes hours of work. Double back pay is neither included or excluded in Article 36. Consequently, the language in Article 26.07 seems plain and clear that double back pay would prevail.

If a person wanted to know if they qualified for double back pay, they would look to Article 26.07—Double Backs. As mentioned, there are only 2 exceptions to the rule. If said person worked a shift less than 20 hours after the previous shift and was not in the excepted categories, a reasonable person would interpret that to mean he/she would qualify for double back pay. Ohio State Highway Patrol Policy on Overtime, OSP-500.20, was approved on July 9, 2021 and it addresses Double Backs. It says to see applicable labor agreement for compensation which would logically be Article 26.07. Said policy makes one and only one exclusion for double back pay and that is for shifts immediately following a report back. Even if one were to review Article 37, a reasonable person would not find an exception for training days from double back pay.

Past practice has been argued by the Employer since this has been going on for thirty-five (35) years. In those thirty-five (35) years, however, three (3) grievances have been filed prior to said grievance. No mention was made as to how often this practice has actually occurred. While past practice is a very compelling reason to maintain the

current language, it is not definitive. It is recognized that, “In absence of a written agreement, ‘past practice’, to be binding on both Parties, must be (1) unequivocable; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice by both Parties.” [May, K. (Ed.). (2016). Elkouri & Elkouri: How Arbitration Works. Bloomberg BNA. p. 12-4]. The language is not unequivocable. This Arbitrator argues that it is clearly enunciated, and the practice has not been accepted by both Parties as evidenced by the multiple grievances and arbitrations. When a past practice has been enforced, an implied mutual agreement or “mutuality” is required. “‘Mutuality’ refers to the requirement that a past practice is binding on the parties only when the circumstances ensure that it had been understood and accepted by both as an implied term of the contract.” [May, K. (Ed.). (2016). Elkouri & Elkouri: How Arbitration Works. Bloomberg BNA. p. 12-6 & 7] Mutuality does not exist in this instant case.

This Arbitrator does not take lightly the decisions of the prior arbitrators. Arbitrator Dworkin’s decision dealt with several issues concerning double backs, not just its application to training days. Arbitrator Dworkin referenced the fact that Fact-Finder Graham recommended that double back pay language should apply to all situations that met the ‘double back’ definition as set forth in Section 26.05 (now Section 26.07). Yet his decision was contrary to that of Fact Finder Graham. In sum, he stated that since training programs are “under a separate subject heading, and the terms and conditions governing participation in training programs are specifically set forth, such provisions govern and control over other provisions of the agreement, including the ‘double back’ provision” (Employer Exhibit #1). He further argued that, “The manner of compensation of bargaining unit employees attending training programs are dealt with separately and apart from the provisions applicable to permanent shifts.” This Arbitrator would argue that only certain aspects of compensation are dealt with in Article 37.02, and double back pay is not included nor excluded.

Arbitrator Brookins’s decision came in 1999. The issue was whether troopers assigned to regular shifts within twenty-four hours after starting training shifts are entitled to

"double back" pay. This is the converse of the instant issue whereby employees started training shifts after their regular shifts. Arbitrator Brookins admitted, "…the Arbitrator is not inclined to discard or even substantially amend a twelve-year past practice, though, on the surface, it seems to contradict the articulated purpose of Article 26.05" (Employer Exhibit #2). Arbitrator Brookins upheld the decision of Arbitrator Dworkin for the following reasons: (1) Arbitrator Dworkin's 1987 Opinion draws its essence from Articles 26.05 and 37.04; (2) is demonstrably rational and hence, does not violate Article 20.08. Arbitrator Brookins did state that, "…Arbitrator Dworkin's interpretation is by no means the only rational interpretation of the relationship between Articles 37 and 26.05."

Arbitrator Dworkin made a distinction between "training" and "testing". Training increases troopers' knowledge or skill; testing verifies troopers' level of proficiency, aptitude, ability or qualifications. Arbitrator Brookins applied those same standards. His award was two-fold. Troopers who attended sessions of either people skills training or Forward Looking Infrared Training (FLIR) training did not receive double back pay as these were trainings intended to increase the knowledge and skills of troopers. Arbitrator Brookins sustained the grievances of troopers, awarding them double back pay, who attended civil disturbance training, which is intended to ascertain the proficiency levels of a trooper.

Arbitrator Pincus's opinion and award were similar to that of the other arbitrators. He reviewed the application of Article 26.05 within the context of Article 37 and determined that employees are not entitled to double back pay while attending training sessions. He, too, made the distinction between training and testing.

While the previous arbitrators concurred on the distinction between training and testing, this Arbitrator fails to see how it impacts the clear and unambiguous language of Article 26.07. They have made these cases about "training" versus "testing", a distinction not made in Article 37. They have made the cases about Article 37. This Arbitrator by no means is diminishing the importance of in-service and training or contesting the Employer's ability to schedule its employees. If, however, training occurs less that

twenty hours after a scheduled shift, this Arbitrator believes double back pay should be awarded according to 26.07. Again, it states:

> ***At any time*** (emphasis added) when the starting times of shifts worked by a member are less than twenty (20) hours apart, the members will receive one and one-half (1-1/2) times his/her hourly rate, including premium pay for the second shift worked except in local emergency situations.

Based on the entire record including witnesses and their testimony and after considering the exhibits submitted by the Parties, this Arbitrator finds that the Ohio Department of Public Safety Division of Ohio State Highway Patrol did violate Article 26.07 of the Collective Bargaining Agreement. The Union's grievance is sustained. The Grievants are awarded double back pay for the day in question.

CERTIFICATE OF SERVICE

The foregoing report was delivered via email on this the
the 16th day of December, 2022, to

Elaine N. Silveira, Esq.
esilveira@ohiotroopers.org

and

Lt. Kaitlin Fuller
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