

STATE OF OHIO/FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.
UNIT 1

In the Matter of the Arbitration)

--between--)

THE FRATERNAL ORDER OF POLICE)
OHIO LABOR COUNCIL INC.)

--and--)

STATE OF OHIO)

OCB GRIEVANCE #15-03-891111-162
-04-0

ARBITRATOR'S AWARD AND OPINION

Anne Arena
Personnel/Labor Relations
For the State

Paul Cox
Chief Council
For the Union

May 15, 1990

Calvin William Sharpe
Arbitrator

On November 11, 1989, Scott Eric Hunter filed a grievance against the Ohio Highway Patrol (State) protesting the State's denial of his bereavement pay request for November 11, 1990. The State denied the grievance. Failing to secure satisfactory relief at earlier stages of the grievance procedure The Fraternal Order of Police, Ohio Labor Council Inc., Unit 1 (Union) has now brought the matter to arbitration. A hearing was held in Columbus, Ohio on March 30, 1990.

I.

STATEMENT OF THE CASE

A. THE ISSUE

1. Did the State violate the agreement by denying the Grievant bereavement pay for November 11, 1989?

2. If so, what is the remedy?

B. RELEVANT PROVISIONS OF THE 1989 - 1992 AGREEMENT

ARTICLE 27 - OVERTIME

§27.01 Overtime and Compensatory Time

* * *

1. Any member who is in active pay status more than forty (40) hours in one week shall be paid one and one-half (1.5) times his or her regular rate of pay including shift differential if ordinarily paid for all time over forty (40) hours in active pay status. The regular rate of pay includes all premium pay routinely received.

§27.02 Active-Pay Status

For purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave personal leave, bereavement leave and administrative leave.

§44.02 Holiday Pay

Members are automatically entitled to eight hours

of holiday pay regardless of whether they work on the holiday. Compensation for working on a holiday is in addition to the automatic eight hours of holiday pay at regular rate and shall be computed at the rates prescribed in Section 44.03 of this Article.

a. If the holiday occurs during a period of sick or vacation leave of an employee, the employee shall draw normal pay and shall not be charged for sick leave or vacation for the holiday.

b. An employee on leave of absence is on no-pay status and shall not receive payment for a holiday. A leave of absence shall neither start nor end on a holiday.

c. An employee in no-pay status shall not receive holiday compensation.

d. Full-time employees with work schedules other than Monday through Friday are entitled to pay for any holiday observed on their day off.

ARTICLE 45 - PERSONAL LEAVE

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§45.06 Uses and Prohibitions

Personal leave may be used to extend an employee's active pay status for the purpose of accruing overtime or compensatory time.

Personal leave may not be used to extend an employee's date of resignation or date of retirement.

* * *

ARTICLE 50 - BEREAVEMENT LEAVE

If a bargaining unit member has completed his/her initial probationary period and is absent from work due to the death of a member of his/her immediate family, he/she will be paid for time lost at regular rate from his/her regular scheduled tour of duty shift up to a maximum of three (3) consecutive work days. Time may be extended by use of vacation, personal, or sick leave with approval of the employee's supervisor. No reasonable request shall be denied.

For purposes of this Article, immediate family shall include: spouse or significant other (which is defined to mean one who stands in place of a spouse and resides in the home of the employee), children, step-children, grandchildren, parents, grandparents,

brothers, sisters, mothers-in-law, fathers-in-law,
daughters-in-law, sons-in-law, sisters-in-law,
brothers-in-law, or legal guardian or other person who
stands in place of a parent (in loco parentis).

C. BACKGROUND FACTS

The Grievant has been a trooper with the Ohio Highway Patrol for 12 years. He is stationed at the Milan Post on the Ohio Turnpike. During the period of November 9-12, 1989, the Grievant was scheduled to work the 7:30 a.m. to 3:00 p.m. shift. Because of the death of his grandmother, the Grievant requested bereavement leave under the Agreement for November 10 and 11, 1990. The State granted the request for November 10 but denied it for November 11.

Because November 11, 1989, was "Veterans Day", a paid holiday, the State required the Grievant to take holiday pay rather than bereavement pay for that day. The State explained to the Grievant that his leave for November 11, 1989, must be taken as holiday pay, entitling the Grievant to eight hours of regular pay rather than regular pay plus an additional eight hours regular pay or premium pay at one and one-half times regular pay. Other troopers who were scheduled and did work on November 11, 1989, received premium pay for working on the holiday. These employees were paid for 92 hours and the Grievant was paid for 80 hours during the pay period encompassing November 11, 1989. In his grievance Trooper Hunter claims that the Agreement entitles him to eight hours of holiday premium pay plus eight hours of regular pay for bereavement leave for November 11, 1989.

II.

CONTENTIONS OF THE PARTIES

A. THE UNION'S POSITION

The Union argues that the Grievant should have been paid bereavement pay for November 11, 1989, plus holiday pay at the rate of one and one half times the regular rate for eight hours or twelve hours compensation time. The Union argues that holiday pay is an entitlement and not overtime as it is characterized by the State. In support of this argument the Union points to the fact that the Grievant would have worked on November 11 but for the necessity of taking bereavement leave. If the Grievant had worked on November 11, 1989, as scheduled, the Union continues, he would have earned the overtime premium as provided in Section 44.02 of the Agreement. The Union argues that the Agreement does not permit the State to deprive the Grievant of a benefit because he exercised the right to take bereavement leave under the Agreement. Accordingly, the Union argues that by denying the Grievant bereavement leave on November 11, 1989, the State has also denied the Grievant premium holiday pay and violated Section 44.02 and Article 50 of the agreement. To remedy this violation the Union requests an award of eight hours of holiday premium pay--1 1/2 times regular pay amounting to 12 hours of pay at the regular rate.

B. THE STATE'S POSITION

The State argues that the Agreement does not permit the Grievant to use bereavement pay to extend active pay status for the purpose of accruing overtime and compensatory time. The State says that the contract only allows personal leave to be

used in this way. The State also notes that except for personal leave other leaves such as sick leave and vacation leave are compensated at the normal rate, when they fall on a holiday. The State argues that under the principal of expressio unius est exclusio alterius the Arbitrator is required to read only personal leave and not bereavement leave as permitting an extension of active pay status in order to secure overtime pay.

The State also points out that under it's reading of the Agreement the Grievant would have been entitled to take November 10 for bereavement leave, November 11 as a holiday, and November 12 and 13 as bereavement leave under the consecutive days term of the bereavement provision. But since the Grievant only requested two days leave and the second day fell on a holiday, the Grievant was entitled to only one day of bereavement leave. On this basis the State argues that the Grievant was properly denied his request for bereavement leave on November 11, 1989, and the Grievance should be denied.

III.

DISCUSSION AND OPINION

This is a case of first impression under the parties' agreement. The issue is how did the parties intend to reconcile the right to bereavement pay as set forth in Article 50 of the Agreement with the right to holiday pay contained in Article 44 of the Agreement. The parties concede that the Agreement is silent on the question of what pay an employee should receive when bereavement leave encompasses a holiday. Moreover, Captain James F. Spurrier, a payroll officer in the fiscal management

section of the Highway Patrol since 1987, testified that no requests for bereavement pay on a holiday have been made during his term of office.

Two well-settled principles of contract interpretation are important to resolving this issue. One is that contractual provisions should be interpreted to avoid a forfeiture, where reasonable alternative constructions are possible. See e.g. Mode O'Day Corp., 1 LA 490, 494 (1946) where Arbitrator George Cheney articulated the principle as follows:

A party claiming a forfeiture or penalty under a written instrument has the burden of proving that such is the unmistakable intention of the parties to the document. (footnote omitted) In addition, the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible. Since forfeitures are not favored either in law or in equity, courts are reluctant to declare and enforce a forfeiture if by reasonable interpretation it can be avoided.

The other principle as cited by the State is found in the latin expression, expressio unius est exclusio alterius, meaning "to express one thing is to exclude another. Arbitrator Lipson nicely states the rationale underlying this principle in Hoover Universal Inc., 77 LA 107, 112 (1981):

[This] principle fits in with the general idea that a written contract is presumed to embody the whole agreement of the parties, and terms or obligations that the parties did not include should be deemed to be deliberately excluded. This is part of the philosophy that to the greatest extent possible, the words that the parties themselves have used should govern, and legal obligations should be limited to contract language.

The coexistence of the bereavement and holiday pay provisions in the Agreement can be read to entitle the Grievant to no bereavement pay on a holiday as the State does in this case or to holiday premium pay plus bereavement pay as the Union does.

It may also be read in a third way not specifically pressed by either of the parties.

The State's interpretation would amount to a forfeiture of the bereavement benefit. The Agreement clearly entitles employees in active pay status (Section 27.02) to holiday pay (Section 44.02) for holidays not worked and to bereavement pay (Article 50) for up to three days leave for the death of a grandparent such as Grievant's. Both benefits are paid at the regular rate of pay. In this case the State refused the Grievant's request for a second day of bereavement pay forcing him to accept holiday pay and thus to forfeit the bereavement benefit. It is undisputed that the Agreement does not explicitly call for this result, and no other evidence has been produced that suggests an "unmistakable intention" to eliminate bereavement pay when bereavement leave falls on a holiday.

The State argues that the Grievant could have received bereavement and holiday pay, if he had requested the first day (November 10) as a bereavement day and up to two additional days following the holiday as bereavement days. The State points out that such a request would have been granted under the bereavement pay provision. However, while this approach, perhaps, prevents the forfeiture of bereavement pay, it simultaneously creates a forfeiture of holiday pay. The State's approach would prevent an employee on bereavement leave from also receiving holiday pay, a benefit that would be available to employees on sick or vacation

leave.¹

The State cites Hiram Walker & Sons, 33 LA 621 (Updegraff 1959) in support of its argument that bereavement pay is not a "consolation bonus" to grieving employees as the Union would have it interpreted. While Arbitrator Updegraff ruled in Hiram Walker & Sons that bereavement leave could not extend vacation leave, he also recognized the essential purpose of bereavement pay as permitting employees to attend to funeral matters without impairing their income. The forfeiture of holiday pay under the State's sandwiching approach would create such an impairment.

If the Grievant had worked as scheduled, he would have received pay for 92 hours of work, because of the operation of the holiday premium pay provision. Instead the Grievant received pay for 80 hours of work, the same as a trooper who decided to take the holiday off, even though it was a normal working day, and who did not extend his active pay status by using personal leave. Yet bereavement leave does not involve the same degree of voluntariness as a decision to take the day off. The Grievant was effectively forced to take leave because of circumstances beyond his control, the death of his grandmother. It does not seem reasonable to put him on a par with employees who have more control over the reasons for their decision to take

¹ It should be further noted that nothing in the bereavement article suggests that bereavement leave can sandwich the holiday as suggested by the State. Indeed, that article only provides that bereavement leave can be extended by vacation, personal, or sick leave approved by the supervisor. Furthermore, the State admits that no requests for bereavement pay on a holiday had ever been made under the Agreement. Thus, the Grievant had no reasonable notice that a forfeiture of bereavement pay could be avoided in the way the State suggests.

leave. The Arbitrator finds that the parties did not intend such a result.

On the other hand, the Union's interpretation would violate the principle, "expressio unius est exclusio alterius" (the expression-exclusion principle). The Union argues that the Grievant is entitled to premium pay, the same as the troopers who worked on the holiday. Such treatment would also put the Grievant on a par with those troopers who extended their active pay status by using personal leave on a holiday.

The Grievant's position is hardly comparable to that of troopers working on November 11, since he did not work. It is not reasonable that he would enjoy the benefits conferred by a provision that is triggered only when an employee works. Rather, the parties' intent can best be gauged by considering the Agreement's treatment of employees who like the Grievant are on leave during the holiday.

Indeed, the best evidence of the parties' intent on this issue is Section 45.06 of the Agreement. That section permits personal leave to be used to extend active pay status for the purpose of accruing overtime. Overtime is paid at the premium rate of one and one-half times the regular rate of pay to unit members who are in active pay status more than 40 hours in one week (Section 27.01). Premium pay is also earned for working on a holiday (Section 44.02). Whether for working on a holiday or beyond regular hours, premium pay recognizes the infringement on one's personal time brought on by holiday or afterhours work.

The Agreement clearly permits personal leave to be used to

help accrue premium pay. It does not permit bereavement pay to be used for the same purpose. The other leave provisions relating to holiday pay--sick and vacation leave (Section 44.02)--permit only normal pay when a holiday occurs during leave. Under the expression-exclusion principle of contract interpretation Section 45.06 of the Agreement evinces the parties' intention that bereavement leave, taken on a holiday, not be used to accrue premium pay.

A third interpretation of the bereavement and holiday pay provisions honors the two relevant interpretive principles and thus most closely approximates the parties intention in this case. The Arbitrator finds that the parties intended for unit members to receive both bereavement pay and holiday pay, but not holiday premium pay. This interpretation squares with the State's concern about forfeiture reflected in its assertion that no forfeiture of bereavement pay is required under its interpretation. As noted above the State has asserted that Article 50 would permit an employee to sandwich the holiday between bereavement days even though Article 50 calls for consecutive bereavement days. The Arbitrator's interpretation also preserves the holiday benefit conferred in Article 44, which in turn would be forfeited under the State's assertion.

The Union's argument that holiday premium pay is an entitlement and not overtime confuses the holiday benefit, which is normal pay received for holidays not worked, with the premium that is paid for holiday work. As also noted above, holiday work like overtime brings a premium, because it infringes upon an employee's personal time. Unlike holiday pay, holiday premium

pay is not automatically triggered by the arrival of the holiday. Thus, it is inappropriate to read the bereavement and holiday pay provisions as entitling the Grievant to holiday premium pay for holidays occurring during bereavement leave.

The State makes the point that bereavement leave is distinguishable from sick and vacation leave, which suggests that this third interpretation treating them the same may be inconsistent with Section 44.02a of the Agreement. The State's argument is that unlike bereavement pay, sick and vacation leave are banked and may be cashed in at a later time. The inference is that the Agreement preserves holiday pay along with sick and vacation leave pay when they occur at the same time but makes bereavement and holiday pay mutually exclusive when they coincide.

However, the issue under the third interpretation is not whether bereavement pay should be banked and later cashed in. Such a reading would be clearly prevented by the expression-exclusion principle, since Section 44.02 permits such future use only of sick and vacation leave occurring during the holiday. Rather, the issue is whether the Grievant should have received bereavement pay plus holiday pay for November 11, 1989. Holiday pay is a benefit to which a unit member is entitled under the Agreement regardless of whether he works. The Agreement does not force the employee to elect between holiday pay and any other leave taken while the employee is in active pay status. Only when a leave of absence is in no-pay status does the Agreement deprive an employee of holiday pay (Section 44.02b).

If the State had permitted the Grievant to take bereavement leave on November 11, 1989, as the Arbitrator finds appropriate in this award, such leave would not have been banked; it would have been spent as intended by the parties. And there would have been no question about the Grievant's entitlement to holiday pay. By denying the Grievant's request for bereavement leave and requiring the Grievant to take holiday pay instead, the State violated Section 44.02 and Article 50 of the Agreement.

IV.

AWARD

Based on the foregoing the grievance is sustained. The State shall pay backpay to the Grievant in the amount of eight hours of pay at the regular rate.



CALVIN WILLIAM SHARPE
ARBITRATOR

5/15/90

DATE