#166

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

March 18, 1988

and

OCB Grievance 87-1885

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

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, Personnel/Labor Relations, Ohio State Highway Patrol, 660 East Main Street, Columbus, Ohio 43205

I S S U E

The issue is phrased separately by the parties. That by the FOP is:

"Was the Employer correct in denying the grievant's request for military leave with pay for the period of August 22-September 5, 1987? If not, what shall the remedy be?"

That by the Patrol is:

"Was the Employer correct in denying the grievant's request for military leave with pay for the period of August 22-September 5, 1987; the purpose of such leave being to attend specialized training not necessary for appointment/enlistment, promotion or retention in the Ohio Air National Guard? If not, what shall the remedy be?"

B A C K G R O U N D

The basic facts are not in dispute, although objections were raised to some of the evidence offered. The issue, accordingly, is a legal one.

Grievant, Trooper Robert H. Waner, a member of the Ohio National Guard, was given time off, with pay, pursuant to the Agreement and statutory and regulatory law, for the period May 30, 1987 through June 12, 1987 for the Guard's annual training. Later that year, the Guard solicited volunteers for a project it desired, for the period of August 22 through September 5, 1987. Grievant indicated his general willingness to volunteer for the project, subject to the vacation schedule at the Patrol Post to which he was assigned, it being his desire not to prevent a fellow trooper from enjoying a vacation scheduled for him. After ascertaining that the time was available, without creating such problem, he indicated his willingness to undertake the project. The Guard, thereafter, ordered him to duty for the period described above.

When Grievant then applied for leave for such purpose, his superior officer, Lieutenant Richard Lodwick, investigated the matter, talked to Grievant to ascertain the details and learned that the duty was voluntary on his part. The Lieutenant also talked to Grievant's Guard Commanding Officer, who confirmed that the duty was voluntary, adding that, whether or not Grievant performed the duty, his status for promotion in the Guard and other benefits and privileges would not be affected.

Thereafter, Lieutenant Lodwick denied the request for military leave with pay. Grievant was allowed the time off for the period, however, under Grievant's entitlement to vacation.

Grievance was filed July 9, 1987 protesting the denial of military leave. It is as follows:

> "On 6-22-87, Tpr. R. H. Waner requested military leave in writing for 8-22-87 through 9-5-87. Lt. W. H. Lodwick requested the orders which were presented 6-26-87. On 7-1-87 the military leave was denied due to it being a voluntary detail. The written denial was placed in Tpr. Waner's file while on time off and he found it 7-3-87 when he returned to duty. See attachment of denial. continued on Hp 22
> Remedy Requested: Military request be granted and spirit

of contract upheld. Any vacation time required to attend military training be returned to accrued vacation time."

The Grievance was denied and the denial confirmed in the Step III proceeding, as follows:

> "After reviewing the information supplied at the Step 3 hearing by both parties, the Hearing Officer finds no violation of the contract.
>
> As stated in the management contention found above, it was was not the intent of the Employer to change it's (sic) pre-contract practice concerning voluntary military training during negotiations. The resulting mutually agreed-upon contract language does not require the Employer to grant such leave.
>
> During the Step 3 hearing, the Union referred to a previous arbitration concerning paid military leave. Under the advice of the Office of Collective Bagaining, the Employer has applied the decision rendered in that case to that case only. The singular application is due to the unique circumstances surrounding the case, including the thought process employed by the arbitrator in determining his finding and award.
>
> The Hearing officer denies the grievance at hand. It shall be the continued policy of the Employer to limit paid military leave to details involving mandatory training and other details that are mandatory in nature. This policy is not in conflict with the language of Article 52 of the collective bargaining agreement."

One of the focal points of the disagreement here is the decision of an arbitrator rendered February 18, 1987 (referred to by the parties and here as the Lipian case). There, the grievant, a Trooper and a member of the Coast Guard Reserve, was accepted for and ordered to duty to attend the Reserve Officer's Training Indoctrination course, i. e., Officer Candidate School. His application to the Patrol for military leave was denied. Two issues were involved in the arbitration decision, one of which, determined in his favor, is not relevant here. The other is his eligibility for military leave with pay, he, as is the case here, having already received eighty hours of military leave pay for field exercises prior to the request for the specialized leave as described.

The arbitrator's opinion and award on that issue are as follows:

"Your ARBITRATOR will begin by summarizing the evidence which has been offered in support of both contentions:

1. The policy statement (Joint Ex-4) dated March, 24, 1982, which states in part, "Active Duty includes annual training (normally 15 days), specialized training courses, and mobilization. Active Duty does not include weekend and other multiple training assemblies (MUTA)." This statement does not restrict leave.

2. The policy statement (Joint Ex-5) dated June 15, 1984, which states in part, "Active duty does not include weekend drill, other multiple training assemblies (MUTA) or specialized training of a voluntary nature. (Emphasis added.) This statement restricts leave.

3. Sept. 4. The Union's initial bargaining proposal (Section B.1.) states, "State employees who are members of...are entitled to a military leave of absence...for such time as they are in the military service on field training, or active duty for a period not to exceed..." This proposal does not restrict leave.

4. Oct. 15. Management's initial bargaining proposal (Section A.2.) states, "State employees will receive compensation...for up to 176 hours in a calendar...on mandatory training or active duty. For non-mandatory training, weekend drills, or...employees may request to use vacation or personal leave..." (Emphasis added). This proposal restricts leave.

5. Oct. 22, 1985. The Union Negotiator states, in part "Our proposal is directly from statutes and DAS rules. No intention to make changes. Orally there is no intention to make changes." This statement indicates that the Union believed that their proposed language supported retention of the current practice.

6. Oct. 29. The Union submits a counter-proposal. The Union modified some of the language in the military leave section of its proposal, but did not change the wording relevant to this case.

7. Nov. 5. Management's second counter proposal is submitted. It omits the sentence which states, "For non-mandatory training ...(See 4. Above). This proposal does not restrict leave.

The record of statements made during negotiations, the proposals offered during negotiations, and testimony at the arbitration hearing shows that Management modified its definition of active duty to exclude voluntary training back in 1984. However, Management also attempted, without success, to include in the Agreement, wording which excluded leave for voluntary training. The Union, on the other hand, insisted that the Agreement leave existing practice concerning military leave unchanged. It must be noted, however there is no evidence on the record to show what the practice was regarding voluntary training.

Finally, Management's policy statement excluding voluntary training does pre-date the Agreement.

In short, Management was unsuccessful in its attempt to exclude voluntary training from the leave provision. The Union claims that voluntary training is included, but provides no evidence that such leave has ever been granted by Management. Finally, the contract which was ratified by both parties is, in fact, silent regarding the matter.

It is my conclusion that reimbursement for voluntary leave is not prohibited by the existing Agreement, but the right has apparently not been exercised prior to this case. In such situations, arbitrators generally agree that (1) unused rights - in this case the Union's right to have voluntary leave treated as military leave - remain as rights to be claimed, and (2) a party - in this case Management - may not gain through arbitration, what it fails to gain in negotiation.

ISSUE 2 AWARD. The grievance is sustained. The grievant shall be credited for the vacation time, and the leave time for special training shall be charged against his military leave total."

That decision was reviewed by the Patrol and the Office of Collective Bagaining of the Ohio Department of Administrative Services. The Deputy Director of the Office, in a letter to the FOP and the Patrol, concluded as follows:

> "Second, there is the issue of Mr. Lipian. Rereading this decision I think we could probably go to court to vacate the award. However, in the interest of the developing labor management relationship this office feels that Mr. Lipian's remedy be granted for reasons of good labor relations but that this decision is useless as a precedent setting device and that it stands in isolation. The F.O.P. needs to understand that the state has chosen to immediately resolve the current case rather than protract the issue by attempting to vacate the award, but that there are serious problems with the award such that it cannot be used for other situations."

This arbitration stems from the Deputy Director's views.

Other background information was covered in the hearing. Captain John M. Demaree, of the Patrol Personnel Division, who deals with military leave, identified a copy of the pertinent sections of the Ohio Administrative Code and a copy of an administrative decision on a similar problem concerning an exempt employee (one not covered by a collective bargaining agreement) which denied him military leave to

attend a military symposium on the ground that it was voluntary and not mandatory. The Captain said he had had the Patrol's policy on military leave reviewed in 1984 and that at least one change had been made as a result, a change not relevant here, he said.

He had also discussed such matters generally with the Guard since then and a new definition of mandatory training had been issued under date of October 9, 1985, as follows:

"MANDATORY TRAINING

Training prescribed by the Adjutant General, National Guard Bureau or Department of Army as being necessary for appointment/enlistment, promotion and retention in the Ohio Army National Guard."

He also identified a copy of a Guard Memorandum, dated June 12, 1987 on Mandatory Training, as follows:

"1. At the state and national level, employer support for the Guard and Reserve is a matter of extreme interest. A cooperative relationship is essential between our guardmembers and their employers if we are to ensure the many men and women of the Ohio National Guard satisfy their military obligations and those of their employers.

2. This cooperative relationship is being strained by incidents of excessive requests by Ohio Guardmembers to perform military duties that are voluntary in nature. This places an undue burden on employers as they attempt to accomodate their absence. The best interest of the employer and guardmember is served when mandatory training is the basis for a formal request by our members to be absent from their place of employment. Mandatory training is defined as that training directed by the Adjutant General or higher authority. Request to be absent from place of employment for voluntary training should be exercised informally with discussion on the part of the parties concerned.

3. In the interest of continued employer support for members of the Guard, it shall be the policy of the Adjutant General's Department that mandatory training serve as the basis for a formal request for leave from the guardmember's place of employment and that a request for voluntary training be treated informally. Additionally, formal rquest should be made 60 days prior to the performance of mandatory training."

On cross-examination, the Captain said that, on the basis of information obtained after the arbitrator's decision discussed above, he believed that Officer Candidate School was mandatory so that now he does not disagree with the result in that case. On the other hand, he said, he did not believe his view had been adopted by the Patrol.

The Adjutant General of Ohio, Richard C. Alexander, testified under continuing objection by the FOP, now overruled as non-prejudicial testimony. He confirmed the Guard documents offered by Captain Demaree. He made a distinction between mandatory duty and other types but acknowledged that, once orders were sent out and not revoked, there was a duty to report and that such voluntary duty was active duty.

Lieutenant D. L. Anderson testified on the history of negotiations concerning Article 52 of the Agreement, the Article that applies to this problem.

He said that the FOP had proposed to continue by contract the State's policy on military leave as set out in the statutes and administrative code.

The State had counter-proposed language to clear up confusion as to hours and days, he said, and to change the phrase "field training" to "mandatory annual training".

Thereafter, he said, the FOP had made a proposal, again expressing its desire to maintain the existing practice.

Finally, the State had counter-proposed the "mandatory training or active duty" language, the wording now contained in the Agreement.

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

ARTICLE 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

(7) Determine the overall mission of the employer as a unit of government;

(8) Effectively manage the work force;

(9) Take actions to carry out the mission of the public employer as a governmental unit;

(10) Determine the location and number of facilities;

(11) Determine and manage its facilities, equipment, operations, programs and services;

(12) Determine and promulgate the standards of quality and work performance to be maintained;

(13) Take all necessary and specific action during emergency operations situations;

(14) Determine the management organization, including selection, retention, and promotion to positions not within the scope of this Agreement.

ARTICLE 20 - GRIEVANCE PROCEDURE

§20.07 Arbitration

5. Arbitration Decisions

***The arbitrator's decision shall be final and binding upon the Employer, the Fraternal Order of Police, Ohio Labor Council, Inc. and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the arbitrator as set forth in this Article. The grievance procedure shall be the exclusive method of resolving grievances.

ARTICLE 52 - MILITARY LEAVE

§52.01 Definition of "Armed Services"

As used in this Article, "Armed Services of the United States" includes the Army, Navy, Marine Corps, Air Force, Coast Guard, Auxiliary Corps as established by Congress, Army Nurse Corps, Navy Nurse Corps, Red Cross Nurse serving with the Armed Services, or hospital service of the United States, active duty with the Civil Air Patrol - Coastal Patrol, and such other services as is designated by Congress.

§52.02 Military Leave With Pay

1. State employees who are members of the Ohio National Guard, the Ohio Defense Corps, the Ohio Naval Militia, or members of other reserve components of the armed services of the United States are entitled to a military leave of absence from their duties without loss of pay, for such time as they are in the military service on field

training or active duty. The maximum number of hours for which payment can be made in any one (1) calendar year for mandatory annual training or active duty is one hundred seventy-six (176) hours.

2. Compensation - State Employees will receive compensation they would have received for up to one hundred and seventy-six (176) hours in calendar year, even though they served for more than thirty (30) days of such year on field training or active duty. There is no requirement that the service be for one (1) continuous period of time.

3. Evidence of Military Duty - State employees are required to submit to the Superintendent an order or statement from the appropriate military commander as evidence of military duty before military leave with pay will be granted. Such orders shall be submitted no later than sixty (60) days or, in the case of emergency activations, as soon as they are received.

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 contract is quite clear: if the employee is on active duty, he is entitled to military leave and pay up to the specified maximum hours. Here, the orders to report stated that he would be on active duty, as was attested by General Alexander. He is thus entitled to military leave.

The Patrol has now required the FOP to litigate this issue a second time, although the first case, the Lipian one, had resolved it. The Patrol takes the position that it would not follow that decision as precedent. That is contrary to the generally accepted doctrine that an arbitrator's decision is binding on both parties.

The Patrol relies on its policy in this field. That policy, however, violates the contract. Moreover, the policy was set nearly two years before the contract and is thus clearly obsolete now.

As to the intent of the parties in negotiation, the argument is irrelevant fundamentally, the contract being the best expression of intent. Even if it is relevant, there was no showing that the FOP shared the Patrol's viewpoint or intention.

PATROL POSITION

The evidence showed that the policy and practice before the contract forbad the payment of military leave pay for voluntarily undertaken military duty. The contract language reflected the state law and administrative rules at the time and, accordingly, military leave

has been denied a non-bargaining unit employee under circumstances similar to these. That practice was confirmed by General Alexander.

The Patrol's intent is reflected in the contract in that its language, reflecting the policy, was incorporated in the contract.

The phrase "active duty" cannot be stretched out of all proportion. If it were to be taken in its broadest sense, the other category of field or mandatory training would be unnecessary, such training being active duty also.

"Active duty" is spelled out in the Code of Military Justice, Chapter 5924 R.C. as follows:

> "(I) "Active state duty" means full-time duty in the active military service of the state under an order of the governor issued pursuant to authority vested in him by law, and while going to and returning from such duty."

Thus, the law reflects a narrower view of "active duty" than that urged by the FOP. The Patrol's approach reflects the law, i. e., that "active duty" applies only where a guardsman is "called up" officially for duty in times of civil unrest, natural catastrophe, etc.

D I S C U S S I O N

In essence, the facts of this matter are: the duty in August-September, 1987 was opened to volunteers; the Grievant volunteered; he was then ordered to duty for "special training"; and he was on active duty during the specified period.

The FOP looks at it as involving "active duty" under Section 52.02 of the parties' Agreement. The Patrol looks at it as special training, not eligible for military leave pay. In other words, only annual mandatory training is eligible for military leave.

Thus the Patrol views the contractual language as covering only mandatory annual training and emergency mobilization in times of natural disaster, civil violence and related matters. Under its view, the two categories recited in the Agreement "on field training or active duty" are disjunctive completely, training being confined to one type only and active duty being some activity not connected with training.

In the view of the FOP, the phrase "active duty" includes all activities a Guardsman undertakes in response to a military order. The phrase "field training" or "mandatory training" is used to differentiate that type of training to which a Guardsman is ordered, from the monthly drills and other exercises required by general direction only.

Both views obviously are reasonable interpretations of the contractual language. That brings into issue the earlier arbitral decision in the Lipian case.

The only differences between that matter and this are that (1) it involved the Coast Guard Reserve and this the Ohio National Guard and (2) it applied to Officer Candidate School and this to special training in rank.

The Agreement lumps armed service reserves and Ohio National Guardsmen together for purposes of paid military leave. Moreover, the Officer Candidate training is voluntary, as here, in the sense that one must apply for it as a prerequisite for admission.

In any event, the contentions of the parties on the facts of that case are substantially identical to those made here. It must be concluded that that decision dealt with the same legal issues as this.

The State, through the Office of Collective Bargaining, has expressed its view that the earlier arbitrator's opinion is so defective that it could have been overturned by appeal to the courts. The decision was accepted without appeal, however, with the reservation that the State would not be bound by it in future cases. This case, therefore, is a relitigation of the doctrine of that one.

The FOP points to the language of Section 20.07 of the Agreement which makes an arbitrator's decision "final and binding", thus refusing to accept the position of the State on the prior case.

Without attempting to interpret generally the language of the paragraph in which that phrase occurs, it must be noted that the later phrase in the same sentence makes the decision binding upon "the employees involved". The "final and binding" sentence, thus, can be interpreted as binding only on the employees involved in such case and not necessarily on all employees similarly situated.

It is recognized, of course, that collective bargaining arbitration should serve the twofold related purposes of resolving the immediate issue and of making future decisions predictable, thus reducing arbitral litigation, and stabilizing relations generally.

The basic principle in labor arbitration, however, is that, while one arbitrator is not bound by the views or actions of a predecessor, respect is owed the predecessor and generally a contrary view should not be espoused where the predecessor's decision is within the realm of reason.

Since the contractual language is not clear as to the generic effect of an arbitral decision, it is more reasonable to construe it consistently with the long established principle respecting earlier decisions.

That approach requires an analysis of the Lipian opinion.

The arbitrator there turned to the policy history prior to the Agreement and the negotiating history in order to assist in interpreting the contractual language, finding that the policy of the Patrol, adopted in 1984 before the Agreement, excluded voluntary training; that in keeping with the policy, the Patrol attempted in negotiations to exclude voluntary training from military leave but without success; that the FOP wanted to keep existing practice but that evidence was lacking to show that the practice coincided with the policy. The arbitrator then found that, in fact, the Agreement is silent on the issue. He concluded that voluntary military duty was not excluded from military leave pay and that the FOP held an unexercised right to have it treated as paid military leave, while the Patrol could not assert a right to exclude it after having failed to exclude it in the contractual negotiations.

The arbitrator's opinion may not have been set out in sufficient detail or with sufficient justification to make its meaning crystal clear, thereby probably affording basis for the belief of the Office of Collective Bargaining that it was erroneous and reversible in a court. Notwithstanding, it appears here that the arbitrator found no evidence of actual practice respecting pay for voluntary training, even though the policy would exclude it. (That was important, of course, in relation to the understanding of the FOP in the negotiations.) That was considered with the Patrol's unsuccessful effort to exclude it specifically from military leave in the contract negotiation. (As shown by the exhibits in this case, such proposal was made by the State in its first counter-offer.) Those facts led to the view that the FOP retained a right to claim military leave pay.

Evidence in this case covering the policy before the Agreement was designed by the Patrol in part to show that the arbitrator's findings of fact were eroneous. At the same time, the Patrol admitted that it did not introduce all of the exhibits on such issue here that it had there. In any event, the history of negotiations

as found by him coincides with the evidence here. In short, the Patrol did propose to exclude voluntary training from military leave and then relinquished the language it had proposed to make that position clear.

Thus, no evidentiary basis exists for disagreement with the arbitrator's essential findings of fact.

It is true that some of the arbitrator's views may be questioned reasonably. On the other hand, it must be recognized that the language of the Agreement is not crystal clear either and, in fact, may be read in two different ways, as the parties do.

In another approach to the problem of interpretation, there is lack of clarity in the literal words of the Agreement. Thus, the first sentence of Section 52.02 directs military leave for "field training or active duty". The next sentence, dealing with maximum hours of pay for military leave, refers to "mandatory annual training or active duty". "Field training" is obviously broader in a literal sense than "mandatory annual training". Field training literally covers all training in the field, i. e., all outside the routine monthly drills, and so would include voluntary training in the field. Mandatory annual training literally covers less and would exclude voluntary training.

Obviously, the contractual language is ambiguous. The arbitrator's resort to history was reasonable under those circumstances. No detailed review of all his conclusions from that history can be undertaken here because all of the data he had before him is not included in this case. It is possible to question his reasoning on the basis of the facts he found but, in result, his views are as reasonable as contrary ones would be.

My precedessor's views on this issue, thus, are within the realm of reason. According his views the respect owed from one arbitrator to another where the earlier one arrives at a reasonable conclusion, it is necessary here to follow that conclusion and to uphold the Grievance, thus requiring the charging of military leave pay for the time involved and crediting the corresponding number of vacation hours he used to fulfill the field training.

A W A R D

1. Grievance, dated July 9, 1987, of Robert H. Waner, is hereby upheld.

2. The Employer shall credit Grievant with the vacation hours for which he was charged while on special training duty with the Ohio National Guard during the period of August 22 through September 5, 1987, and shall charge that time to military leave.

Donald B. Leach