

## **OPINION AND AWARD**

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO STATE TROOPERS ASSOCIATION

AND

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

Grievance 2015-01821-00 (Pay – Cleveland Detail)

Date of Hearing: October 11, 2016

Place of Hearing: Gahanna, Ohio

Arbitrator: Sherrie Passmore

Date of Award: December 30, 2016

### **APPEARANCES**

Advocate for the State: Lieutenant Cassandra Brewster

Advocates for OSTA: Herschel M. Sigall, Esq. and Elaine Silveira, Esq.

## **INTRODUCTION**

This arbitration arises pursuant to the collective bargaining agreement ("Agreement") between the parties, The Ohio Department of Public Safety, Division of State Highway Patrol ("Employer" or "Division") and The Ohio State Troopers Association ("Union"). Sherrie Passmore was appointed as the Arbitrator under the authority of the Agreement.

A hearing was held on October 11, 2016. Both Parties were represented by advocates who had a full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make arguments. Post-hearing briefs were timely filed on November 22, 2016.

## **ISSUE**

Did the Employer violate Article 27 and 44 of the collective bargaining agreement when it did not approve Stand-By Pay, Overtime and/or Double Overtime on a Holiday for units assigned to work the Cleveland Detail (Verdict)? If so, what shall the remedy be?

## **RELEVANT PROVISIONS OF THE AGREEMENT**

### **ARTICLE 27 - OVERTIME**

#### **27.01 Overtime and Compensatory Time**

Because of the unique nature of the duties and emergency response obligations of the Division, management reserves the right to assign employees to work overtime as needed.

1. Any member who is in active pay status more than forty (40) hours in one week shall be paid one and one-half (1.5) times his/her regular rate of pay including shift differential if ordinarily paid for all time over forty (40) hours in active pay status. The regular rate of pay includes all premium pay routinely received.

### **27.05 Standby Pay**

Whenever an off-duty employee is placed on a standby basis by the Employer, he/she will be paid one-half of his/her regular rate of pay for all hours that he/she is actually on standby.

An employee is entitled to stand-by pay subject to the following: 1) the employee is on direct notice of the requirement to be available to respond; 2) the Employer directs that the off-duty activities are specifically restricted; 3) the employee must immediately respond to any summons from the Employer with the consequence of discipline for failure to respond/report.

## **ARTICLE 44 - HOLIDAYS**

### **44.01 - List of Days**

Members of the bargaining unit will have the following holidays:

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4. Memorial Day - (last Monday in May)

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### **44.02 Holiday Pay**

Members are automatically entitled to eight (8) hours of holiday pay regardless of whether they work on the holiday. Members who are on a four-day ten-hour schedule are entitled to eight (8) hours of holiday pay regardless of whether they work on the holiday. Compensation for working on a holiday is in addition to the automatic eight (8) hours of holiday pay at regular rate and shall be computed at the rates prescribed in Section 44.03 of this Article.

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## **BACKGROUND**

In May of 2015, Cleveland City Police Officer \_\_\_\_\_ was tried on two counts of voluntary manslaughter in the deaths of two civilians following a vehicle pursuit. Cleveland Police Chief Calvin Williams requested the Ohio State Highway Patrol assist the City of Cleveland should civil unrest occur following announcement of the verdict.

The Patrol agreed to this request and developed detailed plans for providing assistance. Planning included determining how many units would be needed, what their work shifts would be, and how troopers would be relieved of their duties by

the next shift of Troopers. Logistical items such as lodging and food were also identified and planned for.

Troopers were deployed for this detail from May 23, 2015 through May 25, 2015. Meals were provided for Troopers working the detail and lodging was provided for Troopers who lived more than 35 miles from the detail due to the long hours they were working.

## **POSITIONS OF THE PARTIES**

### **Position of the Union**

The Union's position is that Troopers who were put in lodging and not permitted to go home at the end to their scheduled shifts were in active duty status for all hours present at the deployment until released by the Employer. They, therefore, should have been paid overtime for the hours between shifts.

The Union suggests that a fair test for determining if an employee is on duty for purposes of pay is set forth in US Code of Federal Regulations (CFR) § 551.431. Based on that test, the Union argues that Troopers were on duty for the entire time deployed because they were ordered to report to the Cleveland Detail in their Patrol vehicles, ordered not to return home until released, and were restricted from using their Patrol vehicles for personal reasons.

The Union points out that the only time prior to the Cleveland Detail that Troopers were ordered to be present on a round the clock basis was during the Lucasville riots of 1993. During that deployment, the troopers slept at the Lucasville facility and were paid for all hours present.

It is also the Union's position that Troopers who worked the detail that were allowed to drive home at the end of their shifts were denied stand-by pay in violation of the Agreement for all hours in between their shifts.

### **Position of the Employer**

The Employer maintains that the Troopers who worked the Cleveland Detail were not eligible for overtime or stand-by pay for off duty hours between shifts, which included hours spent sleeping in their hotel rooms or at home. The Employer argues that the negotiated conditions under Section 27.05 of the Agreement for stand-by pay were not met.

The Employer disputes the Union's contention that patrol cars were not available for Troopers to use in their off duty hours. A work rule does state that Division equipment shall not be used except in the performance of official duties. However, it was acceptable on an extended detail such as this for Troopers to use patrol cars in their off duty hours with permission in order to get something to eat or pick up needed items from a local store. The Employer also points out that Troopers had other means of transportation to local venues such as Ubers, taxis, local buses, and walking.

The Employer submits that all Article 27 overtime and Article 44 double overtime on a holiday were approved and paid according to the Collective Bargaining Agreement. It contends no evidence or testimony was provided showing that the Employer improperly denied any overtime.

The Employer takes issue with the Union's comparison of the Cleveland Detail to the Lucasville Riots. In the Riots, the Troopers were sleeping within the prison and subject to recall at any given time, which the Employer argues obviously placed them in standby status.

## **DISCUSSION**

The basic issue presented by this case is whether the Troopers assigned to the Cleveland Detail between May 23 and May 25, 2015 should have been paid for hours at the deployment between shift assignments. The Union alleges that the units that stayed at a hotel location selected by the Employer were entitled to overtime and/or double overtime for holiday pay for time between their shift assignments. The Union contends the other units were entitled to stand-by pay for those hours. The record does not support a finding that those Troopers were eligible for such pay under the terms of the Agreement.

Article 27 of the Agreement governs overtime. Section 27.01 provides that a member "in active pay status for more than forty (40) hours in one week" shall be paid overtime. Article 44, Holidays provides for double overtime for holidays worked, including Memorial Day, which was one of the days of the Cleveland Detail. For purposes of overtime, Section 27.02 defines active pay status as "the conditions under which an employee is eligible to receive pay". Section 27.05 defines the conditions under which an employee is eligible for stand-by pay.

The Union argues that Troopers who were not able to go home during the deployment should have been considered on duty/in active pay status between shift assignments and, therefore, paid overtime.

The Troopers were not on duty in any traditional sense between shift assignments. They were completely relieved from duty and free to use that time for their own purposes. Both witnesses for the Employer and the Union concurred that they could have engaged in activities such as going out to eat, seeing a movie, or even drinking a beer. Some Troopers did engage in such activities between shifts.

The Union does not point to any provision in the Agreement to support its contention the Troopers were on duty between shifts. Instead, the Union suggests that tests under CFR § 551.431 of the Fair Labor Standards Act (FLSA) should be used for making that determination. CFR § 551.431 defines special situations under which time spent in standby or on call status should be considered on duty for purposes of determining hours of work under the FLSA. Application of that provision is inappropriate in this case.<sup>1</sup> In essence, the Union is asking the Arbitrator to interpret and apply tests under the FLSA for purposes of determining when Troopers are eligible to receive pay under the Collective Bargaining Agreement. No express provision of the Agreement provides that the FLSA is to be incorporated therein. Moreover, the parties have negotiated a test for determining

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<sup>1</sup>Even if the CFR §551.431 tests related to standby duty were used, the result would not be different. For hours in standby to count toward hours worked for FLSA overtime purposes, the CFR states that limitations on the employee's activities must be so substantial that he cannot use the time effectively for his own purposes. That was not the case here for the reasons noted above.

The CFR goes on to state “[a] finding that an employee’s activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities....” Putting Troopers in lodging who had worked long hours and lived far away falls squarely in this category. This was done because it would have been unsafe for them to drive home and back and still be ready for their next shifts.

when Troopers will be paid for being on standby and call-in pay has never been at issue in this case.

Under the test negotiated by the parties, the Troopers assigned to the Cleveland Detail were not eligible for stand-by pay. Section 27.05 of the Agreement provides that for an off-duty employee to be entitled to stand-by pay, three conditions must be met: 1) the employee is on direct notice of the requirement to be available to respond; 2) the Employer directs that the off-duty activities are specifically restricted; 3) the employee must immediately respond to any summons from the Employer with the consequence of discipline for failure to respond/report. The Union did not carry its burden of proving that those three conditions were met.

It was not proven that Troopers assigned to the Cleveland Detail were put on notice of a requirement to be available to respond between shifts or told they were subject to discipline if they failed to report or respond. Three Union witnesses testified they were on standby at the detail, but none of them testified they were told they were subject to discipline if they failed to report or respond. Two admitted they had not been given any direct notice to be on standby. Trooper Kyle Mayle could not name a supervisor who specifically told him he was in standby. He conceded on cross-examination that his belief he was on standby might have just been based on "chatter" from the Troopers he was working with. Trooper Keith McCintock testified it was just his "impression" he might be called back out and was never told he was in standby status.

Major Chad McGinty, who was responsible for the overall operations of the detail, testified he did not place any Troopers in standby status nor did he instruct

any of his commanders to do so. He further testified there was never any discussion of placing Troopers on standby who had already worked a shift of the detail. If additional Troopers were needed, Troopers not already assigned to the detail would have been called from patrol posts within the Cleveland District and surrounding districts. Major McGinty further testified he did not order Troopers to be available to respond during their off-duty hours. At the end of each shift, Troopers were just given a time to report back to the detail the next day.

Placing the Troopers assigned to the detail in standby status was not included in the Division's response plan. Captain Chris Zurcher, who authored the memo outlining that plan, testified there was not even any discussion of the Troopers working the detail being placed on standby. If there had been an intent to recall those Troopers, the issue of standby would have been addressed in the plan. He explained that if additional resources were needed, the National Guard was on standby, which was noted in the Division's response plan. If additional Troopers were needed, he confirmed that Troopers would have been called to respond from the Cleveland District and surrounding districts.

It was also not proven that the Division directed that the off duty activities of the Troopers be restricted. Major McGinty, Captain Zurcher, and Captain Swindell all testified the Troopers were free to do what they wanted in their off duty hours at the hotel. Union witnesses agreed with that testimony and agreed that they could have gone to a bar or a movie or gone out to get something to eat. Trooper Jack Tibbs, who was assigned to the Cleveland Detail and provided a hotel room, testified

he did in fact purchase and drink a beer during his off duty hours. He testified he would not have consumed alcohol if he was in standby status and knew he was not.

Troopers' movements were only limited due to geographical restrictions. Command staff explained that lodging was provided to Troopers because they had worked extended hours and lived long distances away. They could not have safely driven home and back, and been ready to report for their next shift. Sergeant Chris Colbert, a Union witness, testified he worked 17 hours on the first day of the detail, 18 hours the second day, and was provided a hotel room for the duration. He agreed that it would have been unsafe for him to drive home after working such long hours and not physically possible.

The Employer did not restrict Troopers in their off duty hours by requiring them to drive patrol vehicles to the detail. Even though the Troopers did not have access to their own personal vehicles and may not have had access to patrol vehicles during their off duty hours, it is undisputed other means of transportation were available such as Ubers, taxis, buses and walking.

Testimony that Troopers were paid for all hours of deployment at the Lucasville Prison riots did not establish that Troopers assigned to the Cleveland Detail are eligible to be paid for all hours of their deployment. Sufficient evidence was not provided to determine the basis on which Troopers assigned to the Lucasville riots were paid for all hours of deployment. The Agreement in effect at that time is not in the record and given that the Troopers were required to sleep at the prison during the Lucasville riots, it appears likely that those Troopers were placed on standby.

In conclusion, Troopers assigned to the Cleveland Detail were not eligible for pay for hours at the deployment between assigned shifts. The Troopers were not eligible for overtime because they were not on duty during those hours. They did not meet the conditions negotiated in the Agreement to be eligible for stand-by pay.

**AWARD**

For the reasons stated above, the grievance is denied.

A handwritten signature in black ink, reading "Sherrie J. Passmore". The signature is written in a cursive, flowing style.

Sherrie J. Passmore  
Arbitrator

December 30, 2016