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OCB Grievance No. 87-0214

Date May 15, 1987

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

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

APPEARANCES: FOR THE FOP/OHIO LABOR COUNCIL, INC.
PAUL L. COX, ESQ., 4222 East Broad Street,
Columbus, Ohio 43213-1216

FOR THE EMPLOYER:
LIEUTENANT DARRYL L. ANDERSON, Personnel/Labor
Relations, Ohio State Highway Patrol, 660 East
Main Street, Columbus, Ohio 43266-0562

I S S U E

Did the Employer violate the Agreement when it refused to pay Grievant, Trooper R. E. Nichols, court time pay for October 23, 1986.

B A C K G R O U N D

The essential facts are not in dispute. The disagreement arises from the interpretation of the Agreement between the parties in relation to the undisputed facts.

Grievant had been subpoenaed to appear in Franklin County Municipal Court at 1:30 P.M. on October 23, 1986 to testify in a criminal case in which he had been an arresting officer.

He had worked his regular shift that day from midnight to 8:00 A.M. At the end of his duty time, he had driven to his temporary home in a Patrol car. There, he went to bed and slept until about 12:50 P.M., at which time he arose, bathed, put on his uniform and started to drive to the Court House, some 10 to 20 minutes distant.

In the meantime, the post headquarters to which he was assigned learned that the matter in which Grievant had been subpoenaed had been continued or settled. From then on, telephone calls were placed to him about every half hour in efforts to notify him of the cancellation of the subpoena.

At the time Grievant and his wife were living temporarily at the residence of her parents, pending the completion of a house for which they had contracted. The parents' home had two phones, one in their bedroom and one in the family room. Grievant was not able to hear either from the room he and his wife occupied, at least while he was sleeping. Thus, while the Patrol did call the number where he was, he was not awakened and failed to receive the message.

When he left the house to proceed to the Court House, he immediately reported, via the Patrol radio, that he was on duty. He had proceeded no more than a few blocks when he was informed by that means to call the post immediately. At that time he had not left the housing development where the residence was located. He returned to the house forthwith and telephoned the post. He was then told of the cancellation of the subpoena and that he was relieved of duty in that connection.

Grievant requested pay of two hours for court appearance time. That was denied and Grievance was filed promptly. It was processed through the various steps of the grievance procedure. It was ultimately denied at Level III of that procedure. The Finding was as follows:

"Based on the information presented at this hearing, and details contained in the grievance trail, the hearing officer finds no violation of the contract.

The section in question compensates for court appearances. Management made necessary attempts to advise the grievant, prior to him preparing to leave his home for court. The grievant was contacted as soon as he established radio contact with his post. He did not go to court.

The hearing officer recommends the grievant reconsider his position on not participating in the "on call" program. It could prevent future disturbances of his off duty time. The grievant shall call his post in the future prior to leaving for court, to determine if the case is still going forward.

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

It appears that the Employer has paid court appearance time whether or not the Trooper has actually testified in the case for which he is subpoenaed and pays such time when the subpoena is cancelled while a Trooper is at the Court House.

On court appearances, the Employer pays so-called "portal to portal pay", i. e., a trooper is paid from the time he leaves home until the time he returns there, unless, of course, he is diverted by matters of his own which he performs on the way to or from the Court House.

While the Employer refused to pay for court appearance time in this case, it offered to pay for the time Grievant actually spent between the time he reported on duty for the trip to the Court House and his call-in from his house in response to the radio instruction to do so.

C O N T R A C T P R O V I S I O N S

ARTICLE 61 - OVERTIME

¶61.06 Court Appearance

Members of the bargaining unit who are required to appear in court during their off duty hours shall be guaranteed a minimum of two (2) hours pay or actual hours worked, whichever is greater. The Employer shall not change an employee's schedule or scheduled shift in order in (sic) avoid payment for court time incurred during off duty hours without the consent of the employee involved. Payment shall be made in cash or compensatory time at the discretion of the employee. Employees shall notify their immediate supervisor when they are required to appear in court.

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

FOP POSITION

The telephone calls by the Employer to the Grievant in the morning of October 23 are irrelevant. The issue is the meaning of the contractual provision.

There is no difference legally between the facts in this case and the type of case where there is a settlement while a Trooper is at the court house. Here, Grievant was on his way to the court house in good faith and in response to the subpoena. Had he failed to appear when wanted, he would have risked disciplinary action.

The real issue here is the line to be drawn to separate the time spent in responding to a summons to court and other time of a Trooper.

There is no difference between a Trooper's being informed after he arrives at the court house, that the case has been settled and the cancellation while he is in the parking lot just after arriving or, indeed, while he is enroute to the court house.

Since a Trooper summoned to court is paid "portal to portal" he is on the clock when he leaves home. Cancellation after that does not affect the matter. He is then entitled to the entire court appearance time.

In another arbitration case, it was held that a Trooper required to report to the prosecutor's office was entitled to court time even though he didn't go to court and was not expected to that day. Here, Grievant was on the way to court.

EMPLOYER POSITION

The Employer has an ongoing responsibility to manage the work force efficiently. It has established a procedure with the courts to minimize liability to the Troopers and the time they must devote to unnecessary court time.

There was no violation of any contractual right here. Grievant did not go to court on the day the Grievance arose. He, therefore, was not entitled to court time pay.

D I S C U S S I O N

As the FOP notes, this is a matter requiring a determination of the line or time from which court appearance may be said to begin. The facts here require a careful analysis concerning that dividing line.

In that respect, this case is little different from many court and arbitration cases which involve careful analysis of contractual (or statutory) meaning. The fact that such type problem arises with more or less regularity, however, does not make the process easier. Indeed, this type problem is one of the more difficult intellectually in the law and in arbitration.

The facts here reveal that both the Employer and the Grievant acted in good faith.

There was some assertion that Grievant did not use, but could have used, a policy available to him in the Employer's procedure and, thus, have avoided this issue. It was clear, however, that the use of that policy was optional and, being so, Grievant cannot be held responsible for failing to do something he was not required to do.

He dressed, left his home, reported on duty, all as required to meet the requirements to be available for testimony in court.

On the other side, the Employer acted to inform Grievant of the subpoena cancellation as soon as it learned the facts. It caused telephone calls to be made to grievant's temporary home frequently from then on but without success. Thus, it did all it could reasonably be expected to do to relieve Grievant of the duty to respond to the subpoena. When it did learn of Grievant's report of being on duty, it took immediate action to notify him of the cancellation, a notification he did receive promptly.

At the time, Grievant was told to telephone in, he was only a few minutes from his home and he proceeded there immediately. In all, it is doubtful if he could have spent more than fifteen minutes in an on duty status.

The actions of both, therefore, reflect good faith without any color of taking advantage of the other.

In essence, the situation was that no court appearance was required and there had been none as of some period in the morning of October 23. Thus, Grievant had no appearance to make or to attempt to make. The problem was that he didn't know he was not so required. These being the fundamental facts, the Agreement must be analysed in relation to them.

Section 61.06 provides in the pertinent sentence:
"Members of the bargaining unit who are required to appear in court during their off duty hours shall be guaranteed a minimum of two (2) hours pay or actual hours involved whichever is greater."

In a technical sense, the provision doesn't apply except to those who are required to appear in court. Grievant was not required to do so that day.

So far, the Employer has understood that to cover not only legal "appearances" in the sense of testifying but also physical presence in the court house. That interpretation has been carried farther, to include travel to an appearance in the sense that a Trooper is paid from the time he leaves home until he returns.

That interpretation, apparently emanating from the Employer alone, may be characterized thus: that court appearance includes all time during which actual appearance in court is anticipated on the basis of knowledge up to the time of arrival at the court house, he being entitled to pay if the case is cancelled after arrival.

That interpretation does not include the situation here, of course, in that no appearance in court could reasonably be anticipated after the cancellation of the morning. Moreover, Grievant did not arrive at the court house. Thus, interpretation by the parties does not lead to the allowance of the Grievance.

On the other hand, if the Employer had allowed Grievant to proceed to the court in the reasonable anticipation he had of actual "appearance" there, then it would seem that, however mistaken that anticipation was, it would have been the final cause of the Trooper's mistaken anticipation which was not corrected until after his arrival. In other words, there would be a type of legal estoppel involved, preventing the Employer from denying payment.

Here, of course, the Employer was not the final cause of the Grievant's mistaken anticipation because it had done all it reasonably could have been expected to do to correct that expectation.

Thus, the question arises as to whether or not the Employer should bear the cost in court appearance time of Grievant's mistaken anticipation which it had done all it could to correct.

The court appearance had been cancelled during the morning. Grievant did not learn of it at home because he couldn't hear the telephone. While he is not at fault because of that fact, it would seem to be an abuse of the contractual provision for a Trooper to use it to force the Employer to pay him the minimum court appearance time. That is particularly true when in fact the time he spent on duty status was very short. In a sense Grievant, while not

morally at fault, did bear the final responsibility for failing to receive the message.

The Employer has offered to pay Grievant for the actual time he spent and, in that sense, it recognizes that he was acting in good faith. Its payment certainly would compensate him for the time he spent on a mistake of fact which the Employer had so unsuccessfully acted to remove.

In the strict language of the Agreement, Grievant's appearance in court was not required in fact and it had ceased to be required as of a few hours before he left to go to court. The strict language of the Agreement does not assist him.

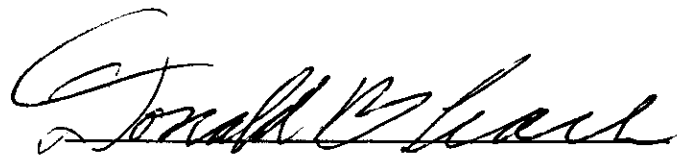
The strict language has been somewhat amplified in practice but that amplification also does not include Grievant's situation that day.

Moreover, the equities of the matter do not extend to payment here where, through no fault of the Employer, he simply failed to learn of the earlier cancellation.

It must be concluded that, under the contractual language and the parties' interpretation of it, Grievant is not entitled to court appearance time. The Grievance, therefore, must be denied.

A W A R D

Grievance, dated November 26, 1986, of Trooper R. E. Nichols is hereby denied.

A handwritten signature in dark ink, appearing to read "Donald B. Leach", written in a cursive style.

Donald B. Leach