OCB Award No: 20

OCB Grievance No: 686-608

Union: FOP

Department: Highway Safety

Arbitrator: Smith

Award Date: 87/2/20

IN THE MATTER OF :

The Ohio State Highway Patrol

and

The Fraternal Order of Police
The Ohio Labor Council,Inc.

ARBITRATOR'S REPORT
AND
AWARD

OCB No.86-608

HEARING: January 9, 1987, Columbus, Ohio

FOR THE EMPLOYER: Major Thomas W. Rice and Witnesses

FOR THE UNION: Mr. Paul L. Cox and Witnesses

ARBITRATOR: George L. Smith, Jr.

THE GRIEVANCE: The grievance, dated 8/7/86, and signed by the grievant Trooper Henry P. Lipian, states, "A request was made by me for 80 hours of paid vacation for military leave. I provided written notification of the leave prior to receiving my orders. On the very day that I received an advanced copy of my orders, I brought a copy of the orders to my Post Commander. I was advised that my request for military leave would be denied based on the fact that my orders were not in 60 days in advance. I was advised that if I needed to report for these active duty orders, I would be required to use my annual vacation time. The mandatory use of vacation for military duty is strictly prohibited by federal law.

"In the last 6 1/2 years that I have been a member of the Division, I have never received an advanced copy of military orders in advance of the reporting date. I have always provided written notification (and inclusion of dates in the vacation schedule), and then once the orders arrived, I immediately provided them to my Post Commander. I have never, in the past, been denied the use of military leave due to the fact that military orders were not in 60 days in advance. As a matter of fact, I served two weeks of active duty during the month of July 1986. The orders that I received for that particular active duty were not received by the Division 60 days in advance, and the orders were allowed to be served with paid military leave. Suddenly for this period of active duty, I have been advised that I will not be allowed to attend unless I use annual vacation.

"The active duty for which I have applied commencing August 9, 1986 is for attendance of Officer Candidate School in Yorktown Virginia. Although I made a voluntary application for this school all the way back in 1985, I was only recently advised that my orders were cut and issued from Headquarters Washington, D.C. Despite the fact that the application was voluntary, I am never the less (sic) ordered to attend the school. The Officer Candidate School is the last school for the entire year of 1986, and no further schools are anticipated until the summer of 1987.

"According to Civil Service Rules, the 176 hours of military leave is allowed whether the duty is voluntary or involuntary. And under no circumstances under federal law can an employer force an employee to use vacation for military active duty.

"This grievance occurred: on Post 47, on 7-27-86 at 0005. Sgt. N.F. Hack was the supervisor. The grievance occurred when after denial was received, I verbally attempted to resolve the situation with Sgt. N.F. Hack, who in then filled out a HP67A indicating that my request for military leave had been denied."

The Employer's Level III response, dated 16 November 1986, and signed by Major Thomas W. Rice, states, "A level III Grievance Hearing was held on November 5, 1986, in Columbus, Ohio regarding grievance number 61, Grievant Trooper H.P. . . . . .

"Union Contention. The grievant and the Union requests 80 hours of paid military leave for military training, which began August 9, 1986, and ended August 22, 1986; and the 80 hours of vacation leave the grievant used to attend the training after the military leave request was denied, be returned to his accrued vacation time.

"Management's Contention. The grievant's request for relief in the form of 80 hours of paid military leave is not merited for two reasons, both based on Article 52, Section 52.02 of the Unit 1 contract. . . . . (Arb's Note, see Contract Provisions, below.)

"Subsection 3 specifically details the member must provide 'an order or statement . . . no later than 60 days (prior to such training)'.

"This mirrors pre-contractually existing Department Operations Policy - File 9-507.13 (Revised 6-15-84), to wit: 'The employee must furnish . . . (Arb's Note, see Contract Provisions, below.)

"The same procedure also states, under the 'Regulations' section: 'Although military orders are not necessary, employees must furnish a schedule of training assemblies to his/her supervisor not less than sixty (60) days prior to each assembly.'

"Although the grievant believes he 'inked in military leave on the vacation schedule' on 'approximately June 7 or 8th', there is no indication he notified his post's management staff of training until he did so via his IOC to Lt. Delili on June 23, which was 47 days prior to his training. This clearly violates departmental policy and negates contractual protection under Article 52.02.

"Turning to the second point, contract Article 52.02, Ohio Revised Code 5923.05, and Ohio Administrative Code 123:1-34-04 provides military leave with pay for "the military service on field training or active duty.

"File 9-507.13 was modified, in part, in June of 1984 to clarify 'Active Duty' - so as to provide 'options for employees desiring military training beyond their normal obligation. It defines

active duty and specifies: 'Active duty does not include weekend drill, other multiple training assemblies (MUTA) or specialized training of a voluntary nature.'

"In checking with the United States Coast Guard Reserve Commander for Ohio, Captain Burke, it has been determined that the training in question - Reserved Officers Candidate Indoctrination - was not required training. It was volunteered for by the grievant by applying for candidacy for the position of Ensign. The grievant could have continued in his former grade of E7 without penalty had he not accepted the training.

"Consequently, the training was clearly 'specified training of a voluntary nature.

"Due to the above explanation, management believes the grievance should be denied.

"Finding. The hearing officer finds no violation of the contract in management's handling of this matter. Both contract Article 52 and existing Division Policy requires members to notify management 60 days in advance of such training in order for military leave to be granted. Evidence submitted indicates office communication of the upcoming training on June 23, which was 47 days prior to the commencement of the training, although the grievant had been aware of the dates as early as 'the first week of June.'

"It is further maintained that the military training received was of such nature as to preclude it from being eligible for paid military leave. The grievant had volunteered for the program which lead to the training. He could have maintained his previous position in the Coast Guard Reserve without penalty had he not volunteered, or even declined the training once he was picked. Existing departmental policy, which is not contradicted by Article 52 or any other portion of the contract, limits paid military leave to mandatory training. Clearly the training received by the grievant on August 9 - August 20 was voluntary in nature, therefore was nor eligible for paid military leave.

"For the above stated reasons, the grievance is denied."

CONTRACT PROVISIONS:

ARTICLE 52.02 Military Leave With Pay

1. State Employees who are members of the Ohio National Guard, the Ohio . . . or members of other reserve components of the armed services of the United States are entitled to a military leave of absence from their duties without loss of pay, for such time as they are in the military service on field training or active duty. The maximum number of hours for which payment can be made in any one calendar year for mandatory annual training or active duty is one hundred seventy-six (176) hours.
2. Compensation - State . . . There is no requirement that the service be for one (1) continuous period.
3. Evidence of Military Duty - State employees are required to submit to the Superintendent an order or statement from the appropriate military commander as evidence of military duty before the military leave with pay will be granted. Such orders

shall be submitted no later than sixty (60) days or, in the case of emergency activations, as soon as they are received.

DEPARTMENT OPERATIONS POLICY - File 9-507.13 (Revised 6-15-84)
II - USE. Active Duty.
Active Duty includes annual training (normally 15 days) and emergency mobilization. Active duty does not include weekend drill, other multiple training assemblies (MUTA) or specialized training of a voluntary nature." (Emphasis added). . .

The employee must furnish his immediate supervisor the inclusive dates of active duty training not less than sixty (60) days prior to such training, and a copy of his military orders as soon as possible prior to his immediate supervisor the inclusive dates of active duty training not less than sixty (60) days prior to such training, and a copy of his military orders as soon as possible prior to the scheduled training date. This sixty (60) day notification is waived for any emergency mobilizations, or order to active duty. In view of the early deployment date of National Guard and Reserve Units, particularly . . . . mobilization.'

BACKGROUND: The grievant is a trooper in the Ohio State Highway Patrol. He also holds the rank of Chief Petty Officer in the U.S. Coast Guard Reserve. He requested and received 80 hours of military leave with pay to participate in Field Exercise Gallant Eagle '86 for the period from 10 July 1986 through 24 July 1986. He requested an additional 80 hours of military leave to attend Reserve Officers Training Indoctrination for the period from 09 August 1986 through 27 August 1986. This second request was denied and the grievant was notified that he would be charged with 80 hours of annual vacation if he attended the training. Upon receiving the notification that his request was denied, the grievant filed the instant grievance.

THE ISSUES: Two issues are before the arbitrator: Issue 1. Did the management violate the Agreement by denying the grievant's request for military leave, on the basis that it was not filed in a timely fashion, and if so, what shall the remedy be? Issue 2: Did the management violate the Agreement by denying the grievant the military leave he requested to attend Officer's Candidate Training School, and if so what shall the remedy be?

ISSUE 1 DISCUSSION:

The UNION'S case is that there is an existing local practice regarding the process by which leave of any type is requested, and that the grievant complied with that procedure, thereby rendering his request timely.

The grievant testified that he has received military leave each year since 1980. The grievant also provided copies of "Request for Leave" documents showing that he has received paid military leave each time he has requested it. In 1982, his official request was dated July 19, and leave began August 1; in 1983 his official request was dated Feb. 21, and leave began March 13, in 1985 his official request was dated May 27, and leave began June 20, and even in the year of this incident, his earlier request for leave - which was granted - was dated May 31 for leave beginning July 10. In each and every one of these instances, Management granted the paid leave. The procedure which the grievant followed in each instance involved entering a green, color-coded request for military leave in a log book maintained

by his immediate supervisor. That practice had applied to all requests for leave time - vacation, military, etc. The grievant testified that at no time was he given any reason to believe that the practice had been modified, or was not acceptable, until the Lieutenant returned from vacation some time after June 23.

MANAGEMENT'S case is based on a plain reading of the agreement. Lt. Anderson, who was a member of the negotiating team, produced a letter from Major General Clem, Adjutant General, to Colonel Jack Walsh of the Highway Patrol, dated March 24, 1982. That letter compared the proposed military leave policy to the policy which had been in effect for "the past few years with few exceptions." In part, that letter proposes that, "your policy be changed to reflect the sixty (60) day requirement rather than the ninety (90) day requirement . . ." The contract language was drafted in accordance with that recommendation. Captain Warren Davis, Massillon HWP Post Supervisor, testified that the sixty-day language in the Agreement is necessary for the orderly conduct of Patrol business. He pointed out - and the union concurred under cross examination - that a number of flexible practices of the past, eg. rotating shifts, were no longer in effect since the signing of the Agreement. Management believes that it is their right to enforce the literal interpretation of the Agreement.

Your ARBITRATOR finds substantial justification for the position of both parties. When contract language is at odds with an established practice, however puzzling it may be to the parties, the "ground rules" are well established. First, the Union has the burden of establishing that there is a practice which has been in effect for sufficient-enough time that it can reasonably be considered "mutually-agreed-upon". I find that the Union has sustained that burden. The procedure which grievant followed is the identical procedure which he had followed for six years. His most recent experience with the procedure was "post-Agreement" and the procedure was acceptable to Management only three months before the grieved incident.

Second, when Management moves to alter an established practice to bring it into line with contrary contract language, it must notify the Union in writing, and with sufficient advanced notice, that it can attempt to bargain, or alternatively, effectively inform the rank-and-file. Management failed to discharge its obligations in this regard.

ISSUE 1 AWARD: The grievance is properly before the Arbitrator. Management did not adequately notify the Union of its intent to alter the existing practice regarding both the notification procedure for requesting leave and the prior notification period necessary to obtain leave. Management may change existing practice and to begin enforcing the contract literally, but before doing so, Management must provide the Union with at least thirty (30) days written notification of intent. However, your Arbitrator warns the parties to move carefully in this matter. The evidence in this case suggests that the Coast Guard - and perhaps other branches of the military - may be incapable of providing sufficient official notice to permit reservists to meet the contractual deadlines. The effect might be to make it impossible for reservists to qualify for the leave which is their legal right, and which the parties clearly intended that they have.

ISSUE 2 DISCUSSION:

The UNION'S argument is that the intent of the parties in

drafting the Agreement was to maintain the policy of permitting paid military leave, voluntary or not, up to the 176 hour limit. Management's Exhibit A, a summary of notes taken by Lt. Anderson during the collective bargaining and the accompanying submissions by the parties, establishes that it was the consistent position that provisions whihc were not a problem before the Agreement went into effect should remain unchanged in the new Agreement. Joint Exhibit 4, dated March 24, 1982, which articulated Management's policy on military leave, contained no language limiting leave to mandatory training. It was only the more recent policy statement, Joint Exhibit 5, dated June 15, 1984, which eliminated voluntary training from leave consideration. However, the contract language which was finally adopted conforms to the earlier policy statement. Finally, Management has not made voluntary training an impediment to paid military leave in the past.

MANAGEMENT'S position is principally one of equity. It is their contention that the language which is found in the agreement provides leave under conditions which mandate the employee's absence, and for which Management agrees paid leave is mandated. They argue, however, that in the case at hand, the employee initiated the action which resulted in his absence from work. It is their position that providing compensation for leave which results from voluntary training constitutes an unfairness toward the other workers. Management believes that they have no contractual right or obligation to provide paid leave for anything except active duty which is mandatory for individuals to remain in the active reserve.

Your ARBITRATOR will begin by summarizing the evidence which has been offered in support of both contentions:

1. The policy statement (Joint Ex-4) dated March, 24, 1982, which states in part, "Active Duty includes annual training (normally 15 days), specialized training courses, and mobilization. Active Duty does not include weekend and other multiple training assemblies (MUTA)." This statement does not restrict leave.
2. The policy statement (Joint Ex-5) dated June 15, 1984, which states in part, " Active duty does not include weekend drill, other multiple training assemblies (MUTA) or specialized training of a voluntary nature." (Emphasis added). This statement restricts leave.
3. Sept. 4. The Union's initial bargaining proposal (Section B.1.) states, "State employees who are members of . . . are entitled to a military leave of absence . . . for such time as they are in the military service on field training, or active duty for a period not to exceed . . ." This proposal does not restrict leave.
4. Oct. 15. Management's initial bargaining proposal (Section A.2.) states, "State employees will receive compensation . . for up to 176 hours in a calendar . . . on mandatory training or active duty. For non-mandatory training, weekend drills, or . . . employees may request to use vacation or personal leave . ." (Emphasis added). This proposal restricts leave.
5. Oct. 22, 1985. The Union Negotiator states, in part "Our proposal is directly from statutes and DAS rules. No intention to make changes. Orally there is no intention to make changes." This statement indicates that the Union believed that their proposed language supported retention of the current practice.
6. Oct. 29. The Union submits a counter-proposal. The Union modified

some of the language in the military leave section of its proposal, but did not change the wording relevant to this case.

7. Nov. 5. Management's second counter proposal is submitted. It omits the sentence which states,"For non-mandatory training . ." (See 4. Above). This proposal does not restrict leave.

The record of statements made during negotiations, the proposals offered during negotiations, and testimony at the arbitration hearing shows that Management modified its definition of active duty to exclude voluntary training back in 1984. However, Management also attempted, without success, to include in the Agreement, wording which excluded leave for voluntary training. The Union, on the other hand insisted that the Agreement leave existing practice concerning military leave unchanged. It must be noted, however there is no evidence on the record to show what the practice was regarding voluntary training. Finally, Management's policy statement excluding voluntary training does pre-date the Agreement.

In summary, Management was unsuccessful in its attempt to exclude voluntary training from the leave provision. The Union claims that voluntary training is included, but provides no evidence of that such leave has ever been granted by Management. Finally, the contract which was ratified by both parties is, in fact, silent regarding the matter.

It is my conclusion that reimbursement for voluntary leave is not prohibited by the existing Agreement, but the right has apparently not been exercised prior to this case. In such situations, arbitrators generally agree that (1) unused rights - in this case the Union's right to have voluntary leave treated as military leave - remain as rights to be claimed, and (2) a party - in this case Management - may not gain through arbitration, what it fails to gain in negotiation.

ISSUE 2 AWARD. The grievance is sustained. The grievant shall be credited for the vacation time, and the leave time for special training shall be charged against his military leave total.

Respectfully submitted,

George L. Smith, Jr.
Arbitrator
164-30-0501