

ARBITRATION AWARD SUMMARY

OCB Award Number: 131
OCB Grievance Number: 87-1221
Union: FOP-I
Department: OSP
Arbitrator: Leach
Management Advocate: Anderson
Union Advocate: Cox
Arbitration Date: 11-18-87
Decision Date: 12-18-87
Decision: Denied

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
OFFICE OF COLLECTIVE BARGAINING
STATE HIGHWAY PATROL

and

December 18, 1987

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

OCB GRIEVANCE NO. 87-1221 - Justus 11/18/87

ARBITRATOR: DONALD B. LEACH, appointed by the Office of Collective Bargaining, Department of Administrative Services, State of Ohio

APPEARANCES: FOR THE FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.: Paul L. Cox, Esq., Fraternal Order of Police, Ohio Labor Council, Inc., 3360 E. Livingston Avenue, Columbus, Ohio 43227

FOR THE STATE OF OHIO, OHIO HIGHWAY PATROL: Lieutenant Darryl L. Anderson, Ohio Highway Patrol, 660 East Main Street, Columbus, Ohio 43215

I S S U E

Did the Employer violate the Agreement at its Gallipolis post, when, on four different days, it refused Grievants time off for vacation or holiday leave, one day for one of them, and three for the other, who also suffered a denial of a shift trade to permit him to take time off.

B A C K G R O U N D

The Highway Patrol (referred to as "Employer") maintains a post at Gallipolis, Ohio, which is responsible for patrolling the State highways in Gallia and Meigs counties. At the time the controversies arose, it had assigned three troopers to the day shift, four to the afternoon shift and two to the night shift. That staffing was predicated on a continuing study of the incidence of highway accidents in the respective shift periods. During the period involved, one of the day shift troopers became incapacitated and did not work. That left the post understaffed for a temporary but indefinitely extended period.

Under the Agreement, shift assignments are made for a six month period and generally are not changed during that period. Thus, the basic burden of the understaffing fell on those on the day shift. The two Grievants, Robert S. Justus and Thomas D. Danner, were also on the day shift and so became the only two troopers left to work that shift. (Ordinarily, a sergeant was also assigned to each shift and did ordinary patrol work to some extent but a sergeant's primary functions were supervisory and administrative.)

Trooper Danner applied for vacation leave for May 6, 1987, a Wednesday, which was denied. Trooper Justus applied for and was denied a day off for vacation leave on Monday, March 23. He was also denied time off for holiday leave on Tuesday, March 31 and on Saturday, April 4, when he asked for a vacation day. On Saturday, April 25, he was permitted to trade shifts with one assigned to the afternoon shift but denied a further trade to the night shift from which he acknowledged he would ask for time off for holiday leave. Grievance was filed because of the denial of the trade and another for the denial of the day off.

Both troopers filed Grievances protesting the denials. Trooper Danner's Grievance is No. 192; Trooper Justus' Grievances are Nos. 187, 193, 194 and 209, the last one protesting the refusal of the trade and the others the request for time off. All were presented together as reflecting the same issue, which the FOP looks at primarily as revealing a discriminatory administration of the Employer's policy.

The FOP pointed out that, on the night shift, there had been a number of examples when no trooper worked the night shift at that post and when, during some hours, not even a sergeant was available to handle calls, those hours generally being from 2:00 to 6:00 A.M. (In that situation, a trooper would be called out if the post received a report of an accident.) While that was happening, it says, the two troopers left on the day shift were being denied time off when the result would have been no coverage except that provided by a sergeant.

Both Grievants, in fact, did use many hours of leave time in 1987, Trooper Danner having had 152 hours of vacation time, 16 hours of personal leave time, 93 hours of holiday compensatory time (referred to as "comp time") and Trooper Justus having had 104 hours of vacation, 24 hours of personal leave, 4 hours of ordinary comp time and 128.5 hours of holiday comp time.

The problem arises respecting only certain days when days off were denied because, if allowed, no trooper would be on duty on the day shift. That arose regularly when one of the two was scheduled to be off or was assigned to other duty, usually training course work.

Obviously, where illness intervened, that affected one of the two, other arrangements had to be made at times, such as when the sick trooper was the only one assigned to work that day. In that case, the sergeant and sometimes the lieutenant in charge of the post covered the duty.

As to the night shift, there were times when a vacation of a full week or more affecting one trooper arose or when one accumulated enough comp time to provide a full week off. In those circumstances, there would be nights in which no troopers would be working because the remaining one would have his regular scheduled days off. As to incidental days off for vacation, holiday comp time, etc., an effort was made to prevent both troopers from being off on Friday and Saturday nights, due to greater incidence on those nights of inebriation on the highways.

When trades of shift occurred, the temporary trooper on the night shift was usually permitted to take off except on the weekend, i. e., the same policy was applied as governed the troopers regularly assigned to that shift.

As to the day shift, an effort was made to keep one trooper on duty, whether a regularly assigned one or one assigned there through a shift trade.

A collateral matter was raised by the FOP, i. e., that Grievant Justus had been able to obtain a continuous period of vacation only by trading several shifts with another trooper.

The Employer's Level III Finding is as follows:

"After reviewing the information supplied at the Step 3 hearing by both parties, the Hearing Officer finds no violation of the contract concerning the central theme of the five consolidated grievances.

The issue addressed is not covered by Article 2 - the "Past Practice" clause of the contract. The relevant contract provisions dealing with vacation leave and compensatory time clearly indicate the employer has the right to approve or deny leave requests. Obviously, management should grant leave if the operational effectiveness of the work facility is not effected (sic). In the cases cited, there was a clear need for management to require the employees to work their assigned shifts.

As pointed out in the hearing, employees have the right to trade shifts with other employees which may then allow them to take leave. In the case where the grievant's request for a "double shift trade" was denied, the Hearing Officer finds no reason it could not have been granted. However, the evidence indicates the grievant would not have been allowed to take leave if he had traded to the 8 P.M. shift, due to it being a Saturday evening with corresponding traffic.

The Hearing Officer finds no evidence of discriminate practices in reference to granting or denying leaves unequally for different shifts. The very evidence submitted by the Union shows different coverage patterns. Additionally, the different shifts have different work-load responsibilities due to different traffic volume. Just as bidding on the day shift has benefits, it brings with it the responsibility of increased need for staffing.

The grievant's ability to obtain leave is hampered somewhat at this time by the absence of one of his fellow employees. This is a short-term condition. The grievant is encouraged to use his shift trade rights when he finds he cannot be granted leave due to operational necessity. Management will continue to work with the all (sic) employees of the Gallipolis Post to ensure requests for leave be granted when operational considerations allow."

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

ARTICLE 21 - WORK RULES

S21.01 Copies of Work Rules

The employer agrees that existing work rules and directives shall be reduced to writing and be made available to affected employees at each work location. To the extent possible, new work rules and directives shall be provided to the Ohio Labor Council two (2) weeks in advance of

their implementation. In the event that the Labor Council wishes to present the views of the bargaining unit regarding a new work rule or directive, a time will be set aside at the regularly scheduled Labor/Management Committee meeting. The issuance of work rules and directives is not grievable. The application of such rules and directives is subject to the grievance procedure.

S21.02 Application

All work rules and directives must be applied and interpreted uniformly as to all members. Work rules or directives cannot violate this Agreement. In the event that a conflict exists or arises between a work rule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

ARTICLE 29 - SHIFT TRADE

By mutual agreement between the involved employees and the Post Commander or equivalent supervisor, members of the bargaining unit may trade posted work days. Approval for such shift trade shall not be unreasonably denied by the Post Commander or equivalent supervisor.

ARTICLE 30 - TRANSFERS/PAYMENT FOR MOVING EXPENSES

S30.01 Transfers

Members of the bargaining unit will be transferred as provided below:

Should the Employer desire to fill a position by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. All personnel in the affected classification shall have the right to bid on the position. Selection of the person to be transferred shall be based upon ability and seniority. If no bid is received, the most junior employee shall be transferred.

S30.02 Moving Expenses

Moving expenses will be authorized and paid by the Employer for employees when the transfer has been initiated by the Employer. Moving expenses will be reimbursed according to procedures established by the Superintendent. Moving expenses will be determined by obtaining three (3) bids from licensed moving companies, who are authorized to operate in this state by the Public Utilities Commission of Ohio.

Moving expenses will not be granted when the transfer is at the request of the individual or the initial move of the cadets upon graduation and assignment from the Academy.

ARTICLE 43 - VACATION ALLOWANCE

§43.04 Vacation Leave

Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee. The Employer may establish minimum staffing levels for a Patrol Post or work station which could restrict the number of concurrent vacation leave requests which may be granted for that Post or work station.

The Employer shall grant first priority to vacation leave requests received at least six (6) months, but no more than one (1) year, prior to commencement of the requested vacation leave period. Such "seniority vacation requests" shall be granted with preference to employees with the greatest rank or classification within a classification series at the Patrol Post or work station in question. Otherwise, in choosing among conflicting "seniority vacation leave requests" seniority shall govern.

All other requests for vacation leave shall be made at least twenty one (21) days prior to the commencement of the requested vacation leave period. Requests made less than twenty one (21) days prior to the commencement of the vacation leave period may be considered by the Employer but need not be approved, regardless of staffing needs. ***

ARTICLE 44 - HOLIDAYS

§44.03 Computation of Holiday Pay or Compensatory Time

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.

ARTICLE 61 - OVERTIME

S61.08 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.

D E P A R T M E N T A L P O L I C Y

File 9-507.4, Holiday Compensatory Time, dated 5-18-80, states in relevant part:

E. 8. It is the intent of this procedure to permit employees to ask for repayment of accumulated holiday hour (sic) at a time that will benefit them most, and at the same time not affect the efficient operation of the division.

E. 9. Each section, district and post commander will administer the principals of this procedure by limiting the number of personnel off duty and on vacation at any one time.

File 9-507.6, Annual Leave Requests, dated 10-24-86, states in relevant part:

Leave shall be taken only at times mutually agreed to by the employer and the employee.

The division may establish minimum staffing levels for a patrol post or work station which could restrict the number of concurrent leave requests which may be granted for that post or work station.

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

Section 21.02 requires uniform rules. Here, the leave rules were not applied uniformly at the Gallipolis post.

In order to take a vacation, Grievant Justus had to trade shifts for several of the days of his desired continuous vacation period. The night shift troopers, however, don't have to go through that procedure. It is a procedure that may not work out since consent of another trooper is required for a trade. The night shift troopers can take a continuous vacation without that, while the day shift ones cannot.

In many cases, no trooper worked on a particular shift. When one of the Grievants asked for time off and that situation would result, however, he was denied. That is not uniform administration of the Employer's policy.

If the Employer cannot administer its rules uniformly in this situation where one person is disabled and unable to work, it should resort to Article 30 and transfer someone into the post.

EMPLOYER POSITION

These Grievances raise the problem of the relative rights of the employees and of the management.

As to vacation, the Agreement expressly permits the Employer to limit the number to be off at one time.

In each case presented here, the Grievant was the only trooper scheduled to be on duty in periods when there was a pressing need for staffing.

On comp time matters, the denial was based, again, on the need for staff at the times involved.

Actually, there are no work rules involved in this matter. Some policy has been established but that includes a recognition that judgment must be used in particular circumstances and that variation will occur accordingly.

Notwithstanding, there has been uniformity of administration in light of the differences in the work load of the two shifts.

No doubt that type of time off may not be denied unreasonably any more than vacation time when applied for more than 21 days ahead of time. There was no unreasonable denial involved here.

D I S C U S S I O N

As is apparent, the problem here arises from the long absence of one of the troopers assigned to the day shift. Under the Agreement, other troopers at the post could not be moved from shift to shift, as a general rule, in order to facilitate adjustment. That caused a continuing problem in performing the work of the day shift.

The FOP's principle objection to the Employer's handling of the resulting situation is that it did not administer its work rules and directives uniformly as to all members as required by Section 21.02. Those items, rules and directives are required by Section 21.01 to be reduced to writing and made available to affected employees at each work location. There was no showing that anything of that nature had ever been so reduced to writing or made available. Thus, there is no way in this case to determine what the rule or directive was, if any, and, it follows, there is no way to judge whether a violation has occurred.

The only thing mentioned in the written documents submitted was a "policy" statement mentioned in the decision at Level III of the grievance procedure. That "policy" made clear that, as to holiday comp time, personnel would be allowed to take off up to a number that would not affect the efficient operation of the division. Substantially the same policy applied to the taking of vacation leave.

Those are not very strict standards. They obviously imply that the policy must be administered with judgment in light of the circumstances. Since circumstances vary almost infinitely, a standard really doesn't exist to guide a supervisor in anything more than a general way.

Since those provisions hardly even set a standard, they clearly don't create a rule, a rule being generally more rigid than a standard.

Other provisions of the Agreement, however, must be considered.

Article 43 governs vacation leave. Section 43.04 provides that vacation leave "shall be taken only at times mutually agreed to by the Employer and the employee". It further provides that where vacation leave is requested less than 21 days ahead of time, it need not be allowed "regardless of staffing needs".

It would seem that, generally, vacation can't be disallowed unreasonably but, if request is made less than 21 days ahead of time, justification of denial probably doesn't require as high a level of explanation.

The provisions on holiday comp time are not as precise as in the case of vacations. Arbitrator Earl M. Curry, Jr., however, has held that it is governed by the same Employer safeguards as regular comp time, i. e., useable in lieu of overtime pay.

Regular comp time is covered in Article 61 and Arbitrator Curry held that Section 61.08 is applicable as well to

holiday comp time. That Section provides that it is to be "granted at the discretion of the Employer in accordance with the operational requirements of the facility".

It follows that in the two types of leave involved here, vacation and holiday comp time, operational requirements must take precedence. That comports also with the Management Rights provisions of the Agreement and, indeed, with implicit management rights of a police organization on whose operation the safety of the public depends. Those rights include the reciprocal duty to deploy staff as efficiently and effectively as possible.

At the same time, it is also implicit in a collective bargaining agreement that individuals will be treated with reasonable uniformity or equality without discrimination. That aspect must be examined here.

It will seem self-evident that operations cannot be the same on each of three shifts when weather, traffic and other conditions vary continuously. A principle that applies uniformly, therefore, would seem to be one that takes variations into account in order to arrive at an equitable allocation of burdens around the clock.

In other words, precise equality is impossible. The problem, therefore, must be understood in a broader context.

Here, the Employer and, indeed, the entire staff was faced with a burdensome problem, the absence of one trooper for an indefinite period. For just and proper reasons, covered in the Agreement, the Employer could not reassign the remaining staff members from one shift to another but had to operate as best possible under the conditions created. That caused a disruption to the day shift primarily. In effect, it then became staffed by the same number of troopers as the night shift, even though its work load, in terms of accidents, was 68% greater. It is obvious that, for the protection of the public, every effort had to be made to keep at least one trooper on the roads every day, to the extent possible. It is equally obvious that the need for manpower on the roads was not as great on the night shift.

It follows that in order to afford vacations and other benefits to those on the night shift, greater freedom existed to leave the roads patrolled only by a sergeant during the earlier hours of the shift. Freedom was not as great on the day shift where traffic was greater and accidents more frequent.

Notwithstanding, those on both shifts were able to use their contractually authorized times off for vacation and holiday comp time under substantially similar circumstances. On the night shift,

effort was made to avoid both troopers being off on Friday and Saturday nights, although that was not always possible where days off of a continuous week or more were being used by one of the troopers. By the same token, some restrictions were placed on day shift employees respecting the days that might be taken. At the same time, they were permitted to take time off at other times when their absence would not create an unduly critical problem.

In short, both groups were restricted in their choice of days off but each was accommodated to obtain the number of days off to which they were entitled. The Employer authorized times off but limited the choices of the troopers on both shifts. The standards for limitation varied as between the two shifts but that variation reflected the different demands of the work.

The differences at every step in the foregoing analysis do not reflect lack of equality or uniformity. Fundamentally each of the two groups was treated equally.

Moreover, the Employer authorized and, indeed, encouraged trades of shifts in order to make possible the enjoyment of times off. The night shift didn't have to trade to enjoy the time off but that was due primarily to the lesser work load. Those on the day shift often had to trade to obtain the same benefit but the facts reveal that they did get time off.

Nothing the Employer did caused the results described. The results flowed from the indefinite absence of one trooper assigned to the day shift. Standards, rules or policies cannot be altered to adjust to every temporary change in the operating needs of the Employer.

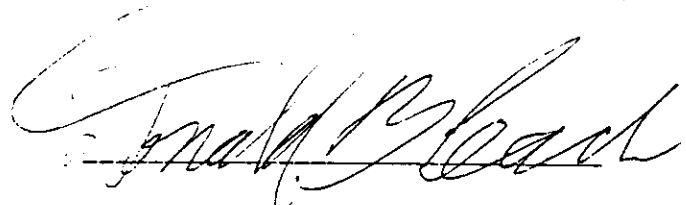
The FOP suggests that the Employer transfer someone in to the post to adjust the work load (see Article 30) or that it cover the absence with overtime. The first might be costly; the second clearly is costly. To incur costs of that type is a matter of management discretion and is not appropriate for consideration here in light of the above discussion.

In summary, actions of the Employer as between the shifts have not been precisely parallel. In substance, however, equality has been maintained under the temporary change of circumstances as viewed in relation to the different conditions dealt with by the two shifts. Some differences have arisen but they are not discriminatory nor have they been shown to deprive anyone of the number of days off to which he is entitled. The only restrictions that have been applied have to do with the day desired in some cases, a restriction inherent in

management respecting vacation leave and holiday comp time, as recognized expressly in the Agreement.

A W A R D

The Grievances of Thomas D. Danner and Robert L. Justus, dated respectively April 13, March 25, April 1, April 7 and April 30, 1987, are hereby denied.

A handwritten signature in cursive script, appearing to read "Donald B. Leach", written over a horizontal line.

Donald B. Leach