

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Public Safety
State Highway Patrol

-and-

THE FRATERNAL ORDER OF POLICE
Ohio Labor Council, Inc.
State Unit I

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* Arbitrator's No. I JD 1-86
* Grievance No. 175
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* Hearing 7-24-87
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* Decision Issued
* August 29, 1988
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APPEARANCES

FOR THE STATE

Lieutenant D. L. Anderson
Captain J. M. Demaree
Peter Coccia
Captain R. A. Curtis
Lieutenant K. M. Garloch

Management Representative
Personnel Officer
Labor Relations Coordinator
District 6 Commander
Granville Post Commander

FOR THE FOP

Paul L. Cox
Deborah L. Bukovan
Trooper R. L. Henderson

General Counsel
FOP Attorney
Grievant

ISSUE: Article 61, §61.03 -- Whether Trooper's rejection of mid-shift overtime was chargeable as refusal on overtime roster.

Jonathan Dworkin, Arbitrator
P.O. Box 236
9461 Vermilion Road
Amherst, Ohio 44001

AN OVERVIEW OF THE DISPUTE

The Agreement between the Ohio State Highway Patrol and the Ohio Labor Council requires equalization of overtime. Article 61, §61.03 states:

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, deviations by shift may be permitted, if caused by inability of the Post Commander to schedule overtime for certain shifts as the result of unavailability of overtime opportunities.

Overtime at each Highway Patrol Post is offered first to qualified employees at the bottom of the overtime roster. If two or more are equal, seniority is determinant. When an employee whose turn is up declines an opportunity, the hours refused are added to his/her accumulation of overtime hours worked. Relative positions on the roster and equalization entitlements are determined by adding each employee's hours worked to his/her hours refused.

The grievance charges that the Commander of the Granville, Ohio Post violated his responsibility for good-faith equalization when he offered mid-shift overtime. Grievants and others found the

offers extraordinarily burdensome, and turned them down. Those who declined were credited with refusals on the overtime roster.

The grievance was initiated by two Troopers assigned to the Granville Post. It was stated as a policy action on behalf of Grievants and all others similarly harmed by the alleged violation. The remedy requested is:

In the past, overtime hours have been offered which cover[ed] all shifts, we would request that this past practice be continued. Also, that these overtime hours not be counted as overtime refused when calculating overtime equalization.

The overtime in question covered the week beginning Friday, March 13, and encompassed St. Patrick's Day. Apprehension of drunk drivers was the object of increasing the number of units in operation. The overtime was scheduled mainly in four-hour blocks when alcohol-influenced drivers were most likely to be on the roads; from 10 p.m. to 2 a.m. Two of the nine slots were scheduled from 6 p.m. to 10 p.m. on St. Patrick's Day itself. Grievants' normal shift was 6 a.m. to 2 p.m. It would have been a real hardship for them to work the overtime. To take advantage of the 10 p.m. to 2 a.m. opportunities, they would have had to report twelve hours after their normal turns, work four hours, and report for straight time duty four hours later. Similarly, the 6 p.m. to 10 p.m. overtime (if it was available for Grievants to select) required them to come in four hours after the end of their shift. They regarded the offerings as severe impositions on their free time, and declined the work.

In processing the grievance, the Union contended that the assignments departed markedly from overtime offerings in the other fifty-six State Highway Patrol Posts. At the other locations, extra

work opportunities are scheduled to coincide with regular shifts -- either immediately before shifts begin or immediately after they end. According to the Union, Post Commanders have latitude to select time frames for overtime and it was unnecessary for the Granville Commander to choose periods he knew would impinge on the employees' right to unbroken time off. The Union views the grievance as a protest against an intentional manipulation of overtime which was designed to undermine the purpose of equalization and increase the chances for "exceptions, exclusions, and charges for hours not worked." It concludes that the abuse demands correction, and the best way to correct it is by an arbitral award relieving Grievants and others of overtime refusals unjustly charged.

The Employer denies the Union's allegations. It maintains that Management has vested authority to use overtime in a way best suited to the Patrol's mission. The authority is spelled out in Article 4 which states in pertinent part:

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:

. . . .

(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;

. . . .

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

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

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

The Patrol argues that it applied its managerial prerogatives reasonably. The St. Patrick's Day overtime was paid for by federal funding specifically designated to curb DUI on the highways. The funds were to be used in the manner best adapted to their purpose. Experience demonstrated that alcohol-related accidents accelerated during St. Patrick's Day weekends, especially in early morning. With this fact in mind, the Post Commander carved out a small number of overtime hours and followed a scheduling strategy likely to generate the greatest return for the overtime investment.

The Employer insists that the schedules were not fashioned for any devious purpose; they were not designed to burden Grievants or erode Bargaining Unit entitlements. Grievants had the same right to accept or reject the work opportunities as every other qualified Trooper. They chose to decline. When they made that choice, Management felt bound by the provision in §61.03 stating, "All overtime hours offered to employees but refused will be credited for purposes of equalization of overtime."

The Patrol held to its position in the preliminary levels of the grievance procedure. An arbitral hearing was convened and, at the outset, the parties stipulated that the Arbitrator was authorized to issue a conclusive award on the merits of the grievance. The Arbitrator's jurisdiction is specifically defined and limited by the following language in Article 20, §20.07 of the Agreement:

6. Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. 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.

THE SELECTIVE TRAFFIC ENFORCEMENT PROGRAM

Overtime allocated to State Troopers is almost all paid for by federal funds. The National Highway Traffic Safety Administration (NHTSA) grants money to promote highway safety. The funds are to be used exclusively to amplify law enforcement in two areas -- speeding and driving under influence of drugs and/or alcohol. NHTSA requires that the funding pay for overtime wages, to assure added rather than routine enforcement.

The 1987 application for an NHTSA grant committed to State to a dual program designated, "Selective Traffic Enforcement Program (STEP). Overtime hours for speeding and drug-alcohol enforcement were segregated and concentrated. Instead of applying the grant to year-round overtime schedules, Ohio proposed to centralize the hours on times and locations where statistics indicated violations would be most abundant. The grant request focused on this purpose:

ALCOHOLProposed ActivityStatewide DUI Enforcement

As in the past, the Ohio State Highway Patrol will conduct a statewide enforcement program with emphasis placed on the detection and apprehension of the alcohol/drug impaired driver. Patrols will concentrate on accident areas within each county with high instances of DUI or other hazardous moving violations during the late evening and early morning hours which have traditionally been identified as being the most likely time for a DUI related accident to occur. Local post commanders will be responsible for the constant monitoring of their respective areas in order to see that the federal program hours are being utilized in the most efficient way in areas that are experiencing the most alcohol-related accidents and/or activity.

POLICE TRAFFIC SERVICES [SPEEDING]Current Activity

The Ohio State Highway Patrol has developed a fatal accident reduction program which focuses on the precise identification of high accident frequency areas and concentrates our enforcement efforts on those violations which contribute directly to the accident problem at those locations. The effective control of speeds within these problem areas has in the past been one of the best solutions to the accident problem.

Planned Activity

. . .

Troopers will concentrate their efforts during the daylight hours on rural interstate highways and other major routes where violations . . . are common. [All emphasis added.]

In accordance with STEP specifications, the Patrol segregated the federally financed overtime into Alcohol (AOT) and Speed (SOT) units. The authorized hours in each category were distributed to Districts and Posts. The Granville Post was allotted 500 AOT hours and 400 SOT hours. The Employer's defense to the grievance rests primarily on the contention that the Post Commander complied with STEP guidelines. He used forty-four AOT hours for the holiday period when drunk driving was known to be a critical problem. He distributed the overtime hours mostly in early mornings as required by STEP.

THE UNION'S POSITION

According to the Union, the Patrol's adherence to the purposes of overtime has not been as rigid as the State implies. In reality, STEP hours are flexible, and have been administered flexibly with emphasis on overtime equalization. Often, AOT and SOT hours are merged regardless of the time of day. The Union maintains that the mid-shift overtime opportunities were abnormal departures from established custom. As proof of its argument, the Union points out that after the grievance was initiated, the Granville Post returned to the former practice of allocating a certain number of overtime

hours to each Trooper weekly, and granting him/her a choice of when to perform the work.

In the Union's judgment, the inconvenience imposed on Grievants and others was deliberate. The contention was vigorously asserted by the Union Advocate in his opening statement:

The offer encouraged refusal by its very nature. It was not good faith compliance with contractual intent. It was so inconvenient as to force the refusal. The spirit of §61.03 was to create equal opportunities . . . The Commander turned the negotiating purpose around in this case and concentrated [the overtime] arbitrarily so that it became a knife used to gut the contracting intent of the provision.

The Union contends that the Employer's posture in this controversy is consistent with its bargaining-table rejection of overtime equalization. In preparing for negotiations, the Fraternal Order of Police mailed a questionnaire to its membership to assess dissatisfactions and develop a strategy responsive to the desires of the Unit. The answers to the questionnaire revealed that overtime distribution was a major source of discontent. Troopers throughout the State felt that Supervision granted disparate chunks of overtime to reward those it favored and withheld the benefit to punish others. The Union's negotiating team felt that it had received a mandate to develop and obtain language making overtime a right, not a gift, and creating a uniform, State-wide distribution plan which would operate equitably. The State resisted the Union's proposals, and §61.03 was adopted only after hard bargaining. In the Union's view, the Patrol's resistance did not end with its adoption of the Agreement; the events leading to this grievance reveal an ongoing purpose to subvert overtime equalization.

The Union calls attention to the fact that the inconvenient "opportunities" generated eight refusals. As a result, forty-four hours were worked, but seventy-six hours were charged (8 refusals = 32 hours). The Union regards the discrepancy as indicative of a particular problem at the Granville Post; a problem which should be rectified by an award sustaining the grievance and redefining what constitutes a "refusal." In the Bargaining Unit's judgment, an overtime refusal should not be charged when the work offer is patently unreasonable.

THE EMPLOYER'S POSITION

The Employer insists that it has lived up to the letter and spirit of the overtime provisions of the Agreement. It concedes that the equalization benefit came about after vigorous bargaining. It was a compromise of the Union's original proposals. The demands and objectives were fully discussed between the fact-finder and negotiators on both sides of the table. The State was intent, not on avoiding the equalization concept, but on assuring that overtime funding would be expended to improve safety on Ohio highways. The Employer recognized that the Union's request for an evenhanded policy was legitimate. In seeking to accommodate, however, it refused to sacrifice STEP policies and their underlying purposes. The matter was explored in depth and the Patrol ultimately agreed to impose the "good faith" requirement upon itself.

Good faith, in the Employer's view, means that every eligible employee must be given "a fair and equitable opportunity" to work available overtime. It does not mean that STEP hours must always be distributed in accordance with the desires of each employee, without regard to the State's STEP commitment. The Patrol claims it has gone extra lengths to try to make overtime convenient. The

Granville Commander and Commanders of other Posts frequently do combine AOT and SOT hours to enhance equalization. However, they cannot guarantee that no employee will ever be inconvenienced; highway safety must always be the first consideration.

The Patrol argues that the overtime in issue constituted a small and very necessary departure from the norm. Statistics proved that St. Patrick's Day and the preceding weekend was a period when alcohol related accidents, injuries, and deaths were at an apex. Early-morning hours were the most critical for law enforcement. To carry out the State's mission, the Granville Post Commander assigned a limited number of AOT hours (8.8% of his 1987 allotment) at such times as drunk drivers were most likely to be on the roads. His decision was approved by his superior, the District Commander. The work opportunities were offered to all Troopers equally, and those who declined were assessed overtime refusals in accordance with the contractual requirement. As an aside, the Employer maintains that, if there was bad faith, it was the representative Grievant's. He could have accepted overtime on one of his unscheduled days, thereby avoiding the inconvenient connection between the opportunity and his shift starting time. But he turned down the chance, apparently preferring to bring his grievance to fruition.

The Patrol urges the Arbitrator to deny the Union's request for a redefinition of the contractual word, "refusal." It argues that the term is unambiguous. It means a declination or rejection, and the word was applied according to its meaning in this instance. Grievants declined an overtime offer. They rejected an opportunity to work. The Employer maintains it had no contractually permitted alternative but to credit the rejections as refusals.

The Patrol concedes that §61.03 places restrictions on Management Rights. In its post-hearing brief, it presents the following analysis of what those restrictions are:

Lacking specific contract language spelling out the fine details of how to "rotate and equalize scheduled overtime opportunities among qualified employees", the Employer maintains it is within the reserved management rights of the Employer to develop, implement and maintain the equalization process. The Employer is fully aware the process must not violate the written language or the stated intent of the parties in negotiations. The Employer is fully aware the detailed policy must not be arbitrary, capricious, or discriminatory against the qualified employees.

The Employer asserts it has in good faith implemented a comprehensive overtime equalization program meeting the language and the intent of Section 61.03. [Brief, 10-11.]

OPINION

Close examination of the arguments over the word, "refusal," reveals that the Union's position may be semantically flawed. As the Patrol contends, the term is clear. The Agreement attaches no conditions to it. A refusal is just what it suggests -- a rejection -- and the Union is hard pressed to urge that it means anything else.

The error is of little real significance. The definition of a related word, "opportunity," is less apparent. Its meaning is decidedly relevant to this dispute. Not every overtime opening constitutes an "opportunity," and it is obvious that there can be no refusal unless an opportunity is first presented. By way of example, an overtime slot during a Trooper's regular shift is not an opportunity for that Trooper and is not subject to being credited as a refusal on the overtime roster.

In the Arbitrator's opinion, the pivotal issue is whether or not the mid-shift overtime constituted contractually valid opportu-

nities for Grievants to refuse. One need look no farther than the Employer's brief to find support for the conclusion that overtime offers are not legitimate if they are arbitrary, capricious, or discriminatory [Employer's Brief, 10-11]. It follows logically that rejections of offers tainted with any or all of those defects are not refusals within the meaning of §61.03.

Grievants maintain that the offers were so unreasonably burdensome as to constitute non-opportunities, and rejections should not have been counted as refusals. Their position can be sustained only if it is held; 1) that reasonable employee convenience is a paramount negotiated purpose behind §61.03, and/or 2) that the creation of inconvenient overtime was a systemic practice, indicating the Employer's willful disregard of the limitations on its Management Rights.

1. Employee convenience is not a paramount purpose of §61.03. During negotiations, the Union pressed for decisive language on equalization. Its proposal was unconditional: "The Employer will rotate and equalize overtime opportunities among qualified employees." It was a stronger mandate than what finally emerged from the bargaining table. It did not contain the current language limiting the Employer's obligation to "[g]ood faith attempts to equalize overtime by shift." Even so, the proposal set forth a clear recognition that scheduling was an essential Management function. It stated in part:

The Employer shall determine when overtime work is necessary and shall authorize its use.

Although that sentence did not make it into the Agreement, the concept remained intact. It stands out clearly in the Management

Rights provision, Article 4, which vests the Employer with exclusive authority to determine its overall mission and take action to carry out that mission.

Of course, Management rights are not unbridled. Employees have a right to expect that, when feasible, they will be offered overtime opportunities which are reasonably convenient. Post Commanders are required to meaningfully consider this employment right when scheduling overtime. In balance, however, the Employer's mission is the contractually acknowledged priority.

The State's mission relative to overtime is defined by the STEP plan. It is to place extra units on the highways when certain kinds of violations are more prevalent. AOP hours are to be used for the apprehension of alcohol-drug impaired drivers; early morning is the best time for achieving that goal.

The record confirms that the Commander acted reasonably and moderately. He used a small amount of overtime to deal with a large problem. He allocated the time as economically as he could, by concentrating it. Some Troopers were inconvenienced, but not to the extent their difficulties can be held to have been caused by arbitrariness.

2. The overtime allotment was not part of a design to erode the equalization requirement. The Union's own argument makes the point. The grievance alleges that the Post Commander violated binding past practice when he scheduled the mid-shift overtime.* The assertion that the schedule was part of an overall policy to evade equalization stands out as glaringly inconsistent when measured against the allegation. The prevailing custom was either to offer overtime so as not to inconvenience employees or to offer it so as to force refusals. The custom could not have been both. The Commander testified that he gives employees as much latitude as possible in the selecting overtime slots. Grievant's testimony, rather

than denying the assertion, was in agreement. The Employee stated that, subsequent to the week in question:

. . . overtime was handled in the manner in which it was handled before. Hours were offered in gross amounts to each Trooper each week, to be worked before or after his or her shift.

The evidence justifies only one conclusion -- that Management observed the purposes and limitations of its vested authority when it scheduled the protested overtime. The Granville Post Commander did not act arbitrarily or unreasonably. His usual practice was to allow significant latitude in offering overtime. The deviation in the week beginning March 13, 1987, was slight, necessary to the State's mission, and contractually permissible. It follows that Grievants received legitimate overtime opportunities and their refusals were properly charged as such.

* The remedy request in the grievance states in part, "In the past, overtime hours have been offered which cover[ed] all shifts, we would request that this past practice be continued." No evidence of a binding past practice was introduced; therefore, the assertion that a practice governs Grievant's rights was disregarded. However, the statement does constitute an admission for other purposes.

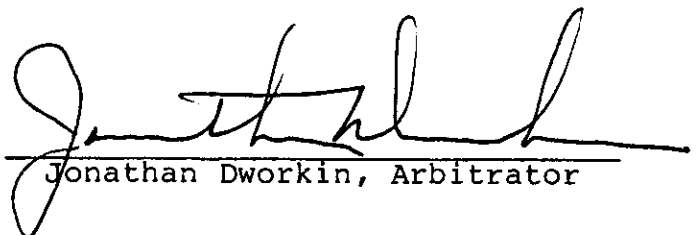
AWARD

The Employer has vested authority to schedule overtime. The employees have a competing right to expect that overtime will be offered at reasonable times, consistent with their usual work requirements. Scheduling which wholly ignores this right of employees is arbitrary and does not create "opportunities" for which refusals may be credited on the equalization roster.

When the Employer's mission conflicts with reasonable employee convenience relative to overtime, the mission takes priority so long as the scheduling decision is not arbitrary, capricious, and/or discriminatory.

The Employer's scheduling of overtime for the week starting Friday, March 13, 1987 met the foregoing standards. Therefore, the grievance is denied.

Decision Issued:
August 29, 1988



Jonathan Dworkin, Arbitrator