

STATE OF OHIO  
OFFICE OF COLLECTIVE BARGAINING  
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration	)	
	)	<u>OPINION AND DECISION</u>
Between	)	
FRATERNAL ORDER OF POLICE	)	OCB Grievance Nos. G86-127
OHIO LABOR COUNCIL, INC.	)	G86-134
	)	G86-721
- and -	)	Grievant(s):
	)	Karen L. Keifer (Miller)
	)	Wadell A. Bennett
OHIO STATE HIGHWAY PATROL	)	James P. Czerniakowski
DEPARTMENT OF HIGHWAY SAFETY	)	

SAMUEL S. PERRY, PANEL ARBITRATOR

The Panel Arbitrator, Samuel S. Perry, was mutually selected by the Parties and appointed in accordance with Article 20, Section 20.07 of the Contract existing between the Parties (Joint Exhibit #1) to hear and decide this matter.

The oral hearing was held on Friday, February 13, 1987 in a Conference Room at the Office of Collective Bargaining, Department of Administrative Services, 375 High Street, 17th Floor, Columbus, Ohio 43266-0585.

The following appearances were made for each of the Parties:

FOR THE PATROL:

<u>NAME</u>	<u>POSITION</u>
John R. Alexander	Assistant Attorney General
Louis C. Holben	Payroll Officer
John M. Demaree	Captain, Personnel Officer
Darryl Anderson	Lieutenant, Labor Relations
Peter Coccia	Labor Relations

FOR THE UNION

<u>NAME</u>	<u>POSITION</u>
Paul L. Cox	Chief Legal Counsel
Edward Baker	Staff Representative
Wadell A. Bennett	Trooper
Karen Miller Keifer	Dispatcher
David H. Plunkett	Trooper
James P. Czerniakowski	Trooper

The Parties agreed that the matter was properly before the Arbitrator for a decision on the merits. The Parties waived a separation of witnesses and requested that the oath be administered to each person called to testify.

The Patrol and the Union, each requested one (1) copy of this Opinion and Decision. At the conclusion of the oral hearing, each Party stated they would file a post-hearing brief. The oral proceedings in this matter were concluded on February 13, 1987.

The Arbitrator received two (2) copies of the Patrol's post-hearing brief on February 27, 1987. The Union submitted a letter dated May 29, 1987, stating the Union was waiving its rights to file a post-hearing brief in this matter.

Therefore, the Arbitrator declared the hearing closed as of June 1, 1987, and the Arbitrator shall render his Opinion and Decision, pursuant to Article 20.7-5 of the Agreement existing between the Parties.

THE GRIEVANCE(S):

Three (3) grievances (Joint Exhibit #2-A; Joint Exhibit #2-B and 2-B Supp and Joint Exhibit 2-C and 2-C Supp were offered and admitted into evidence and state as follows:

SEE NEXT FIFTY-SIX (56) PAGES

Joint Exhibit #2-A - Karen Miller Keifer  
Joint Exhibit #2-B - Wadell A. Bennett  
Joint Exhibit #2-B Supp - Wadell A. Bennett  
Joint Exhibit #2-C - James P. Czerniakowski  
Joint Exhibit #2-C Supp - James P. Czerniakowski

THE ISSUE:

The Issue as framed by the Patrol:

Is the employer in compliance with overtime and compensatory time provisions of the collective bargaining agreement of the parties in forbidding bargaining unit members from utilizing compensatory time in the same work week that overtime is claimed? If not, what shall the remedy be?

Pertinent Provisions of the Agreement (Joint Exhibit #1):

ARTICLE 26 - HOURS OF WORK AND WORK SCHEDULES

§26.01 Permanent Shifts.

Permanent shifts shall be established. Shift assignments will be made by the facility administrator on the basis of seniority on March 1st and September 1st of each year. The assignments made on March 1st will be for the period from September 1st to February 28th, and the assignments made on September 1st will be for the period March 1st to August 31st. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur. The normal work week shall be forty (40) hours.

§26.02 Report-in and Computation Time

Employees shall be at their work sites, report-in location or headquarters location promptly at their shift starting time. Employees who must begin work at some location other than their actual work location or report-in location shall be paid from the time they leave their residence until the time they return to their residence.

. . .

§26.05 Double Backs

At any time when the starting time of shifts worked by a member are less than twenty-four (24) hours apart, the members will receive and one-half (1-1/2) times his or her hourly rate, including premium pay for the second shift worked, except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

ARTICLE 44 - HOLIDAYS

§44.03

An Employee who is required to work a holiday or is called in may choose to receive overtime pay equivalent to one and one-half (1-1/2) times the hours worked times the total rate or receive compensatory time equivalent to one and one-half (1-1/2) times the hours worked. All compensatory time

accrued will be placed into a special holiday bank. All overtime worked by an employee on a holiday will be compensated at two and one-half (2-1/2) times the total rate of pay or receive compensatory time equivalent to two and one-half (2-1/2) times the hours worked.

Holiday Compensatory Time will be used by the end of the year, or by June 30th of the following year if the work occurred in the second half of the year. Holiday Compensatory Time not used by these dates shall be compensated.

Upon separation from state service for any reason including retirement, members will receive compensation for all holiday compensatory time earned but not used pursuant to this section.

## ARTICLE 61 - OVERTIME

### §61.01 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 or 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.

2. An employee may elect to take compensatory time off in lieu of cash overtime payment of hours in an active pay status more than forty (40) hours in any calendar week. Such compensatory time shall be granted on a time and one-half (1-1/2) basis.

3. The maximum accrual of compensatory time shall be sixty (60) hours for non-sworn members of the bargaining unit and one hundred twenty (120) hours for sworn members of the bargaining unit.

4. When the maximum hours of compensatory time accrual is rendered, payment for overtime shall be made in cash.

5. Upon termination of employment, an employee shall be paid for unused compensatory time at a rate which is the higher of:

- a: the final regular rate received by the employee, or
- b: the average regular rate received by the employee during the last

### §61.02 Actively-Pay Status

For purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave and personal leave.

### §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 to 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.

§61.07 Requests for Compensatory Time Off

Requests for compensatory time off must be submitted in writing twenty-four (24) hours in advance of the anticipated time off.

§61.08 Granting of Compensatory Time Off

Compensatory time off shall be granted at the discretion of the Employer in accordance with the operational requirements of the facility.

§61.09 Pyramiding of Overtime

There shall be no pyramiding of overtime.

OVERTIME COMPENSATION (Joint Exhibit #4)

. . .  
7. Overtime work opportunities may be granted while on vacation, time off, or personal leave under specially funded conditions and emergency situations as determined by the Superintendent. Compensatory time and holiday hours (HHD) may not be used during any scheduled work period or order to earn overtime, holiday pay or additional compensatory time.

. . .  
9. Active Pay Status includes sick leave, vacation leave, holiday hours automatic holiday pay, compensatory time and personal leave, but does not include report back pay if less than 2:36 minutes or associate time, or standby pay.

FACTS AND BACKGROUND

The employer in this dispute is the Highway Patrol for the State of Ohio (hereinafter referred to as the Patrol). The employees responsible for these grievances are members of the bargaining unit known as the Fraternal Order of Police/Ohio Labor Council, Inc., which will be hereinafter referred to as the Union. The parties are in conflict about the proper applications of the overtime provisions in Article 61 of their latest contract which will hereinafter be referred to as the Agreement. The in-house regulations contained in Joint Exhibit 4 will be hereinafter referred to as the Work Rules.

The Grievants are protesting the Patrol's refusal to compensation them for extra hours they worked in a forty (40) hour pay period that happened to also include hours they took

off as compensatory time earned for past activities. In all three instances, their absence from regular duties was with the knowledge and prior approval of the appropriate supervisor.

Grievant One, Karen L. Miller, is a dispatcher for the Patrol. She was assigned to work a Saturday due to the lack of personnel. Earlier that week, she has been absent from her regular duties on a pre-approved leave of compensatory time accrued from holiday previously worked by Ms. Miller. She is seeking monetary payment for the four hours worked on Saturday, July 26, 1986, in accordance with the Article 61 of the Agreement.

Grievant Two, Trooper Wadell Bennett, had a court appearance on his day off and had requested to take sixteen (16) hours of compensatory time off during that week. His overtime compensatory time bank was depleted and the Patrol arbitrarily credited him sixteen (16) hours of holiday compensatory time. In the Patrol's view, that action made this Grievant ineligible to claim his off-duty court time as overtime. He is seeking credit for his court overtime in compliance with Article 61.

Grievant Three, Trooper James D. Czerniakowski, was called in on an emergency prior to the start of his regular shift on July 26, 1986. Later that day, he was absent from his duties on a pre-approved use of two compensatory hours. He is seeking reinstatement of his report back pay.

#### POSITION OF THE PATROL:

It is the contention of the Patrol that Article 61 of the Agreement was not violated when the Patrol refused to give employees extra overtime compensation during a calendar week in which that employee had used accrued compensatory time to compute the forty hour work week that was the base period for the requested overtime. The Patrol further contends that the phrase "active pay status" as used in Article 61 does not include compensatory time.

POSITION OF THE UNION:

It is the contention of the Union that the Patrol violated Article 61 of the Agreement by refusing to pay overtime to employees because each had taken compensatory time off during that same work week. The Union also contends that the term "active pay status" does include the use of compensatory time.

DISCUSSION AND OPINION:

These three grievances share the mutual question of when the Patrol must pay an employee for "overtime" duties performed. The Patrol has taken the position of refusing to pay employees for extra hours worked beyond their normal schedule if that individual has not completed forty hours of duty in an "active pay status" during that week or if that person has used any compensatory time during that calendar week.

The Union is seeking clarification of Article 61 including the meanings of Section 61.09 on Pyramiding; Section 61.02 on Active Pay Status and the prohibitions against using compensatory or holiday time "to earn overtime, holiday pay or additional compensation time".

Normally, the work day consists of an eight hour shift per person and a work week of forty (40) hours long. An employee may be required or requested to work in excess of those hours at the discretion of the Patrol according to its needs. For example, a trooper may be called in on an emergency or to fill in for absent personnel.

As stated before, an employee must be available and able to perform his or her assigned duties for at least forty hours each week. An employee will also receive a full paycheck while absent on certain categories of approved leave such as vacation leave. Additionally, the Agreement provides for extra compensation whenever a trooper has a court appearance during off duty hours or when a trooper must "report back" before the start of his or her next regular shift.

If an employee works extra hours beyond their normal duties, he or she gets the choice of either accepting cash for that

overtime or taking compensatory time off in lieu of cash. The purpose of allowing employees to take compensatory time off is to reward them for performing duties outside of their normal work schedule.

In conjunction with interpreting the terms "active pay status" and "pyramiding", this Arbitrator finds it necessary to discuss the Patrol's control over scheduling all work. The Patrol reserved the managerial right to set all schedules including the assignment of employees to overtime duties. Section 61.08 of the Agreement states that compensatory time off shall be granted at the discretion of the Employer in accordance with the operational requirements of the facility. One Work Rule contained in Joint Exhibit No. 4 states that compensatory time off shall be granted at a time mutually convenient to the employee and the supervisor. Section 61.07 further mandates that requests for compensatory time off must be submitted in writing twenty-four hours before being used. Section 61.01(3) states that maximum number of overtime hours that can be accumulated and Work Rule No. 6 states that cash will be paid for all hours over that limit. In other words, no "overtime" is earned and no compensatory time off is used without the express consent of the Patrol.

"Active Pay Status" as used in Article 61 is defined as the conditions under which an employee is eligible to receive pay including but not limited to vacation leave, sick leave and personal leave (emphasis added). In other Articles and in the Work Rules, the term includes compensatory time and holiday hours as well. Employees are eligible to receive pay for all hours actually worked and for those hours spent away from the job on pre-approved absences. Records are kept on employee's hours which reflect the actual hours worked and the various accumulations of sick, vacation and personal leave hours. When an employee works "overtime", that time is credited to his compensatory time bank at the rate of one and a half (1-1/2) hours earned for each hour so worked. Cash overtime payments are made at the rate of one and a half (1-1/2) times that employee's



regular pay rate. (If the overtime is the result of working on a holiday, the compensation rate uses compensatory time off on a one hour to one hour basis.

The Patrol argues that the language in Section 61.02 outlined above should be interpreted in such a manner as to exclude all categories of leave that are not specifically named therein. It is saying that the parties deliberately excluded compensatory time from that clause of Article 61. The Union testified that there was no real discussion on the subject as applied here. It is clear that there was not a meeting of the minds on this matter.

There is even more disagreement about the meaning of the term "pyramiding" as used in Section 61.09 which prohibits such actions. Pyramiding means the compounding of items in such a way profits on the increases and the base units. It is a deliberate manipulation of units in order to garner such profits or benefits.

The Patrol contends that the prohibition against pyramiding one's overtime is an embodiment of the past practices and customs of the Patrol as forbidden by the O.A.C. 123:-42-05. Patrol witnesses testified that employees were not allowed to use compensatory time or holiday time to accrue more compensatory time. Work Rule No. 7 includes a clause saying that Compensatory time and holiday hours may not be used during any scheduled work period in order to earn overtime, holiday pay or additional compensatory time.

In accordance with the Agreement, schedules are prepared and posted months in advance. No employee has any input into his or her work schedule at that point. When the employee needs to be absent due to vacation, compensatory time, sick leave, etcetera, that person must then request the Patrol's permission to be absent. Furthermore, should overtime duties become available, the Patrol selects the employees to do that work.

In seeming conflict with Work Rule No. 7 is Work Rule No. 9 which states that "Active Pay Status" includes sick leave, vacation leave, holiday hours, automatic holiday pay,

compensatory time and personal leave and report back pay if it is of more than 2:36 minutes. It is the opinion of this Arbitrator, that the inclusion of the term compensatory time - in Work Rule No. 9 is consistent with the rest of the Agreement and no conflict exists with Work Rule No. 7 because employees have no control over scheduling.

It is the understanding of this Arbitrator that the Patrol is attempting to avoid paying a trooper extra pay when his or her regular duties have not been completed. Likewise, it is understood that the Patrol would not want to pay a trooper twice for the same job. There is no question that an employee must be paid for all of his/her on duty hours. The issue here is how to account for overtime so that the term is understood by all of these parties.

Overtime is defined in the Agreement as all time worked in excess of forty (40) hours in one week. That work must have been completed while the employee was in an "active pay status". It is the ruling of the Arbitrator that the term "active pay status" as applied throughout the Agreement and as defined in the Work Rules (Jt. Ex. 4) does in fact include the category of compensatory time off. Earning and using compensatory time must be distinguished. Although compensatory time is earned at a greater rate than regular time, compensatory time off is used at the same rate and is paid when used at the same rate as regular time. Compensatory time off must be treated as an active pay status because it is an approved absence.

Patrol employees have no real control over their schedules. The regular shifts assignments are made by the Patrol and no time off is taken without the consent of the Patrol in accordance with the Patrol's scheduling need. This lack of control makes it very difficult for any one employee to manipulate his or her schedule in such a manner as to compound their hours to an extent that would amount to pyramiding time.

Specifically, Grievant One, Ms. Miller, should be paid for her extra hours worked on July 26, 1986 because she did not know she would be asked to work the extra hours on Saturday when she

used the compensatory time off on Monday, July 22nd. It is blatantly unscrupulous to punish an employee retroactively in this situation. Had she known she would not be properly paid, she probably would not have agreed to work those extra hours. Those hours were authorized by the Patrol and should be paid to the Grievant in cash in accordance with Article 61.

Grievant Two, Wadell Bennett, should be credited with his court-time earned because Section 61.06 of the Agreement states that Union members shall be guaranteed a minimum of two hours pay of the actual hours worked, if that is greater whenever they are required to appear in court during their off duty hours. Additionally, it is the ruling of this Arbitrator that the term "holiday hours" should be also considered for those two days off, the fact that those days off were with the approval of the Patrol means that he should be compensated. Likewise, the time spent in court before the start of his shift on June 12, 1986 should also be credited to Mr. Bennett's account as court time earned.

Mr. Czerniakowski, the third Grievant, was called in on an emergency before the start of his shift at the request of the Patrol. His use of two hours of compensatory time off had been preauthorized before the emergency arose. This report back is also an active pay status by definition because the Grievant had worked more than two hours and thirty-six minutes before the regular shift started. The compensatory time off should have been counted as part of his regular schedule because it was used on an hour for hour basis and that would result in this trooper being on duty for more than forty hours that week.

It is the Ruling of this Arbitrator that this Grievance be upheld. The Patrol has not proven that the Grievants deliberately manipulated their schedules in order to work the extra hours. A person working overtime either receives cash at the rates of one time and half in compensation for working overtime OR that person gets the chance to be off a certain number of hours at the discretion of the Patrol to reward them for the extra work. Pyramiding would not occur unless an employee was paid twice for the same hours worked or used. The

Patrol's control over the hours worked and the accrual of hours earned in the various benefit categories overrides the limited ability of an individual employee to "con" the Patrol out of extra compensation. The Patrol is not in compliance with the Agreement by refusing to pay Union members for extra duties simply because they were absent on pre-approved leave in that same work week.

  
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Samuel S. Perry, Panel Arbitrator