

OFFICE OF THE ARBITRATOR

December 3, 1986

In the Matter of the Arbitration between:

STATE HIGHWAY PATROL	)	
DEPARTMENT OF HIGHWAY SAFETY	)	
State of Ohio	)	
	)	
and	)	OCB Grievance No. 86-24
	)	
FRATERNAL ORDER OF POLICE,	)	
OHIO LABOR COUNCIL, INC.	)	
Tpr. [Grievant], et al.	)	

APPEARANCES

For the State:

Capt. John M. Demaree	Executive Officer, O.S.P.
Major Robbie K. Hartsell	Academy Commandant, O.S.P.
Major Thomas W. Rice	Personnel Commander, O.S.P.
Lt. Darryl L. Anderson	O.S.P.
Peter Coccia	Ohio Dept. of Highway Safety
Marlaine Eblin	Labor Relations Spec. O.C.B.
Michael J. D'Arcy, Jr.	Observer

For the Union:

Paul L. Cox, Esq.	Attorney & Executive Director
Edward F. Baker	Staff Representative
[Grievant]	Grievant

Arbitrator

Earl M. Curry, Jr.

BACKGROUND

The instant arbitration arose as the result of a class grievance filed by the Fraternal Order of Police, Ohio Labor Council, Inc. (the "F.O.P." or "Union") pursuant to Section 20.04 of the parties' Agreement, on behalf of Trooper [Grievant] (the "Grievant"), and eleven others similarly situated, protesting the decision of the Ohio State Highway Patrol (the "State" or "Patrol") of not allowing them to work the 1986 Ohio State Fair Detail. When the parties were unable to resolve the matter between themselves it was referred to arbitration pursuant to Section 20.07 of the Agreement.

Trooper [Grievant] statement of the grievance on the grievance form is as follows:

"There are no weight-height standards for the Ohio State Highway Patrol, and I have been denied the ability to work overtime at the Ohio State Fair for being "overweight". I am still being used for special details at Post level RE: A F.F.A. speech presentation before 150 people on June 10, 1986. Remedy Requested: To be placed on the Fair detail for 52 hours at \$19.92 an hour and/or receive \$1,035.84 in pay."

STATEMENT OF FACTS

The facts of the instant matter are not in dispute. In May, 1986 Major R. K. Hartsell, the State Highway Patrol Academy Commandant and commander of the State Fair Detail, sent a memorandum to all District/Section Commanders of the State Highway Patrol informing them of the dates of the 1986 Ohio State Fair and the personnel allocation for each District. The memorandum stated the following:

The 1986 Ohio State Fair is scheduled for Friday, August 1 through Sunday, August 17, 1986. The first half of the detail will start on Wednesday, July 30 for supervisors and on Thursday, July 31 for troopers. The second half of the detail will begin on Saturday, August 9 for all second half units. The personnel allocation will remain the same as last year's detail.

Attached you will find a detailed personnel allocation for each District, as well as the uniformed supervisors and plainclothes units who have been selected to work the detail. Please notify the Academy as soon as possible of any supervisor or plainclothes officer who is unable to work the detail.

Survey your troopers to determine who wants to work the detail. Positions on the detail should be selected on a voluntary basis, offered by seniority at each post. If Districts cannot meet their allocations, additional assignments should be made on a reverse seniority basis. Post Commanders should document the acceptance and/or refusal of overtime. Overtime hours for the first half of the detail will be 52 hours; 48 hours for the second half.

Additionally, shift preference by seniority will be considered for detail assignments. Units submitted for the detail should indicate their 1st, 2nd and 3rd shift choice based on the following shifts: DAY (starting at 6A, 7A, 8A, 9A, or 10A); AFTERNOON (starting at noon, 1P or 2P); or NIGHT (starting at 6P, 7P or 8P).

Finally, units with obvious weight or other appearance problems should not be recommended. Questions concerning weight limits should be addressed by contacting this office.

Submit your recommendations in accordance to your respective manpower allocation. Include in your recommendation one alternate per half from each post. Please submit your recommendations to this office, by IOC, by Friday, May 23, 1986.

DETAIL ALLOCATION

	FIRST HALF (JULY 31 - AUG 9)			SECOND HALF (AUG. 09-17)			TOTAL (%)
	P.C.	SUPV.	TFRS.	P.C.	SUPV.	TFRS.	
GHQ	7	7	6	6	7	6	39 (41%)
D-1	0	0	12	1	1	11	25 (23%)
D-2	0	0	11	0	1	10	22 (22%)
D-3	1	1	11	1	1	11	26 (22%)
D-4	0	1	12	1	1	12	27 (22%)
D-5	1	1	9	1	0	10	22 (22%)
D-6	1	1	11	2	0	12	27 (21%)
D-7	1	1	10	0	1	10	23 (22%)
D-8	1	2	11	0	2	11	27 (22%)
D-9	1	1	8	1	1	8	20 (22%)
CLEVE.	1	0	0	1	0	0	2 (29%)
TOTALS	14	15	101	14	15	101	260 (21%)

Total - 130

Total - 130

GRAND TOTAL - 260

(\*) - Denotes the percentage of uniformed personnel of the district or section committed to the detail.

P.C. - Denotes Plainclothes detail unit.

The Grievant was one of twelve officers who volunteered for this detail and had sufficient seniority at their post to serve but were turned down following a review and evaluation of their weight and general physical condition. The officers turned down for the 1986 State Fair detail were as follows:

<u>Name</u>	<u>Rank</u>	<u>Unit/Post/Dist</u>	<u>Ht</u>	<u>Wt</u>	<u>Allowed (+10%)</u>	<u>Over</u>
Tpr.	1050	48 1	5'11"	250	211	+39
Tpr.	86	DHQ 1	6'1"	229	222	+7
Tpr.	1352	32 1	5'9"	203	199	+4
Tpr.	1399	32 1	5'11"	219	211	+8
Tpr.	1384	85 3	5'11"	253	211	+42
Tpr.	513	52 3	6'0"	252	217	+35
Tpr.	1273	DHQ 4	5'11"	236	211	+25
Tpr.	408	79 7	6'3"	249	234	+15
Tpr.	802	7 7	5'11"	220	211	+9
Tpr.	468	9 8	5'10"	221	205	+16
Tpr.	1201	71 9	6'0"	245	217	+28
Tpr.	637	5 9	6'5"	252	245	+7

Prior to the start of the State Fair, Major Bartsell sent a second memorandum to all commanders regarding personnel assignments for the fair. In relevant part it states:

It is our objective to have officers assigned to the Detail who are in good health and physical condition, and project a professional appearance. In an effort to accomplish this, officers volunteering for the detail were screened utilizing the attached height/weight criteria. Those officers who did not meet the criteria or were questionable have been discussed with you on an individual basis.

The attached information is provided for District use so you may follow up to insure officers assigned from your District will meet the criteria upon arrival to the detail. If any officer will be unable to meet these standards, contact this office with a recommended replacement.

PROPORTIONATE HEIGHT AND WEIGHT CHART  
1966 STATE FAIR DETAIL

Height	Men_(Maximum_Allowed)	Women_(Maximum_Allowed)
		133
4-10	150	138
4-11	154	142
5-0	157	146
5-1	164	153
5-2	167	157
5-3	173	164
5-4	176	169
5-5	180	176
5-6	186	180
5-7	190	187
5-8	196	193
5-9	199	198
5-10	205	204
5-11	211	210
6-0	217	216
6-1	222	221
6-2	228	227
6-3	234	233
6-4	239	239
6-5	245	244
6-6	251	250
6-7	257	256
6-8	262	261
6-9	268	267
6-10	274	273
6-11	281	279
7-0	285	

Height will be measured in stocking feet. Any height over 1/2 inch will be counted as the next greatest inch. Any height less than 1/2 inch will be counted as the even inch.

All measurements should be taken in Class 'C' uniform, without shoes and without Sam Brown belt.

ISSUE

Did the State violate the Collective Bargaining Agreement by not permitting the Grievant and others similarly situated to work the Ohio State Fair due to his (their) weight and/or physical conditions? If so, what shall the remedy be?

(14) Determine the management organization, including selection, retention, and promotion to positions not within the scope of this Agreement.

## ARTICLE 20 - GRIEVANCE PROCEDURE

### 20.01

The State of Ohio and the F.O.P. Ohio Labor Council recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievances. Such procedure shall be available to all bargaining unit employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure.

### 20.04 Grievant

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement.

Where a group of bargaining unit members desire to file a grievance involving an alleged violation which affects more than one member in the same way the grievance may be filed by the F.O.P. Ohio Labor Council provided that at least one member so affected signs the grievance. The title on the grievance shall bear the name of the one affected member plus the designation et al. Class grievance shall be filed within fourteen (14) days of the date on which any of the like affected grievants knew or reasonably should have had knowledge of the event giving rise to the class grievance. Class grievances shall be initiated directly at the third step of the grievance procedure.

The bargaining agent shall not attempt to process as grievances, matters which do not constitute an alleged violation of the Agreement.

### 20.07 Arbitration

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#### 5. Arbitration Decisions

The arbitrator shall render his/her decision as quickly as possible, but in any event, no later than thirty (30) days after the conclusion of the hearing unless the parties agree otherwise. The arbitrator shall submit an

PERTINENT CONTRACT PROVISIONS

ARTICLE 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

- (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
- (2) Direct, supervise, evaluate, or hire employees;
- (3) Maintain and improve the efficiency and effectiveness of governmental operations;
- (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote or retain employees;
- (6) Determine the adequacy of the work force;
- (7) Determine the overall mission of the employer as a unit of government;
- (8) Effectively manage the work force;
- (9) Take actions to carry out the mission of the public employer as a governmental unit;
- (10) Determine the location and number of facilities;
- (11) Determine and manage its facilities, equipment, operations, programs and services;
- (12) Determine and promulgate the standards of quality and work performance to be maintained;
- (13) Take all necessary and specific action during emergency operations situations;



account for the fees and expenses of arbitration. The arbitrator's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issues submitted to arbitration. The arbitrator's decision shall be final and binding upon the Employer, the F.O.P. Ohio Labor Council and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the arbitrator as set forth in this Article. The grievance procedure shall be the exclusive method of resolving grievances.

6. Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

ARTICLE 40 - PHYSICAL FITNESS AND WELLNESS POLICY

The Association and the Employer recognize the need for members of the bargaining unit to be in good physical condition. The Association, the Highway Patrol and the Office of Collective Bargaining will jointly develop a systematic approach to physical fitness. This approach will have primary emphasis on the maintenance of good health of the employees, but will provide systematic standards for progressive discipline for the Patrol to utilize if physical fitness is not maintained. This policy will be implemented no later than January 1, 1987 unless the date is mutually extended by the parties.

CONTENTIONS OF THE PARTIES

Union's Contentions

The Union contends that the Patrol is attempting to unilaterally impose a physical fitness standard upon all volunteers for special duty in violation of the Agreement. It argues that under Article 40, quoted above, the parties are still in the process of negotiating a physical fitness policy and that until

they do the Patrol cannot impose its own policy. It argues that the standard applied by the Patrol was arbitrary at best; that the Patrol was interested only in the appearance of the officers working the detail and that they used a height/weight standard to screen out officers who would not, in the Patrol's opinion, have a good appearance. It argues that the actual physical condition of the officers working the fair was not considered during the selection process and was only an afterthought. It argues that the height/weight standard used was not agreed to by the Union and clearly violates the Agreement. It points out that the Grievant has worked other special details where appearance is important i.e., the Jamboree in the Hills at St. Clairesville in July, 1986, and two recent speaking engagements. Further, it argues that troopers working the Fair Detail rarely work more than three to four hours without a break and given the number of troopers working the Fair there is always a relief nearby.

It asks, accordingly, that the grievance be sustained and that the Arbitrator declare that the Patrol's policy violates Article 40 of the Agreement and establishes a height/weight standard not in accordance with the Agreement.

It further asks that the class of grievants be paid all monies they would have earned had they been allowed to work the 1986 State Fair Detail.

#### State's Contentions

The State denies that it has violated the Agreement as alleged by the Union. It argues that management had the right to require officers selected to work the Ohio State Fair to meet minimal

physical fitness standards. It argues that it has this right under the management rights provision of the Agreement. It argues that officers selected to work the Fair Detail were chosen after much consideration was given to their overall fitness, which involved a review of their physical history and, in most cases, a thorough review of their Comprehensive Fitness Evaluation, not just their weight. The unfavorable consideration to work the State Fair in regard to the Grievants was not based on any one single determinate factor, it argues.

It argues that it was management's objective to have officers assigned to the Fair Detail who were in good health and physical condition. Officers with weight and other physical problems certainly run a higher risk of developing additional physical problems should they be subjected to the added physical demands required of those who work the Fair Detail. It points out that unlike the normal duty assignment the Fair Detail called for a 12-hour shift for either nine or ten days in a row, that the officers would be on their feet most of this time and that the weather could be very warm during August, the time of the State Fair. It argues that past experience supports the fact that the possibility of officers experiencing knee, leg and foot problems from the inordinate amount of walking required on Fair Detail is increased. Further, water weight loss and nausea, due to high temperatures has also been a problem in the past. All of these conditions, it argues, are more likely to affect an individual who is overweight and not physically fit and healthy. It argues that

all of the Grievant's physical condition qualified them as high risk candidates.

In regard to Grievant , it argues that his physical condition certainly qualified him as a high risk candidate. Not only was it determined that he was overweight, but during the Graded Exercise Test he took on May 5, 1986, his oxygen consumption was in the "poor" category. It was also noted on this test that he had borderline high blood pressure.

Further, the test indicated that his percentage of body fat was in the "poor" category. His cholesterol level was borderline "good"; his triglyceride level was "poor"; his high density lipoprotein and cholesterol ratio was "poor" which would be indicative of someone with a higher risk for cardiovascular disorders. All of these factors, it argues, were taken into consideration before a final decision on the Grievant's fitness to work the Fair Detail was made.

Further, being selected to work the Fair Detail is not a right but a privilege, it argues, which is extended to those officers who volunteer and are in good health and physical condition. This privilege was extended to officers on the basis of seniority not because the Agreement required it but because it was the most equitable and fair way to assign officers. It argues that the Fair Detail selection was not made in a capricious, arbitrary or discriminatory manner but was made with the best interest of the individuals in mind and in accordance with Article 4, whereby Management has the exclusive right to "[d]etermine the overall methods, process, means, or personnel by

which governmental operations are to be conducted."

In the instant case, the duties involved are not the routine, everyday assignment, but a once-a-year special duty detail whereby officers are not only subjected to constant public scrutiny, but, more importantly, to physical demands which at times taxes even the most physically fit individuals.


It asks, accordingly, that the grievance be denied.

#### DISCUSSION

In the opinion of the Arbitrator the grievance must be denied. The Union has argued that the State has violated the provisions of Article 40. The Arbitrator cannot agree. All that Article 40 states is that the parties will, prior to January 1, 1987, "jointly develop a systematic approach to physical fitness." Not having done so at the time the instant dispute arose, clearly the management right provision of the Agreement prevails. Paragraph 4 of Article 4 clearly places in management the exclusive right and authority to "[d]etermine the overall methods, process, means, or personnel by which governmental operations are to be conducted;" ... (emphasis added). The assignment of the Fair Detail clearly falls within this provision and is a management prerogative, so long as it was not done in an arbitrary, capricious or discriminatory manner. In the instant case the record clearly indicates that the selection process used to select the Fair Detail was not arbitrary, capricious or discriminatory.

AWARD

The class grievance is denied for the reasons stated just above.

  
Earl M. Curry, Jr.  
Arbitrator

December 3, 1986  
Cleveland, Ohio