

AWARD OF ARBITRATOR

#71

In the Matter of the Arbitration Between: )  
 )  
 STATE OF OHIO )  
 DEPARTMENT OF HIGHWAY SAFETY )  
 STATE HIGHWAY PATROL )  
 Columbus, Ohio )  
 )  
 -and- )  
 )  
 FRATERNAL ORDER OF POLICE, )  
 OHIO LABOR COUNCIL, INC. )

HARRY J. DWORKIN,  
ARBITRATOR

RE: OCB CASE NO. G86-0128  
 Grievance protesting charged overtime  
 offered to Trooper on scheduled vacation  
 day, which overtime was declined.

A P P E A R A N C E S

On Behalf of Employer

STEVEN CHESLER, ESQUIRE	Counsel for Employer
JOHN M. DEMAREE	Management Representative
DARRYL L. ANDERSON	Lieutenant
STANLEY E. FORD	Sergeant
PETER COCCIA	Labor Relations

On Behalf of Union

PAUL L. COX, ESQUIRE	Counsel for F.O.P.
EDWARD BAKER	Staff Representative
LARRY HUDSON	Staff Representative
RICKY L. HENDERSON	Trooper (Grievant)

THE ISSUE

WAS IT CONTRACTUALLY PROPER TO CHARGE THE GRIEVANT  
 WITH EIGHT HOURS OF OVERTIME THAT WAS OFFERED TO  
 HIM ON A SCHEDULED VACATION DAY, AND DECLINED?

PRELIMINARY STATEMENT AND BACKGROUND:

The instant grievance is in the form of a class action  
 grievance filed at Step 3. The Arbitrator is requested to

offered the overtime was on scheduled vacation, and which overtime he declined.

The parties' current, and first collective bargaining agreement was entered into on April 26, 1986. The grievances arose during the fiscal year of June 1, 1986 - July 31, 1987.

There appears no significant conflict as regard the operative facts that gave rise to the grievance. The grievant, Trooper Ricky L. Henderson, a 15 year veteran, was assigned to the Granville Post, Licking County. An overtime roster was posted on June 18, 1986. The grievant was scheduled for overtime on July 5, 1986, between the hours of 6a.m. - 4p.m. The grievant, however, had been previously scheduled for vacation on the scheduled overtime day, by reason of which he noted on the overtime roster, "not available - V[acation]". Trooper Henderson was not subject to discipline by reason of his election to decline the overtime; however, he was charged with eight hours for overtime equalization purposes by reason of his election to decline the overtime "offered" to him on July 5, 1986. The fact that the grievant was charged with eight hours of overtime as having been worked, resulted in the filing of the grievance before the Arbitrator.

The FOP claims that the grievant had been previously scheduled on vacation on the day the overtime was offered. Inasmuch as he was unavailable it was improper to charge him with overtime on the day in question as having been worked. The grievant returned from vacation on July 14, 1986, on which day he learned that he had been debited with overtime for July 5. He thereupon filed a grievance which is before the Arbitrator for resolution.

The collective bargaining agreement defines a grievance as follows:

misinterpretation or misapplication of a specific article or articles, section or sections of this Agreement."

The contract permits filing of both individual grievances, and grievances that affect more than one member of the bargaining unit, [class action grievances]:

"§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 (1) member in the same way, the grievance may be filed by the Fraternal Order of Police, Ohio Labor Council, Inc. provided that at least one (1) member so affected signs the grievance. Grievances so initiated shall be called class grievances..."

Pursuant to Section 20.04, a "class grievance" is required to 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..."

It appears clear, therefore, that the class action grievance filed on July 14, 1986, on the date Trooper Henderson returned from vacation, and first learned that he had been charged with overtime, complied with the time requirements as set forth in Section 20.04 relating to the initiation of class action grievances.

The State Highway Patrol has presented a procedural issue, claiming that the grievance is both untimely, and pre-mature, for the reason that the grievance was filed on July 14, 1986, alleging violation of the overtime provision, whereas, the fiscal year is June 1, 1986 - July 31, 1987, thereby, according to management the opportunity to "equalize" overtime prior to the end of the fiscal year so as to comply with the contractual requirements. In support of its procedural claim, the State Highway Patrol reasons that

equalize overtime, as regards the grievant, prior to June 30, 1987, the end of the current fiscal year. In support of its claim that the grievance was not filed within the contractually prescribed time limits (14 days) as set out in Section 20.04, the State Highway Patrol reasons that:

"...It is the employer's position that June 18 was the date Trooper Henderson should have known that he would be credited with rejecting ten (Later reduced to eight hours) hours of overtime for purposes of the equalization program...Trooper Henderson should have known that rejection of the overtime on June 18 would be counted for purposes of equalization of overtime. Therefore, Trooper Henderson 'reasonably should have had knowledge of the event giving rise to the class grievance' on June 18, 1986. This grievance, therefore, was not timely filed." (Employer's brief, page 3).

The State Highway Patrol claims further that the grievance "is not ripe for consideration" inasmuch as the State Highway Patrol is authorized, pursuant to Section 61.03 "to equalize overtime opportunities at the end of the fiscal year, June 30, 1987." Accordingly, the State Highway Patrol reasons that a grievance claiming a violation of the overtime equalization program would not be "ripe until June 30, 1987."

Article 16, is a comprehensive "Overtime" provision, including language that specifically deals with "Equalization of Overtime":

"§61.03 Equalization of Overtime:

The Employer shall rotate and equalize scheduled overtime opportunities among qualified employees. Such equalization should be complete within the July 1 - June 30 fiscal year. For purposes of this Article 'equalization' shall be satisfied when employees are within ten (10) hours of each other. Those employees who are not equalized shall receive pay at the overtime rate. All overtime hours offered to employees but refused will be credited for purposes of equalization of overtime.

Good faith attempts will be made to equalize overtime by shift at any one installation. At the end of any measured equalization period, devia-

It is evident from the foregoing language that the equalization of overtime is to be effectuated prior to the end of the June 30, 1987 fiscal year. A degree of flexibility is recognized as regards compliance with the "equalization" requirement; a disparity in overtime is allowed, not to exceed 10 hours. Of particular relevance to the instant dispute is the language that,

"all overtime hours offered to employees but refused will be credited [charged] for purposes of equalization of overtime."

In the judgment of the State Highway Patrol, the fact that Trooper Henderson was scheduled for vacation on the day overtime was offered to him, is of no consequence insofar as charging him with overtime is concerned. The fact is, the State Highway Patrol reasons, he was offered eight hours of overtime on July 5, 1986, which he declined for reasons of his own. Under these circumstances, and in light of the contract language, the State Highway Patrol contends that it fully implemented the terms and conditions appearing in the Agreement, to wit:

- (a) 8 hours of overtime was offered to Trooper Henderson on July 5, 1986;
- (b) he declined to work the overtime; and
- (c) he was properly charged with having worked the overtime for the purpose of overtime equalization.

The State Highway Patrol predicates its claim that offered overtime that was charged to the grievant is consistent with both past practice (since 1977) and the contract language:

"...All overtime hours offered to employees but refused will be credited for purposes of equalization of overtime..." (Employer's brief, page 4).

"...In spite of the fact that for over ten years the Patrol had offered overtime to troopers on vacation, no attempt was made to change this at the bargaining table. It is well established that past practices are deemed to be part of the contract unless specifically excluded..." (Employer's brief, page 6).

"...If overtime is to be offered to those employees on vacation, why should a refusal to work it not count towards the equalization program?" (Employer's brief, page 5).

The class action grievance was filed on July 14, 1986, at the Step 3 level. The text of the grievance is as follows:

"...I signed the roster as not being available due to vacation. I later learned that I had been credited with a refusal to work 8 hours on overtime equalization program."

The remedy requested included, "that vacation...not be considered as refusal to work on overtime equalization program."

The grievance was initially submitted to Major Thomas W. Rice, Personnel Commander, as hearing officer. Major Rice upheld the position of the State Highway Patrol. In his report, the hearing officer pointed out that, pursuant to Section 61.03,

"...officers are offered overtime opportunities by rotation. Refusals can be made verbally, in writing or by an unanswered phone call.

An employee shall be considered reasonably available for equalization of overtime while in active pay status. Those on vacation would fall within this category."

Hearing Officer Rice concluded:

"...The grievant was offered overtime and waived his overtime opportunity by being unavailable due to vacation. As outlined in Article 61.03 all overtime hours offered to employees, but refused will be credited for purposes of equalization of overtime."

Hearing Officer Rice issued his decision as follows:

"The grievant was afforded the opportunity to work the overtime which was posted well in advance. He chose to decline the overtime opportunity due to being on vacation.

Since the grievant was given the opportunity to work overtime, and refused, it is held that the employer was in compliance with Article 61, Section 61.03 of the labor agreement regarding equalization of overtime.

ARBITRATOR'S FINDINGS AND OPINION:

of the grievance; that the labor agreement permits "equalization of overtime" and, that an employee who is offered overtime, but declines, is to be charged with such hours as having been worked for the purpose of equalization of overtime. However, the Arbitrator disagrees with the final conclusion of the Hearing Officer to the effect that the contract language was complied with, and that the grievance should be denied.

Notwithstanding the fact that the grievant "was offered the opportunity to work the overtime", which was posted well in advance, the Arbitrator is of the opinion that a condition precedent to charging a trooper with overtime that is offered and declined is, that, the trooper be "available" for such overtime. In the judgment of the Arbitrator, to conclude that a trooper who had been scheduled on vacation well in advance, is to be charged with overtime offered on a scheduled vacation day as having been worked, would lead to an absurd result. In the judgment of the Arbitrator the parties did not intend such consequence by the language which they employed.

Pursuant to Section 20.07 - Arbitration, the Arbitrator's authority, functions, and jurisdiction, are specifically delineated, including,

"...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 language of this Agreement."

In resolving the grievance before him, the Arbitrator will seek to manifest fidelity to the contract language, and shall limit his reasoning to the "interpretation, application, or\*\*\*violation" of provisions of the Agreement that are deemed relevant.

In the instant case Trooper Henderson was scheduled well in advance, for vacation, some two months prior to the overtime

the parties have provided that scheduled overtime opportunities shall be equalized among "qualified" employees, (Section 61.03). It is a maxim of contract construction that all words used by contracting parties should be accorded meaning, and none disregarded. Accordingly, in interpreting the contract language, it appears that, the parties did not provide that scheduled overtime opportunities shall be equalized among "all" employee; the parties deemed it desirable, and necessary that scheduled overtime be rotated, and equalized among "qualified" employees. The dictionary definition of the word "qualify" which appears in Black's Law Dictionary, 4th Edition, is: "to make one's self fit or prepared to exercise a right, office, or franchise."

In Webster's New World Dictionary of the American Language, "qualify" includes the definition; "to render fit for an office occupation, exercise of a right, etc."

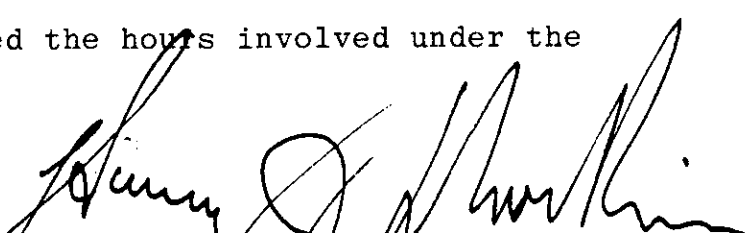
In light of all of the circumstances it cannot be said that an employee who has been scheduled on vacation on the day the overtime is available, and offered, has "refused" the overtime so as to be subject to being charged for equalization purposes. In the judgment of the Arbitrator, a trooper who is on scheduled vacation is not subject to being charged with overtime by reason of his declination; to do so, would be contrary to both the letter and spirit of the overtime equalization language. It would also appear that the State Highway Patrol would be aware that a trooper who is scheduled for vacation would in all likelihood decline or "refuse" such overtime. Nevertheless, the evidence indicates that troopers have been known to accept overtime even while on vacation, and therefore, such practice may be continued in effect, and does not appear to be at variance with the contract language.

The language employed by the contracting parties,



The conclusion is required that employees subject to the foregoing conditions are "unavailable" for legitimate causes, and therefore, would not be "qualified" for such overtime. A refusal or declination, under such conditions would not warrant that the employee be charged [debited] with overtime as having been worked. To hold otherwise, would constitute a strained, and unwarranted interpretation of the language of Section 61.03, and would reduce it to an absurdity.

By way of conclusion, and confining the opinion, and award, to the specific facts giving rise to the class action grievance, a trooper who is on scheduled vacation, and who accepts offered overtime, is properly charged with having worked such hours; however, if the trooper is on vacation, and declines such overtime, he cannot be charged pursuant to the contract since, he was not available, or "qualified". In the opinion of the Arbitrator, Hearing Officer Rice in his decision, failed to address the question whether the grievant was "qualified" at the time the overtime was available, and offered. Notwithstanding an absence of bad faith on the part of the State Highway Patrol, or deliberate intention to circumvent the language of the Agreement, the conclusion is inescapable that scheduling a state trooper for overtime who it was known in advance would be on pre-planned vacation, constituted the scheduling of an employee for overtime who was not available, and therefore not "qualified". On the basis of the foregoing reasoning, it is the finding of the Arbitrator that, in the administration of Section 61.03, the refusal of a trooper who is on scheduled vacation to work overtime, may not be charged against him as having worked the hours involved under the equalization formula.



A W A R D

I.

The Arbitrator finds, and determines that the grievant was offered overtime pursuant to a schedule posted on July 5, 1986; that the grievant had previously been scheduled on vacation on the day in question, and that he elected to decline the overtime;

II.

Inasmuch as the grievant was on scheduled vacation on the day the overtime was offered, he cannot be considered "qualified" for such overtime, and therefore, his refusal is not subject to being charged for the purpose of administration of the equalization of overtime program; an employee's refusal to work overtime because he is on vacation may not be considered as a refusal under the equalization program.

AWARD SIGNED, ISSUED, AND DATED AT CLEVELAND, CUYAHOGA COUNTY OHIO, THIS *28th* DAY OF JULY, 1987.

  
HARRY J. DWORIN, ARBITRATOR