

ARBITRATION AWARD SUMMARY

OCB Award Number: 132

OCB Grievance Number: 87-1446

Union: FOPI

Department: OSP

Arbitrator: Leach

Management Advocate: Anderson

Union Advocate: Cox

Arbitration Date: 10-21-87

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. 87-1446 *Steiner 10/21/87*

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, the State of Ohio, violate the Agreement when it forced Grievant, S. R. Steiner, a Highway Patrol Trooper, to move from his assigned day shift to the night shift to fill a vacancy at the post caused by the promotion of the former incumbent.

B A C K G R O U N D

In April, 1986, the parties entered into their first collective bargaining Agreement, covering the period from that date to December 31, 1988. One of the greatest areas of disagreement in the negotiation had been the rotating shift system under which, at frequent intervals, troopers changed shifts. The Employer preferred that system and the FOP strongly opposed it. A Fact Finder recommended the FOP position, which was adopted, the terms of the applicable provision being those recommended by the Fact Finder. In practice, both parties found it to their advantage to operate under it in a slightly modified manner.

The exact provision required shift assignments to be made for six month periods, each such assignment to become effective approximately six months after being made. That has been modified so that the six month shift assignment becomes effective approximately thirty days following the assignment.

Under the modified system, Grievant was assigned to the day shift at the Employer's Ashland, Ohio post, the shift he preferred. That became effective on March 1, 1987. In the following month, a trooper assigned to the night shift at the same post was promoted and moved to a different location, leaving a vacancy on that shift.

The original staffing at the post, before the vacancy, was one sergeant and three troopers on the day and evening shifts and a sergeant and two troopers on the night shift. There was also a post commander, of course. Thus there were only a sergeant and one trooper on the night shift after the vacancy and that was deemed to be insufficient personnel.

The Employer determined that the manpower resources of the Ashland post were more ample generally than those at other posts - a position not contested by the FOP - and decided it would be better to fill that vacancy from the Ashland staff than to transfer someone into it. It further decided that it could decrease the day shift by one trooper and use an individual so released to fill the night shift vacancy.

Under the policy adopted by the Employer, the troopers at the Ashland post, in order of seniority, were offered transfer to the night shift there. All declined. Under the policy, the next step was to require the junior trooper at the post to change to the night shift. All those on the evening shift and one on the night shift were junior to Grievant, who, however, was the junior trooper on the day shift. Under the policy, Grievant was going to have to move to another shift. He was approached and the explanation made that one of the afternoon shift

troopers would be moved to the night shift and then he, as junior on the day shift, would be required to move to the afternoon one. Grievant protested the move but elected the night shift as his preference, if he was made to change. That change was made and Grievance was duly filed. It was processed through the grievance procedure.

The Employer's Finding in the Level III decision, from which the matter proceeded to arbitration, 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.

The key to the Hearing Officer's decision lies in the intent of the fact-finder in crafting the language of Section 26.01. As well stated in the management position, the contract provision effectively prevents the employer from "rotating" troopers around the clock, on a weekly or monthly schedule, as was pre-contract past practice.

The language neither proscribes, nor provides direction for, changing one permanent shift to another permanent shift when such a change is operationally necessary, as is the case at hand. The Hearing Officer finds management has operated cautiously and in good faith in reassigning the grievant from a "day" shift which was abolished to a more necessary, previously vacated "midnight" shift.

The grievance is denied."

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

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 shall be for the period from September 1st to February 28th, and the assignments made on September 1st will be for the period from 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.

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

30.01 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 on ability and seniority. If no bid is received, the most junior employee shall be transferred.

ARTICLE 32 - TEMPORARY WORKING LEVEL

32.01 Payment Adjustment

Each employee that is temporarily assigned to duties of a position with a higher pay range than the employee's own, shall be eligible for a working level pay adjustment. This pay adjustment shall increase the employee's base rate of compensation to the greater of: a) classification salary base of the higher level position or b) a rate of pay at least five (5%) percent above his/her current rate of compensation. This pay adjustment shall in no way affect any other pay supplement which shall be calculated using the employee's normal classification salary base.

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 issue of permanent shifts was resolved against the Employer in the Agreement that governs the rights of the parties.

Nothing in Section 26.01 permits the Employer to change shift assignments during the six month period during which one is in effect. The Employer is seeking here to amend the Agreement in the guise of an arbitration decision.

EMPLOYER POSITION

The Employer's decision to reassign Grievant was based on sound management judgment. In that connection, the action taken was the most reasonable solution of the Employer's problems in context of the transfer of an employee to another post. To transfer someone in might well have left another post undermanned.

The Employer's brief also discusses contentions of the parties in the Fact Finding hearing that preceded the Agreement. The Arbitrator here, however, is limited to the terms of the Agreement as they may be illuminated by the Fact Finder's report, the language of the Agreement being always paramount.

D I S C U S S I O N

Throughout this matter, the Grievant and the FOP have maintained that the Agreement, Article 26, requires a shift once assigned to an individual to be maintained without change for the full six month period prescribed in the Agreement. The Employer agrees with that where the assignment remains the same but argues that circumstances change, making new allocations of manpower resources essential and, in the course of reallocations, shift changes may become necessary, an aspect of operations not specifically covered in Article 26.

The Fact Finder's report concentrated on the point in contention, i. e., rotating shifts and no comments or provisions, in what became Article 26, were made for changes in organization.

The language of the applicable Section 26.01 requires, in the first sentence, that permanent shifts be established. The second sentence covers the periods of duration for each shift assignment and the effective dates for each (modified informally later as noted above). The third sentence, the critical one here, is as follows:

"In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur."

(The fourth and last sentence, not relevant here, merely establishes a normal work week of forty hours.)

In the critical third sentence, the first clause of the conjunctively linked two-clauses is a categorical statement of finality, that a shift assignment is permanent. Standing alone, that clause would require decision for the FOP, regardless of any practical problems that might arise. In a sense, however, the clause is redundant in that it says about the same thing as the first sentence of the Section, i. e., that shifts are permanent.

The second, equal clause of the third sentence, however, says that no shift rotation will occur. That result is implicit in the first sentence of the paragraph also, i. e., that permanent shifts must be established. It is not unreasonable, therefore, to believe that the forbidding of rotating shifts has meaning beyond mere reiteration.

The exact meaning of the Section, of course, is impossible to determine from analysis of the words alone. It could reasonably be understood to mean that the first clause is to be construed in the context of the second, i. e., that the first clause is not as categorical as it would be if it stood alone but is limited in application to prevent rotating shifts. That possibility must be considered and tested in relation to other provisions of the Agreement.

Article 30, alluded to by the FOP as the avenue available to the Employer to solve the scheduling problem, provides that an employee may be forced to transfer (probably from one location to another), when he is the junior in seniority and when no one volunteers for a posted opening. Under those terms, a person can be required to transfer without reference to the shift to which he may have been assigned. The language requires the junior to transfer and says nothing of shift assignment. Obviously that individual may be required to change shift from the one he had to the shift of the open position in the new location. In that sense, his shift assignment is not permanent.

The same result would occur where one volunteers to transfer. Volunteering would authorize the transfer but his shift would be different in the new location from that in the old. (That can happen expressly in a voluntary shift trade, Article 29, but a voluntary transfer does not fit the definition of a shift trade and hence would not justify the shift change in the situation discussed, although, as shown, it might happen in full accord with other provisions.)

It is also possible that the same result would occur, i. e., change of shift, under Article 32, covering temporary upgrades.

In a sense, of course, it may be argued that a person may waive a right to stay on the same shift and that that could explain the voluntary transfers discussed here. Such is not crystal clear, however, as is evidenced by the specific provision on shift trades, noted above, Article 29. More importantly, the literal and absolute language of the first sentence and the first clause of the third sentence of Section 26.01 could be held to forestall waiver by an individual. Even if waiver is possible, however, it would not affect the remaining points, i. e., involuntary transfers and temporary upgrades.

In terms of the other Articles discussed, it appears that shift changes can occur within a six month shift assignment. If Article 26 is interpreted as consistent with the other provisions, it would follow that the first clause of the third sentence could not be understood to be categorical as if it stood alone. If it were interpreted to be categorical, it would come into conflict with the provisions, discussed above, which are equally as categorical. It is preferable to interpret a contract as consistently as possible and to avoid unnecessary conflicts of language. Thus, the third sentence may be construed consistently with the other provisions by interpreting it, as suggested above, to be restricted to the context of rotating shifts.

So understood, Article 26 does not absolutely prevent change from one permanent shift to another.

While not directly determinative, a further reason appears for more flexible interpretation of Article 26 than would be true under the FOP's approach.

As noted above, the FOP urged the use of Article 30 for the solution of the staffing problem at the Ashland post. Application of that Article would entail transfer of someone into the open night shift assignment. If that assignment left the post understaffed from which the transferred employee came, the vacancy thus created would have to be filled by further transfer. That could go on through a number of changes. At the very least, the suggested solution is an extremely cumbersome one and a necessarily expensive one, since some moving expense would likely become involved also.

Unnecessary complexity should be avoided where possible in contractual interpretation. That consideration here, while not a deciding factor, is an important one in supporting the view that Article 26 must be understood to permit some types of change in shift assignment during the six month assignment period.

The FOP opposes that approach on the basis, among others, that it would open the way for the Employer to sidestep the contractual provision and require individuals to change shifts for whatever reason might be dreamed up.

The fact that some change of shift is authorized by the Agreement does not imply that every type of occasion could justify a shift change.

In this case, the operational problem arose in a straightforward manner, by promotion and transfer of a trooper, leaving a vacancy on the night shift. That shift was manned by the fewest number of troopers assigned to any shift at the Ashland post. The vacancy in that staffing pattern created a very real problem of staffing the post with troopers every night in the week as well as providing some additional time for investigation. Thus, from an operational standpoint, something had to be done.

The obvious solution was to transfer someone in to work at the post. The evidence was that no one was available in terms of excess staff in other locations. No cadets or new employees would become available until the autumn when the cadet class was graduated.

The result was that a manpower shortage existed within the Employer's ranks. A transfer from one place to another, under those circumstances, would only create a shortage elsewhere.

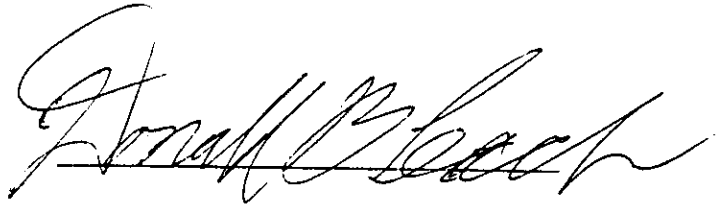
After consideration, the Employer concluded that it could do without a trooper at the Ashland post on the day shift better than transfer one in to the Ashland post. That solution would help to alleviate the manpower problem but, of course, it required a change of shift for one person during the six month period.

The foregoing demonstrates a good faith decision based exclusively on operational necessities, a power naturally inhering in management. Thus, the purpose was a valid one in terms of the public duty of the Employer and the action was taken in good faith, not for the purpose of evading the requirements of Article 26. Under these circumstances and in terms of these findings, it must be concluded that the change in Grievant's shift was not forbidden by Article 26 and was a contractually permissible change of shift.

Accordingly, the Grievance must be denied.

A W A R D

Grievance, dated May 6, 1987, of Trooper S. K. Steiner,
is hereby denied.

A handwritten signature in cursive script, reading "Donald B. Leach". The signature is written in dark ink and is positioned above a horizontal line.

Donald B. Leach