

A R B I T R A T I O N
O P I N I O N A N D A W A R D

STATE OF OHIO
OHIO HIGHWAY PATROL

and

Date April 3, 1987

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

ARBITRATOR: DONALD B. LEACH, appointed through the procedures
 of the Department of Administrative Services,
 Office of Collective Bargaining

APPEARANCES: FOR THE FRATERNAL ORDER OF POLICE, OHIO LABOR
 COUNCIL, INC.: Paul L. Cox, Esq., 4222 East
 Broad Street, Columbus, Ohio 43213

 FOR THE STATE OF OHIO, OHIO HIGHWAY PATROL:
 Captain John M. Demaree, Advocate, Ohio Highway
 Patrol, 660 East Main Street, Columbus, Ohio 43205

I S S U E A S S T I P U L A T E D

"Is the Employer in violation of Article 52,
Section 52.03(9) of the collective bargaining agreement by not
adjusting the Grievant's time off to coincide with monthly week-
end drills? If so, what shall the remedy be?"

B A C K G R O U N D

The issue, involving time off to attend Ohio National Guard training and drills, is a legal one. There is no essential disagreement respecting the facts.

The Grievant, Larry Wayne Goss, is a Dispatcher, a position of considerable importance in the screening of calls, dispatch of troopers, provision of back-up, etc. He is also a member of the Ohio National Guard, assigned to demolition. In May, 1986, he submitted to his superior officer a schedule of military drill dates for his Unit with a request that they be scheduled as his days off. It was forwarded under date of June 2, 1986 by Lieutenant J. D. Freese, his superior officer, to Captain R. A. Curtis, Commander, District 6 of the Employer, in which Grievant worked. One of the training periods listed in the request for scheduling was the week-end of September 6 and 7.

Grievant had the least seniority in the Dispatcher group in his District. On the week-end of September 6 and 7, only four Dispatchers were assigned to that District, a fifth, a cadet, having resigned a few weeks before. One of the four was scheduled off in the course of regular scheduling. Another of the four had been given the week-end-off with excused absence. Grievant was not permitted to take off that week-end unless he could obtain a replacement to cover his shift, which he refused to attempt. (It must be noted, however, that he applied to take the week-end off without pay but that time off was denied also.) Accordingly, Grievant missed National Guard Drill and training that week-end.

On September 8, the Grievance was filed as follows:

"Saturday, September 6 and Sunday, September 7, 1986
2400 - 0800 Lancaster Post 23.
The above dates were Scheduled Drill dates for the
National Guard, which I did not report for due to
working the midnight shift.
Request Work schedule be adjusted So I can attend
Scheduled monthly drills."

The matter was processed through the various steps of the grievance procedure. The immediate supervisor, Sergeant Steineman, denied the Grievance, as follows:

"On 9/6 & 7/86 employee was scheduled to attend weekend drill with Ohio national Guard. He was unable to attend due to working midnight shift. Employee had previously requested his work schedule be adjusted so he could attend scheduled drill dates; this request was denied. According to article 52.03, Section 9--The employee's work

schedule will be adjusted to allow for week-end drill duty during employee's days off if employee cannot make up drills during his regular days off. Do (sic) to manpower needs and contract controls the request for a schedule change was not granted. Also the people in the National Guard who hold critical positions with the patrol have been given permission by the Guard to makeup drills on days off during the week."

Lieutenant Freese then reviewed the matter and ruled as follows:

"Employee requests his work schedule be changed to provide his time off to be in conjunction with his monthly military drill (Ohio National Guard). Article 52.03, Military Leave Without Pay, paragraph 9 provides that if weekend drill duty cannot be arranged to occur during employee's regular time off, then employee's work schedule be adjusted so that his time off occur in conjunction with weekend drill duty. Correspondance from employee's military commander was submitted to post commander in July which stated that it was impracticable (sic) for employee to receive military drill training at any other time than scheduled on weekend."

The level 3 decision was made by Major T. W. Rice of Personnel. It is as follows:

"Article 52, Section 52.03 - Military Leave Without Pay, states in sub-section 9:

9. Requests will be made of an employee's military commanding officer by Highway Patrol management in an attempt to arrange for scheduling of weekend drill duty during the employee's regularly scheduled days off. If such accomodation is not possible, the employee's work schedule will be adjusted to allow for the weekend drill duty during the employee's days off.

On September 9, 1986, two days after the incident occurred for which the grievance was filed, the grievant's post commander checked with the grievant's military unit administrator, Sgt. S. E. Welsh, and determined that the grievant could have his weekend drill duty scheduled during his regularly scheduled days off. The grievant made no attempt to attend or make up the training session stated on the grievance, (or a later session), on his scheduled days off, which are Monday and Tuesday.

Management was and remains correct in working to arrange such re-scheduling on the grievants (sic) regularly scheduled days off due to the heavy activity at his post during

the weekend. If management adjusted the grievant's schedule to allow this grievant weekends off, either desk overtime would need to be paid or troopers would be taken off the road to man the desk.

Management's action in this case is consistent with both Article 52 of the Unit 1 contract and Divisional policy 9.507.13 which states in part:

"Employees who are members of military reserve units and attend regularly scheduled weekly or monthly training assemblies, are not entitled to leave with pay. However, the employees may:

1. Apply for vacation, holiday makeup or compensatory time to attend scheduled meetings.
2. Make arrangements with their reserve unit commander to attend a makeup training session.
3. Arrange to exchange days off or tours of duty with other employees.
4. Apply for absence without pay.

All of the above are subject to approval by the employee's supervisor. Decisions must be upon sound management practices considering the responsibilities of the Highway Patrol, the Military Units, along with the employee's desire to enhance his/her military obligations."

Both the Unit 1 contract and existing departmental procedure allow for the employee to make up weekend training on their regular scheduled time off. The grievant's post commander has arranged for him to do so, which was approved by the grievant's military unit administrator. The grievant, on his own volition, refused to make up the training. The grievance should be denied.

FINDING

Based on the evidence presented, the hearing officer find (sic) there has been no violation of the grievant's contractual rights concerning military leave without pay.

The hearing officer emphasizes, as pointed out in the hearing, that the grievant has options which may allow him to attend his weekend drill duty, as outlined in existing divisional policy. The grievant indicates he has not fully explored these options."

Grievant testified that he believed make-up drill could not be beneficial in his specialty which required cooperation of the others in his group and that, in their absence, the training could not be beneficial. While he had done make-up on occasion in the past, regular such make-up would be harmful in his opinion.

The policy of the Ohio National Guard, respecting law enforcement members of its forces, was set out in statement of the Adjutant General of the Guard. In pertinent part, it is:

"3. POLICY. It will be the policy of this department that a request made by the head of a law enforcement agency for one of their personnel to be excused from either a specific Annual Training period of a scheduled weekend or other MUTA will be honored; however, each individual so excused will be expected to attend Annual Training at another date and will perform equivalent training with their unit or another unit for any missed regularly scheduled training. All requests to be excused must be fully documented by the requesting official. If a commander has doubts as the validity of any request, the commander should personally contact the official concerned to verify the facts. Any suspected abuse of this policy will be reported to this department immediately so the matter can be investigated."

A day or so after the Grievance was filed, Lieutenant Freese attempted unsuccessfully to telephone Grievant's military commanding officer. He then telephoned a Sergeant Welch, who, however, was not subject to the Grievant's military commander. The Lieutenant understood from that conversation that Grievant could be excused from weekend drill and make it up on his days off. According to Grievant, Sergeant Lane is his military commander's officer in charge when the commander is not present.

Officials of the Guard learned belatedly of the hearing on this matter and sent Master Sergeant David Herman to it. The FOP had no prior knowledge of his appearance but offered his testimony on the policies of the Guard. The Employer objected to his testimony as being offered in violation of Section 20.07 of the Agreement which requires each party to notify the other, no less than five days before the hearing, of the names of the witnesses to be called. The testimony was heard subject to that objection.

The Employer did not find the witness' testimony to be prejudicial to it or as introducing an element with which it was unacquainted but insisted on its objection in terms of contractual adherence.

It is not necessary here to consider the contractual ramifications of the testimony of the Guard representative. In fact, the testimony did not really bear on the issue here, which is contract violation. If the Agreement should conflict with the federal law, speaking hypothetically, an arbitrator would have no power to consider such argument. Because the issue is contract violation, as the parties stipulated, the Guard representative could offer no background. For that reason, it is not necessary

to consider his testimony and, by the same token, not necessary to interpret Section 20.07.

C O N T E N T I O N S O F T H E P A R T I E S

POSITION OF THE FOP

This is a simple contractual issue. Under Section 52.03(9), request is to be made to the employee's military commanding officer to arrange for scheduling weekend drill during the employee's days off but if that is not possible, then the employee's work schedule is to be adjusted to allow for the weekend drill during the employee's days off.

Under that procedure, the request for arrangement must be initiated by the Employer and that request should have been addressed to the military commanding officer. Here, a request was made after the weekend in question to a non-commissioned officer in the Guard, who had no direct authority in the matter. Moreover, the request was supposed to be documented, under the Adjutant General's statement of policy and no documentation was given.

In short, the Grievant is not required by the Agreement to take any initiative. Instead, the Employer has that burden.

POSITION OF THE EMPLOYER

The Employer did not violate the Agreement. To the contrary, it acted in good faith in attempting to carry out its intent, in order, as best possible, to satisfy the needs of all parties.

The Employer is an emergency, semi-military organization with the primary obligation of enforcing the traffic laws of the State and of an emergency police force during disasters, etc. As such, it must respond to problems on a moment's notice. The Guard understands those functions and generally permits employees to make up monthly drill on their regular days off.

Here, the Employer contacted the Grievant's commanding officer in order to arrange for scheduling make-up drill during the Grievant's days off.

Grievant's scheduled days of work included weekends at that time, the period of greatest traffic activity in the course of an ordinary week and his services as a Dispatcher were critical to operations.

Grievant was given the opportunity to do make-up drill through contact by his superior officer with the Guard but failed to avail himself of it.

The Employer's actions were consistent with the Agreement and of the Employer's written policy on Guard duty. (The pertinent portion of that policy is quoted above as part of the Level 3 decision of Major Rice.)

D I S C U S S I O N

The Employer points out that contact with the Guard was made by one of Grievant's Employer supervisors.

In Lieutenant Freese's decision on the Grievance, reference was made to a communication from Grievant's military commander stating that it was impractical for employees to receive military drill training at any time other than on scheduled week-ends. (That letter from Captain Woodall, Grievant's Guard Commanding Officer, dated June 7, 1986, was a joint exhibit.) The letter did indicate some possibility of exception in some cases but it was suggested that requests for such be addressed to him.

About September 9 or 10, 1986, after the week-end in question, it appears that Lieutenant Freese contacted a Sergeant Welch of the Guard concerning make-up time for Grievant and he understood from the conversation that such could be arranged.

Thus, it does not appear that the Employer took any steps before the week-end in question to obtain any sort of arrangement concerning Grievant with the Guard, the procedures set out in the Adjutant General's memorandum. Likewise, nothing was done ahead of time by the Employer concerning any possible adjustment, as hinted in the letter of the Grievant's military commander. All contacts occurred after the event in question and after the Grievance had been filed.

A further question has arisen respecting the later contact, in that it was not made with Grievant's military commanding officer but with a Sergeant who may or may not have had authority to do more than represent the general policy of the Guard. No conclusion can be reached on that issue because neither party to the conversation testified and, in a sense, it is hearsay, although there is no reason to question the good faith of the Employer's representative in that conversation.

Without regard for the details of the evidence, however, the long and short of the situation was that the Employer faced a critical problem of Dispatcher staffing on week-ends in

District 6 and refused Grievant the time off for Guard drill on September 6 and 7 but that, thereafter, it took some steps to arrange for Grievant to attend make-up drill at times other than week-ends.

The Employer's action, as set out in its various rulings on the Grievance and in its brief, were stated to have been premised on Section 52.03(9) and on its own policy directive.

The Employer's policy directive on week-end military drill was last revised in 1984 before the date of the Agreement and seems not to have been modified since. It clearly places the responsibility of arranging for drill on the employee who, it directs, may:

1. Apply for vacation, holiday make-up or compensatory time.
2. Make arrangements with his military commander to attend make-up sessions.
3. Arrange to exchange days off or tours of duty with other employees.
4. Apply for absence without pay, provided that all are subject to approval by the employee's supervisor.

According to Grievant's testimony, he was offered one of those alternatives, i. e., arranging a trade off with another but, on the other hand, he was denied absence without pay.

The contractual provision, however, places the initiative on the Employer to make arrangements with the military commanding officer and, if that is unacceptable, to arrange the employee's schedule to allow him drill week-ends off.

Thus, while the policy directive provides, on the one hand, that the employee may make arrangements with the military commander to attend make-up sessions, the Agreement provides that the Employer's management will make a request of the military commander to try to arrange drill during the employee's regularly scheduled days off. (If such arrangement cannot be made, the second sentence of the contractual provision makes clear that the employee's work schedule is to be adjusted to allow for week-end drill on the employee's days off.)

Here, the Employer was giving great weight to its 1984 policy directive on week-end military drill. It had not been revised to conform with the Agreement. In its wide divergence from the Agreement, at least in terms of the party responsible for taking the initiative on matters, it is inconsistent with the Agreement. Therefore, the Employer erred in following the directive rather than the Agreement.

The Employer did its best to arrange, after the event and after the Grievance filing, for Grievant to have make-up training.

The problem with that approach was that nothing was done ahead of time. Thus, the Grievant's schedule on the week-end was not changed and, at the same time, no arrangement had been made respecting him. The Agreement clearly requires that the training is to be arranged during regular days off or the employee's week-end schedule is to be changed to give him those days off. Neither was done.

It is impossible to imagine how a decision on Grievant's schedule could be made after the event. The provision clearly contemplates prior arrangement of the schedule, i. e., make-up training or week-end days off.

It must be reiterated that the Employer did all it thought feasible but it did it after the critical week-end. Even here, however, it did not contact the Grievant's military commander, the person the Agreement designated. While he was unavailable at the time, he probably could have been reached later. No later effort was made, however. The action taken under the circumstances was to call some Sergeant who could have known nothing more than general policy. It was not even claimed that the Sergeant undertook to schedule the make-up days or that he could. That did not comply with the contractual provision. That provision is that the arrangement must be "for scheduling week-end drill duty during the employee's regularly scheduled days off". Until the military commander knows what those days off are, it would seem impossible for him or anyone else to know whether make-up drill would be available on those days.

An assurance from the commanding officer of flexibility on the matter might be acceptable and, if he specifically authorized another to give it, it might also be acceptable. Here, however, there was no adequate showing that more than general policy of the Guard was discussed. That must be the conclusion because nothing appeared that Sergeant Welch was authorized by the commanding officer to speak for him.

Thus, it must be found primarily that the Employer must make prior arrangements under the Agreement and that it failed to do so. Secondly, the Employer failed to show that such failure should be waived here because of subsequent developments. The subsequent developments failed to meet the basic contractual requirements, even by a most liberal interpretation.

The scheduling problems of the Employer were critical on the week-end in question. Its errors were made in the exercise of its best judgment as to how to discharge the duties imposed on it by law. In that sense, it operated in the best of faith and did successfully discharge its duties. Its errors here, thus, are

technical only. Those directly responsible here naturally felt their actions to be governed by the policy directive. As good supervisors in the line of a semi-military organization, they obviously were so bound.

The collective bargaining Agreement, which the Employer undertook, requires a substantial departure from the customs of the past in many ways. Not all of the areas of change are immediately manifest to any organization. This is one area of procedure, however, that is affected fundamentally. There are no doubt others. As they come to light in the course of experience with the new factor in operations, the Agreement, changes are bound to occur. While the FOP indicated some impatience at the speed of change, it must be borne in mind by both sides that organizations change very gradually. Thus, patience must be kept along with confidence that necessary changes will occur.

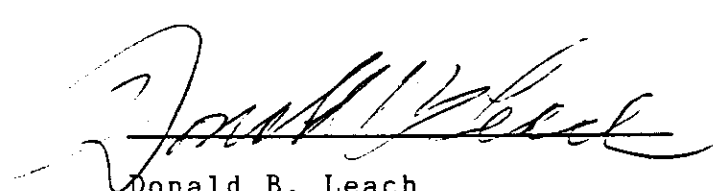
The Grievant requests that his work schedule be adjusted so that he can attend scheduled monthly drills on week-ends. To grant that request would also fly in the face of the Agreement. The scheduling of his time off is a matter for the Employer and the Grievant's commanding officer. His preferences are not a contractually significant factor. Thus, the Award must be to comply with the Agreement by scheduling Grievant's drill time after arrangement is made with the Grievant's military commanding officer.

A W A R D

1. Grievance dated September 8, 1986 of Dispatcher Larry Wayne Goss is upheld in part.

2. The Employer violated the Agreement when on September 6 and 7, 1986, it denied Grievant's prior request for time off to attend Ohio National Guard Drill while, at the same time, it had made no arrangements with the Grievant's military commanding officer for make-up drill or training at any other time.

3. As to scheduled drill week-ends hereafter, the Employer shall make advance arrangements with Grievant's military commanding officer, or his formally designated alternate, for drill to be made available on days on which Grievant is scheduled off duty with the Employer or shall arrange Grievant's work schedule so that he may attend the scheduled week-end drill on his days off.



Donald B. Leach