

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 615

OCB GRIEVANCE NUMBER: 15-03-900619-0051-04-01
15-03-900612-0046-04-01

GRIEVANT NAME: MASON, TROOPER K.L. and ERTEL, TROOPER JAMES

UNION: FOP UNIT 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: KEENAN, FRANK

MANAGEMENT ADVOCATE: ARENA, ANNE

2ND CHAIR: KITCHEN, LOU

UNION ADVOCATE: CREMEANS, KAY

ARBITRATION DATE: MARCH 14, 1991

DECISION DATE: JUNE 11, 1991

DECISION: DENIED

CONTRACT SECTIONS
AND/OR ISSUES:

BOTH CASES INVOLVE GRIEVANCES CHALLENGING THE PATROL'S DENIAL OF PERMISSION TO TROOPERS ERTEL AND MASON TO ENGAGE IN CERTAIN OFF-DUTY EMPLOYMENT.

HOLDING: "I SIMPLY FIND NO WARRANT FOR CONCLUDING THAT THE PATROL'S DENIAL OF OFF-DUTY EMPLOYMENT WAS SOMEHOW DISCIPLINARY, AND FURTHER, WITHOUT JUST CAUSE. ...THE FOP'S CONTENTION IN THIS REGARD WAS NOT MADE UNTIL THE ARBITRATION HEARING, AND BEING AN ENTIRELY DIFFERENT CONCEPT THAN ANY ADVANCED DURING THE PROCESSING OF THE GRIEVANCES, THE FOP IS SIMPLY ESTOPPED FROM RAISING AND RELYING ON THIS CONTENTION NOW." PATROL'S DENIAL WAS NOT UNREASONABLE, ARBITRARY OR CAPRICIOUS.

ARB COST: \$868.91



ARBITRATION

BETWEEN

THE STATE OF OHIO,
OHIO STATE HIGHWAY PATROL

and

Cases Nos. OCB 15-03-900619-051-04-01
(Tpr. K. L. Mason)
OCB 15-03-900612-046-04-01
(Tpr. James E. Ertel)

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

#615

Appearances:

For the Patrol:
Anne Arena
Personnel/Labor Relations
O.S.H. Patrol Headquarters
Columbus, Ohio

For the F.O.P.:
Kay Cremeans, Esq.
General Counsel
F.O.P., O.L.C., Inc.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

Statement of the Case:

These cases, well presented by the parties' advocates, were heard in Columbus, Ohio on March 14, 1991. Following the presentation of their evidence, the advocates ably argued their respective positions. On the merits^{1/} both cases involve grievances challenging the Patrol's denial of permission to Troopers Ertel and Mason to engage in certain off-duty employment. In this regard the Patrol has maintained since 5-8-80 the following Policy with respect to off-duty employment:

SUBJECT: OUTSIDE EMPLOYMENT

POLICY

It is not the intent of the division to restrict a member from engaging in outside employment unless there is a clear conflict of interest or the outside employment has an adverse effect upon the member's job performance.

A member shall not engage in any outside employment unless approval has been granted as outlined in the application File 00-10-104G. If, after approval has been given, there is a clear indication that the outside employment has an adverse effect upon the member's on-duty job performance, such approval may be withdrawn.

A member engaging in outside employment shall be ready to respond to emergency patrol duty within two (2) hours.

^{1/} In both cases the Patrol had argued that the grievances were not arbitrable, putting forth the same arguments as were made in the matter of the Arbitration Between the Ohio State Highway Patrol and F.O.P., O.L.C., Inc. (Trooper Senkar) OCB Case #15-03-900111-004-04-01, which issued 11-14-90. For the reasons noted therein, the instant grievances are found to be arbitrable.

Definition of Member

Active members of patrol, radio, dispatchers, drivers license examiners, motor vehicle inspectors, and cadets.

Definition of Outside Employment

Includes the rendering of any service of a business or commercial nature for which pay or remuneration is received from any source.

Definition of Business Activity

Includes participation in or affiliation with any commercialized business activity except solely by investments, for the purpose of financial gain or for which remuneration is received.

The record reflects that the Patrol relies on the following criteria for secondary employment: conflict of interest (opposing interests of employers); impact on performance of duty (ability to perform public service duty); impact on reputation; emergency response time; impact on fellow employees; use of uniform (or not); alcohol; avoidance of placing officer in compromising position; impact on other law enforcement agency relationships; and relationship with public agencies.

The Patrol points to the "Code of Ethics, Oath of Office, and Regulations of the Ohio State Highway Patrol," as the source of authority for said Policy. In that regard that instrument, promulgated by the OSHP Superintendent, provides in pertinent part as follows:

"By virtue of the authority vested in me as Superintendent of the Ohio State Highway Patrol under the provisions of Section 5503.03 of the Revised Code of Ohio, the following Oath of Office, Code of Ethics and

Regulations for the administration and operation of the Ohio State Highway Patrol are herewith prescribed, effective March 24, 1984. . . .

* * * *

REGULATIONS

* * * *

4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT

* * * *

(G) Off-duty employment

(1) A member shall not engage in any off-duty employment which hinders or interferes with the performance of duties. A member shall not engage in any off-duty employment that represents a conflict of interest with the performance of their duties.

(2) A member shall not engage in off-duty employment unless such employment has been approved, in writing, according to procedures established by the superintendent."

Finally it is noted that O.R.C. 5503.03 provides in pertinent part that ". . . [t]he Superintendent, with the approval of the director, shall prescribe rules for instruction and discipline, make all administrative rules, and fix the hours of duty for patrol officers. . . ."

On 3-22-90 Trooper James E. Ertel filled out an HP 104G i.e., an "Application For Off Duty Work." In it he indicated that his Employer would be the Cincinnati Bible College, that his

position would be as Security, with duties entailing securing buildings at 2200 hours; conducting periodic security checks of campus buildings; and overseeing campus security after 2200 hours."

Trooper Ertel's application was denied and he grieved. In his grievance Trooper Ertel (herein Grievant Ertel) asserts in pertinent part:

". . .

5. Articles and Sections Grieved: Article 2 - Effect of Agreement (Past Practice), Article 7 - Non-Discrimination.
6. Statement of Grievance (Time and Date, Who, What, Where, How) Be Specific: On 3/22/90 I submitted an application for off-duty work (HP 104G) to Lt. Lewis for a Security Officer's position at the Cincinnati Bible College and Seminary. The application cited duties performed as, securing building after 2200 hours, a grounds and dorm building watch during night hours for intruders and fire. This request for off-duty work was denied by Major Hartsell on 5/29/90, citing that a security guard position creates a conflict of interest.

Remedy Requested: That the attached HP 104G be approved due to there being no conflict of interest which are applicable to the grievants' present job duty and assignments--that all lost wages from 6/8/90 forward be reimbursed to the grievant.

The Patrol's Level III response well reflects the Patrol's position in the matter. Thus the Patrol noted that the Grievant's request was:

". . . ultimately^{2/} denied by Major R. K. Hartsell,^{3/} Personnel Commander, after review by the Assistant Attorney General assigned to the Highway Patrol. The request was denied based on the determination a conflict of interest was present, including the possibility of civil liability claims against the Highway Patrol.

Considerable case law exists which bolsters the Employer's right to limit off-duty employment. In McNamara v. City of Chicago, 700 F. Supp. 917 (N.D. Ill. 1988), a Federal Court ruled a public employee does not have a constitutional right to engage in secondary employment. Moonlighting can be totally banned (but not on an individual basis) or severely limited (when rationally related to the employment mission).

In Dake v. Bowen, 521 N.Y.S.2d 345 (A.D. 1987) a sheriff argued there was the possibility of civil liability claims against the Sheriff's department for off duty acts as a security officer. A five-judge appellate court rejected a suit filed by three deputies. The court ruled the decision to deny off duty employment as a security guard was lawful and served a rational governmental purpose.

Major Hartsell's decision to deny Tpr. Ertel's request to work off duty as a security guard was consistent with longstanding Highway Patrol policy and public sector case law. No Ohio Highway Patrol trooper has been granted permission to work as security officers off duty. The decision to deny permission was a proper exercise of discretion and served a rational governmental purpose, the elimination of potential liability.

The Hearing Officer, Sergeant R. G. Corbin observed and concluded that:

^{2/} Grievant Ertel's request was initially approved by first line supervision, Post Commander Lt. Lewis.

^{3/} Major Hartsell's testimony at the hearing essentially conformed to the points made in this written Level III response.

". . . The grievant stated he would be the only person charged with responsibility for security of a 2500 student campus during his work shift from 10:00 p.m. to 6:00 a.m. In addition to fire watch and building security, he would be summoned to disturbance calls. He stated he could make felony arrests as a private citizen and would be required to summon the Cincinnati Police Department for any other enforcement action.

Clearly, the potential for civil liability exists any time police action is taken whether by a security guard or a sworn police officer. The actions of the grievant in the capacity as a private security guard would be scrutinized in relation to this training and experience. The grievant's qualifications for a security guard position are based on his training and experience as a Ohio Highway Patrol Trooper. The mission of the Highway Patrol and all public employers is to limit the potential for liability. The decision to deny the grievant's request was a reasonable exercise of the Employer's discretion."

Grievant Ertel also testified at the arbitration hearing to the same point attributed to him by Sgt. Corbin, as noted above. Additionally he testified that he was not expected to wear his Trooper's uniform, or any uniform, rather only a ball cap with the designation "Security" on it.

By way of elaboration, Personnel Commander Major R. K. Hartsell, indicated, in his testimony at the arbitration, that positions as a security guard had never been approved by the Board. Hartsell explained that because Security work was similar in content to that of a Trooper, and perforce the training received for becoming a Trooper could be said to also prepare one to be a Security guard, there was a significant potential for liability and a holding of the Patrol accountable for mishaps as a Security guard. For example, in both positions arrests could well be made. Additionally, court appearances were another

significant potential. It is noted that Major Hartsell conceded on cross-examination that a mishap in an intervention in a mugging incident could also pose a risk of liability for the Patrol.

On May 14, 1990, Trooper K. L. Mason filled out an HP 104G, Application For Off Duty Work. In it he indicated that he desired to work as a sales clerk and cashier at the Heath Carry Out. Trooper Mason's application was denied. He grieved. In his grievance, Trooper Mason (herein Grievant Mason) asserts in pertinent part:

". . . .

5. Articles and Sections Grieved: Off duty work. Article IV, Section 4.
6. Statement of Grievance (Time and Date, Who, What, Where, How) Be Specific: On 5-10-90 I submitted a HP 104G for off duty work at the grocery store near my residence. My duties are cashier, clean up, and stocking. The grocery sells food, paper items and beverages (including beer and wine). On 6-15-90, I received notification that I was not approved to work at the grocery due to a conflict of interest with my duties as a Trooper. I do not see where my working in a grocery store, on my time off, interferes with my duties as a Trooper. It is my neighborhood and the majority of the customers know who I am and what I do for a living. I also feel that if I

am not doing anything illegal, the Patrol should not interfere with my off-duty time.

7. Remedy Requested: I am not doing anything illegal or detrimental to the State Highway Patrol on my time off and the grocery store job does not interfere with my duties as a State Trooper. I feel that I should be allowed to work at the grocery. . . ."

The Patrol's Level III response well reflects the Patrol's position in the matter. Thus the Patrol noted that the Grievant's request was denied:

". . . based on the determination a conflict of interest was present.

Considerable case law exists which bolsters the Employer's right to limit off duty employment. In McNamara v. City of Chicago, 700 F. Supp. 917 (N.D. Ill. 1988), a Federal Court ruled a public employee does not have a constitutional right to engage in secondary employment. Moonlighting can be totally banned (but not on an individual basis) or severely limited (when rationally related to the employment mission). In Allison v. City of Southfield, 432 N.W.2d 369 (Mich. App. 1988) the court ruled that:

"This is not a case involving a delegation of legislative power without standards to regulate the general public, but it is rather a matter of the internal governance of police discipline, exercised by a supervisor over subordinate police employees . . . we conclude that the actual exercise of discretion in this case was not arbitrary or capricious."

The employer's decision to deny Tpr. Mason's request to work off duty as a cashier in a carry out was consistent with longstanding Highway Patrol policy and public sector case law. No Ohio Highway Patrol Trooper has been granted permission to work in an establishment regulated by Department of Liquor Control, if the officer will have direct contact with the regulated substance.

The mission of the Highway Patrol is to save lives and reduce injuries. Operational Objectives to fulfill the

mission include efforts to detect and remove the alcohol/drug impaired drivers from Ohio highways. Officers of the Highway Patrol make 26,644 arrests of persons driving under the influence of alcohol and/or drugs of abuse. To allow an officer of the Highway Patrol, an officer charged with the duty to detect and remove alcohol impaired drivers, to sell alcohol, is a situation of patent conflict with the heart of the highway safety mission.

The decision to deny permission in this situation was a proper exercise of discretion and served a rational governmental purpose, the elimination of potential conflict of interest.

Grievant Mason testified as per the representations in his grievance. Additionally he indicated that approximately 25% of the Heath Carry-Out's inventory consists of beer and wine. Mason also testified that the carry-out owner's policy was never to sell "singles" of beer.

Major Hartsell also testified as per the representations in the Patrol's Level III response. Additionally the Major indicated that the Patrol maintains good relationships with such civic organizations as MADD and SADD, and permitting a Trooper to directly sell alcoholic beverages would adversely impact on these relationships and hence the mission of the Patrol to enforce a no drinking and driving public policy and law. It was Hartsell's testimony that a potential for a conflict of interest exists where a Trooper is selling alcohol one day and perhaps arresting the purchaser, or indeed anyone, the next day for drunk driving.

It was further Hartsell's testimony that while concededly a Trooper has been granted permission to work as a meat cutter in a Kroger supermarket, where beer and alcohol are also sold, this Trooper has no direct role in selling the alcohol, in contrast to

Grievant Mason who would have such a direct role. Hartsell also conceded that the Patrol sanctioned social gatherings of Troopers, such as "Spring Round Ups," where alcoholic beverages were consumed and where non-Patrol members, i.e., guests, were in attendance and/or which were held at facilities wherein the public could surely observe the Trooper's consumption of alcohol.

With respect to some of the off-duty positions permitted by the Patrol, Major Hartsell identified a list compiled by the Patrol of such and that is attached as Appendix I. In this regard Hartsell explained that some substitute school bus driver positions are granted and some are denied, the latter being those where the Troopers are responsible for inspecting the school buses for safety. Hartsell also explained that EMT training is not provided in the course of a Trooper's training and hence this was one factor why the list reflects certain EMT positions as being approved for off-duty employment. Hartsell conceded that some troopers are allowed to work off duty in sporting goods stores, and that if guns are sold there, said guns could later be used in the commission of a crime.

The F.O.P.'s Position:

As a general proposition, the F.O.P. asserts that bargaining unit members do have a right to earn money outside their employment with the Patrol. With respect to Grievant Mason, the F.O.P. contends that the only arguable rational connection to at best a potential conflict of interest is the fact that Grievant Mason's proposed Heath Carry-Out employment would involve him in

the sale of alcohol. In this regard the F.O.P. asserts that no real conflict of interest exists because the alcohol sales at Heath Carry-Out constitute but one-fourth of their sales and, in addition, there is a policy against selling "singles" of beer, a phenomenon often associated with illegal drinking while driving. The F.O.P. also emphasizes that Grievant Mason's employment at the carry-out did not contemplate any illegal activity; indeed, he was free and expected to refuse selling alcohol to minors and/or the intoxicated.

Furthermore, argues the F.O.P., the Patrol's standard of proscribing certain outside employment on the basis of "potential" conflicts with employment as a Trooper is improper, the F.O.P. asserting that each case should be dealt with only when a conflict in fact arises. The F.O.P. points out that driving a motor vehicle creates a potential for violating the speeding laws, yet the Patrol permits outside employment positions requiring driving.. Similarly argues the F.O.P., the Patrol sanctions social gatherings or round-ups of Troopers, their families, and friends, at which the drinking of alcohol is permitted thereby creating the potential of Troopers drinking and then driving, potentially under the influence, and therefore in violation of the traffic laws. The F.O.P. also points out that another Trooper is allowed to work as a meat cutter in a Kroger supermarket. The F.O.P. additionally asserts that EMT-Emergency first aid positions, EMT-Emergency Squad positions, a sales clerk in sporting goods stores where guns are sold, and basic police

instructor positions, all present the potential of liability on the part of the Patrol because they entail matters concerning which Troopers are trained by the Patrol, nonetheless the Patrol permits Troopers to work in these positions. The point made with respect to all of these "other" permitted positions is twofold, i.e., such demonstrates that Grievant Mason is being treated disparately and hence arbitrarily and capriciously in violation of Article 7 of the Contract and such also demonstrated that in analogous off-duty employment situations the F.O.P. permits the off-duty activity and hence its denial here is simply unreasonable.

With respect to Grievant Ertel, the F.O.P. asserts that his proposed security duties at the Cincinnati Bible College were not tantamount to law enforcement because he would have had no arrest powers and would, like any citizen, call 911. This being so, argues the F.O.P., there is no conflict of interest with his status as a Trooper. Indeed, asserts the F.O.P, initially Grievant Ertel was granted permission by Lt. Lewis, who clearly saw no conflict of interest. Additionally, this being so, the case against permitting Grievant Ertel to act as a security guard rests solely on potential liability for the Patrol. But in this regard, asserts the F.O.P., other off-duty positions, which are permitted, ran the same, or higher, risk of liability, to wit, basic police instructor; sporting goods sales clerk (where the store sells guns); EMT-Emergency First Aid; and EMT-Emergency Squad positions. The F.O.P. also asserts that the risk of

liability the Patrol fears in the event Grievant Ertel were permitted to act as a security guard is no more serious than the liability that might arise from interfering with an in-progress mugging, and that, accordingly, the Patrol's anxiety is unrealistic and therefore unreasonable.

The F.O.P. contends that the Patrol has acted unreasonably and thereby evaded the spirit of the Agreement in violation of Article 7 - Non-Discrimination; Article 4 - Management Rights; and Article 2 - Effect of Agreement - Past Practice. The Patrol violated Articles 2 and 4 by unilaterally expanding the scope of its denials of requests for permission to engage in off-duty employment.

With respect to both grievances, the F.O.P. contends that the Patrol's unreasonable denials of permission to the Grievants to work the off-duty positions they requested is tantamount to discipline of the Grievants, and said discipline being without just cause, the Patrol's denials cannot be allowed to stand.

So it is that the F.O.P. urges that the grievances be sustained and that the Patrol be directed to permit the Grievants to engage in their requested off-duty employments, and further, that the Grievants be awarded the monies they would have earned had they not been wrongfully denied permission to pursue their requested off-duty employments.

The Patrol's Position:

In addition to the points made by the Patrol in its Level III response, noted hereinabove, the Patrol draws the

Arbitrator's attention to the Senkar award, and characterizes it as stating "in essence: the issue is arbitrable, but only to the extent the Union contends a violation of a specific article or section of the Contract. . . . [T]he Union may only prevail in these cases, if they are in fact able to prove violations of the particular articles grieved. . . . [T]he Union has brought forward two particular scenarios, both dealing with off-duty employment, both alleging violations of different articles of the Agreement. . . . The Union bears the burden of proof. They must prove violation of Article 2 - Past Practice, Article 4 - Management Rights, and Article 7 - Discrimination. Argument and testimony advanced by the Union has failed to substantiate this burden. In fact, the union's contentions are "patently frivolous."

There is no violation of past practice in either of these scenarios. The employer derives its management authority from Ohio Revised Code Section 5503.03, which gives the Superintendent the power to make all rules necessary to govern the members of the Highway Patrol. The practice of monitoring off-duty employment has been in force through the 58 year history of the Highway Patrol; it certainly predates the advent of collective bargaining. There was never discussion regarding off-duty employment during bargaining sessions.

According to Articles 2 and 4 of the contract, management retains all management rights unless altered by the current contract. Additionally, management bears no obligation in today's proceedings to explain it has not usurped any

contractually guaranteed rights, and it has no past practice of so doing.

The Union has failed in their burden to prove management has violated Article 7 by discrimination. There has been no discrimination based on age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, or for the purpose of evading the spirit of this agreement. Neither has there been intent to discriminate. Testimony will show the denial of off duty employment is based on rational, reasonable criteria. The employer has not treated one of the protected classes of employees any differently than employees from a different class. The Union attempts to prove discrimination by arguing against management discretion."

The Patrol additionally asserts that the Contract does not confer upon the bargaining unit any right to make a living outside of their employment with the Patrol.

Nor, argues the Patrol, can any claim of disparate treatment of Grievant Mason prevail because another trooper is permitted to work as a meat cutter at Kroger's supermarket. Thus, the Patrol contends that a decidedly different atmosphere prevails at a Kroger supermarket and at a neighborhood carry-out, where 25% of the sales volume is in alcohol products.

The Patrol also asserts that the Union simply failed to prove that the Grievants, as members of the bargaining unit, were

discriminated against "for the purpose of evading the spirit [of the Agreement]" as proscribed by Article 7.

The Patrol also points to several Court decisions as supportive of its position. Thus the Patrol cites to the Arbitrator the following cases: Emery v. Lefevre (New York State Dept. of Corrections, 470 N.Y.S.2d 772 (A.D. 3 Dept. 1983)); FOP Lodge 73 v. City of Evansville, 559 N.E.2d 607 (Ind. 1990); McNamara v. City of Chicago, 700 F. Supp. 917 (N.D. Ill. 1988); Allison v. City of Southfield, 432 N.W.2d 369 (Mich. App. 1988); Decker v. City of Hampton, Virginia, 741 F. Supp. 1223 (E.D. Va., 1990); Dake v. Bowen, 521 N.Y.S.2d 345 (A.D. Dept. 1987); Long Beach Police Officers Assn. v. City of Long Beach, 250 Cal. Rptr. 869; 759 P.2d 504 (1988); Martin v. Matthys, 501 N.E.2d 286, 149 Ill. App. 3d 800 (1986); Dalton v. City of Russellville, 720 S.W.2d 918 (Ark. 1986); and Bowman v. Twp. of Pennsanken, 709 F. Supp. 1329 (D. N.J. 1989).

With respect to the F.O.P.'s contention that the Patrol's denial of the Grievants' requests for permission to engage in off-duty employment is "discipline" and furthermore is discipline "without just cause," the Patrol characterizes such as "off-the-wall," and thereby, implicitly, as untimely, and in any event not worthy of comment by the Patrol.

So it is that the Patrol urges that the grievances be denied.

Issues:

The parties stipulated that the issue in Grievant Mason's case is:

"Has the Employer violated Article 4 - Management Rights Section 4, by denying the grievant's off-duty employment request? If so, what shall the remedy be?"

The parties stipulated that the issue in Grievant Ertel's case is:

"Has the Employer violated Article 2 - Past Practice and Article 7 - Non-Discrimination by denying the grievant's off-duty employment request? If so, what shall the remedy be?"

Discussion and Opinion:

First addressed is the analytical framework within which the grievances must be determined. As the Patrol points out, in the Senkar Award, it was held that when it comes to grievance challenges to the Patrol's denials of off-duty employment requests, the grieving Trooper must identify some contractual provision as having been violated. Here Grievant Ertel identified Articles 2 and 7 as having been violated when the Patrol denied his request for off-duty employment as a security guard. These Articles provide in pertinent part as follows:

**ARTICLE 2 - EFFECT OF AGREEMENT -
PAST PRACTICE**

This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. This agreement may be amended only by

written agreement between the Employer and the Labor Council. No verbal statements shall supersede any provisions of this Agreement.

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement will continue to effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Labor Council.

ARTICLE 7 - NON-DISCRIMINATION

Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference; or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio. . . .

Grievant Mason identified Article 4, Section 4 as having been violated when the Patrol denied his request for off-duty employment as a sales clerk at the Heath Carry-Out. Those provisions provide as follows:

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:

. . .

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

In my examination of Article 2, unaided by any specific contention related thereto, I find nothing which would furnish a basis for a challenge to a denial of permission to engage in the

off-duty employment of a security guard. Article 7, however, stands on a different footing. Thus the applicable and operative language of Article 7 is the language that "[n]either party will discriminate for or against any member of the bargaining unit . . . for the purpose of evading the spirit of this Agreement . . ." In my judgment, this language is particularly broad and embracing. And if one thing can be inferred with certitude, it is that the spirit of the Agreement is that bargaining unit employees will be treated in a reasonable fashion and perforce not treated in an arbitrary or capricious fashion. This is of course the goal, essence, and spirit of virtually every collective bargaining agreement, and I find no basis for distinguishing the parties' Agreement. Therefore, in the context of this case the Patrol was required to act reasonably, and not in an arbitrary or capricious manner in acting on requests for off-duty employment.

With respect to Article 4, Section 4 of the Agreement, as the prefix sentences to the enumeration of some fourteen (14) specifically reserved rights indicates, all inherent managerial rights are reserved, and in a law enforcement context this clearly embraces the long and well established inherent right to monitor and control, at least to some extent, the off-duty employment of the law enforcement employer's employees. But the prefix sentences, sentence one in particular, also expressly refer to the fact that the rights therein reserved, including perforce the right to some control over off-duty employment, may

well be "modified" by other provisions of the Agreement. And in this regard, as just noted above, Article 7 constitutes just such a contractual modification, namely, to repeat, the requirement that managerial action with respect to off-duty employment permission requests not be unreasonable, arbitrary, or capricious. In this manner then Article 4, in a concededly circuitous fashion, raises a viable challenge, as does Article 7 in a direct manner, to the propriety of the Patrol's denials of the Grievants' off-duty employment permission requests. Both grievances challenge the reasonableness of the Patrol's denials.

One prong in the F.O.P. challenge to the reasonableness of the Patrol's denials of permission to the Grievants is that the Patrol is concerned only with the "potential" of a conflict of interest. However, in my view, virtually any conflict of interest is prospective and potential. In all conflict of interest matters, the concern is with the appearance of goals being potentially at cross purposes and endeavors which could lead to inconsistent or incompatible results. Any doubt as to the legitimacy of the concern for the mere "potential" of adverse consequences is in my view persuasively laid to rest by the Court in Martin v. Matthys, 501 N.E.2d 286, 291 (Ill. App. 1 District 1986) [one of the many judicially decided cases cited by the Patrol, all of which were read by the Arbitrator] wherein the Court with respect to a policeman's performing security work observed that it was "not necessary for [the Employer] to show actual conflicts. A showing of potential conflicts between the

primary and supplemental employment is sufficient to establish cause for discharge."^{4/} And here it cannot in my judgment be seriously questioned but that there exists substantial potential for inconsistencies and incompatibilities between Grievant Mason's Trooper's duties and his direct involvement in the sale of alcoholic beverages what with their potential for mischief vis-a-vis the traffic safety laws. And in my view this potential for mischief is not meaningfully diminished by the conceded fact that some precautions would have been in place, such as the secondary employer's expectation that Grievant Mason would not sell alcoholic beverages to minors or to the already intoxicated, and the fact that "singles" of beer would not be sold. Nor am I persuaded by the F.O.P.'s contentions to the effect that Grievant Mason is in any event being treated disparately because other Troopers are allowed to work off-duty in businesses (Kroger's Supermarket) where alcohol is sold, or are permitted to work off-duty in endeavors analogous to the selling of alcohol. Thus, with respect to the meat cutter employee working in Kroger's, as

^{4/} See also: Weisenritter v. Board of Fire and Police Commissioner of City of Burbank (1979), 67 Ill. App. 3d 799, 24 Ill. Dec. 424, 385 N.E.2d 336, cited by the Court in Martin v. Matthys, wherein the court sanctioned a rule which expressly stated that "the possibility of conflict of interest is a reason for the prohibition against dual [and outside] employment." (Emphasis Supplied.) And Dake v. Bowen, 521 N.Y.S.2d 345 (1987) wherein the Court upheld the Sheriff's rule against all outside employment, the Court observing that the Sheriff had "demonstrated a rational basis for imposing it, in order to avoid potential conflicts of interest and to minimize the risk of claims of liability for off-duty conduct of members of the Department."

the Patrol points out, as a meat cutter he is not directly involved in the sale of alcohol as would be Grievant Mason, as a sales clerk, and additionally, Kroger stores are not identified in the public's mind with the sale of alcohol, whereas what is known in the retail business as a Mom & Pop operation, such as the Heath Carry-Out, are. Indeed such a perception must be regarded as well justified vis-a-vis Heath Carry-Out, where some 25% of its inventory is alcoholic beverages. Concerning other purportedly analogous endeavors, such as the potential of a conflict in interest (and of Patrol liability) in gun sales by a sporting goods clerk, or interfering with a mugger, it seems to me that the Patrol is simply entitled to take into account the degree of probability of a lawsuit or a conflict, and that doing so, the sale of alcoholic beverages from a Mom & Pop carry-out simply carries a greater risk and a more frequent risk of both liability and conflict than do these and other analogous situations relied on by the F.O.P. But the touchstone of any disparate treatment claim is that like sanctions or prohibitions obtain in "like circumstances." And while the Arbitrator has often held that the concept of "like circumstances" does not envision lock step similarity, the fact remains that very substantial similarity is required. The finding here is that none of the analogies the F.O.P. draws are in my view very substantially similar to Grievant Mason's circumstances and hence no "like circumstances" obtain. This being so no disparate treatment claim is made out.

With respect to Grievant Ertel, it appears now well established judicially that public law enforcement agencies, in order to preserve the funds necessary to carry out their law enforcement mission, may take various steps, including limits on their employees' outside and off-duty employment, where such employment puts their funding source at risk from a liability suit. Thus in Bowman v. Township of Pennsanken, 709 F. Supp. 1329 (D.N.J. 1989) the Court cogently observed:

" While it may be true that economic factors have forced police officers into the practice of moonlighting, a township has a legitimate interest in regulating its police department, including the off-duty activities of its officers. It is clear that such goals as reducing mental and physical fatigue, limiting litigation and lessening liability insurance expenses serve as legitimate government interests supporting regulation. See, e.g., *Ammon v. City of Coatesville*, No. 87-1577 (E.D. Pa. July 24, 1987) (1987 Lexis 6719, 1987 WL. 15032), *aff'd*, 838 F.2d 1205 (3d Cir. 1988). Because of these legitimate goals, it is also clear that a municipality can regulate and even prohibit off-duty work. See *Isola v. Borough of Belmar*, 34 N.J. Super. 544, 112 A.2d 738 (App. Div. 1955); see also *Rhodes v. Smith*, 273 S.C. 13, 254 S.E.2d 49, 50 (1979) ("Regulations prohibiting all outside employment have been upheld."); Annotation, *Validity, Construction, and*

Application of Regulation Regarding Outside Employment of Governmental Employees or Officers, 94 A.L.R.3d 1230 (1979). Finally, the court recognizes that a "majority of courts considering the validity of regulations which in some way restrict the outside employment of government employees have upheld the regulations."

(Emphasis Supplied). [See also: Dake v. Bowen, supra, footnote 4.]

As has been seen, it is principally on the ground that Ertel's security duties would run an undue risk of a claim of liability against the Patrol that the Patrol declines to grant Ertel permission to engage in security activities off-duty. In my view because the essence of the Troopers' duties is the maintenance of safety through enforcement of laws, I see his safety maintenance duties as a security guard to be closely akin. Accordingly, there is a substantial risk that given the similarity of the skills involved and the results expected, that a third party would look to the deep pockets of the Patrol in the event of an unfortunate negligent misstep. In my view the F.O.P. cannot and does not point to any circumstance wherein there exists the same mesh of skills required in both the on-duty and off-duty positions as exists in the Trooper/Security positions so as to make out a case of similar degree and frequency of risk of liability so as to conclude that "like circumstances" obtain. Indeed with respect to its EMT claims, it appears that EMT is not a part of a Trooper training. Directly to the point, the Patrol

simply can't be faulted for its fact sensitive approach to these off-duty cases and rather refined distinctions in justification of in one instance granting permission for an off-duty endeavor, and denying it in another. This is so both because rational distinctions do exist and because the making of these refined but rational distinctions often serve to expand the scope of permissible off-duty employments. This is especially so in light of the judicial sanction of a total ban on all off-duty employment, a policy not followed by the Employer here. Dake v. Bowen, supra.


Finally, I simply find no warrant for concluding that the Patrol's denial of off-duty employment was somehow disciplinary, and further, without just cause. In any event, insofar as the record made before me shows, the F.O.P.'s contention in this regard was not made until the arbitration hearing, and being an entirely different concept than any advanced during the processing of the grievances, the F.O.P. is simply estopped from raising and relying on this contention now.

It may be that at some point the Patrol's denial of permission to engage in a certain off-duty employment will be deemed unreasonable, arbitrary, or capricious in violation therefore of the spirit of the Agreement and Article 7, but such is not the case with respect to the requests of the two Grievants here. Hence the grievances must be denied.

Award:

For the reasons more fully set forth above, the grievances are denied.

Dated: June 11, 1991



Frank A. Keenan
Arbitrator

APPENDIX I

OCCUPATION	DATE FILED
ADMIN.- BOARD OF EDUCATION	08/16/89
ADMIN.-BOARD OF EDUCATION	08/03/89
AEROBIC INSTRUCTOR	01/22/88
AMWAY DISTRIBUTOR	09/17/81
AMWAY SALES	09/16/83
ARMORER	05/17/85
ASSISTANT INSTRUCTOR	04/28/88
ASST BASKETBALL COACH	09/14/89
ASST SAFETY DIRECTOR	08/11/89
ASST VARSITY FOOTBAL COACH	08/02/89
AUTO BODY	06/23/80
AUTO MECHANIC	01/08/91
AUTO REPAIR	08/27/81
BASEBALL UMPIRE	03/16/89
BASIC POLICE INSTRUCTOR	03/28/86
BASIC POLICE INSTRUCTOR	02/22/90
BASKETBALL & FOOTBALL COACH	10/21/87
BASKETBALL OFFICIAL	11/17/89
BASKETBALL REFEREE	02/19/82
BOOK KEEPING/SALES - AUTO SRV	02/01/90
BRICK LAYER	06/04/81
BUY, SELL, REPAIR COMPUTER	01/15/91
CABINET BUILDER	03/05/86
CARPENTER	05/13/78
CARPENTER	11/02/82
CARPENTER	06/09/76
CARPENTER	07/11/69
CARPENTER	11/02/78
CARPENTER	05/17/88
CARPENTER	01/31/90
CARPENTER WORK	08/23/82
CARPENTER/MASON	01/20/88
CARPENTER/PAINTING	03/24/83
CASHIER-GAS STATION	11/21/90
CATERER'S ASSISTANT	10/10/89
CHARTER BOAT SERVICE	03/28/85
CLERK/SALES - SPORT STORE	06/16/90
CO-PILOT	10/03/84
COACH	03/26/90
CONCRETE MASON	01/12/85
CONSTRUCTION	11/27/76
CUSTOMER SERVICE(BOATS)	07/27/72
CUT/DELIVER FIREWOOD	12/13/82
DATA ENTRY CLERK	02/16/90
DELIVER FOOD SUPPLIES	12/11/82
DISTRIBUTE/SELL VITAMIN SUPP	05/22/90
DISTRIBUTOR HEALTH FOOD	11/08/89
DRILL TRUCK OPERATOR	04/23/86
DRIVING INSTRUCTOR	03/13/86
DRIVING INSTRUCTOR	03/07/89
DRIVING INSTRUCTOR	03/20/89
DRIVING/BASIC POLICE INSTRUCTR	01/01/90
EMT - EM. FIRST AID	07/28/89
EMT - EMERGENCY SQUAD	01/11/91
EMT/FIREFIGHTER	08/20/90
ENGINE MECHANIC	11/03/80
FARM LABORER	10/20/79
FARM WORK	04/25/77

FARMER	01/17/91
FINANCIAL PLANNER	09/16/88
FIREARM SALES	04/20/81
FIREWORKS EXHIBITOR	06/06/89
FLIGHT INSTRUCTOR	01/22/89
FLIGHT INSTRUCTOR	01/30/90
FLORAL DESIGNER	04/26/85
FOOTBALL COACH	08/30/86
FOOTBALL OFFICIAL	08/30/89
FOOTBALL REFEREE	10/28/81
GAS STATION ATTENDANT	11/26/90
GENERAL CONSTRUCTION	05/09/78
GENERAL CONSTRUCTION	03/26/90
GENERAL CONTRACTOR	01/19/81
GYM OWNER	10/21/87
INSTALL ANTENNA	03/08/78
INSTRUCTOR	04/13/85
INSTRUCTOR	04/28/83
INSTRUCTOR	10/10/79
INSTRUCTOR	11/28/84
INSTRUCTOR	05/09/84
INSTRUCTOR	02/28/84
INSTRUCTOR	12/21/85
INSTRUCTOR	07/07/87
INSTRUCTOR	09/16/87
INSTRUCTOR	02/29/80
INSTRUCTOR	01/01/88
INSTRUCTOR	12/11/87
INSTRUCTOR	02/08/88
INSTRUCTOR	08/22/88
INSTRUCTOR	01/03/89
INSTRUCTOR	01/04/89
INSTRUCTOR	05/23/90
INSTRUCTOR	06/27/90
INSTRUCTOR	07/19/90
INSTRUCTOR (A. I., LAWS, STOPS)	07/29/90
INSTRUCTOR (ACADEMY)	12/15/89
INSTRUCTOR (LAW, RADAR)	08/21/90
INSTRUCTOR - BASIC POLICE ACAD	02/28/91
INSTRUCTOR LAW ENFORCEMENT	09/23/86
INSTRUCTOR OPOTC	10/17/86
INSTRUCTOR POLICE COURSE	11/14/89
INSURANCE AGENT	10/08/86
INVESTMENT MANAGEMENT	10/07/87
JANITORIAL SERVICE	10/02/86
JUNIOR HIGH BASKETBALL COACH	10/25/89
LABOR GENERAL CONSTRUCTION	09/25/85
LABORER	05/31/87
LAWN AND GARDEN HANDYMAN	10/16/87
LAWN CARE	06/13/89
LOCKSMITH	03/04/81
MACHINE SHOP LABORER	01/11/88
MAPLE LEAF CLEANING/CLEANER	06/10/88
MARKETING - AMWAY	08/30/84
MARTIAL ARTS INSTRUCTOR	07/30/90
MCDONALDS - CREW MEMBER	02/10/91
MEAT DEPT CUSTOMER SERVICE	03/27/90
MECHANIC	09/09/75
MEMBER OF ZONING BOARD	01/18/88
MUSICIAN	01/09/86

MUSICIAN	05/11/88
OPERATE APPLE ORCHARD	01/12/78
OWNER - OFFICE CLEANING	08/08/89
OWNER/MGR OF T.C.B.Y.	08/08/90
OWNER/OPERATOR (SALES)	07/13/88
OWNER/OPERATOR OF HOBBY SHOP	08/01/87
OWNER/SUPERVISOR-MUSIC - VIDEO	06/20/89
PAINT/CARPENTER	02/13/73
PAINTER	01/02/86
PAINTER	09/11/86
PAINTER	10/24/87
PAINTING	03/07/75
PHOTOGRAPHER	02/19/79
PHOTOGRAPHER	11/18/81
PHOTOGRAPHER	10/14/80
PHOTOGRAPHY	09/29/81
PHYSICAL MAINT. INSTRUCTOR	09/17/87
PLUMBER'S ASSISTANT	11/09/87
POLICE INSTRUCTOR	07/07/87
POLICE INSTRUCTOR/SOUTHEASTERN	11/07/90
PRACTICAL DRIVING INSTRUCTOR	02/26/90
PRINTER	06/14/82
RADIO SHACK SALESMAN	12/21/83
REAL ESTATE	07/15/87
RELOAD AMMO	03/12/81
REMODELING	06/11/76
SALES & GUN REPAIR	10/22/85
SALES & MANAGEMENT	02/25/86
SALES & SERVICE/COMPUTERS	11/02/90
SALES REP - INSURANCE	01/21/87
SALES REP - INVESTMENTS	03/29/88
SALES- HOT WATER HEATERS	01/07/90
SALES-HOUSEHOLD PRODUCTS	10/21/83
SALESMAN - BUILDING REPAIR	03/06/90
SCUBA INSTRUCTOR	09/22/81
SELF-EMPLOYED	02/23/89
SELF-EMPLOYED - BUILDING	04/20/87
SELF-EMPLOYED - PET CASKET	01/06/88
SELF-EMPLOYED - SPORT GOODS	08/03/88
SELF-EMPLOYED MACHINIST	04/14/88
SELL & INSTALL REPLACE. WINDOW	11/13/86
SENIOR SYSTEMS ANALYST	09/30/87
SERVICE STATION ATTENDANT	06/07/86
SNOW PLOWING	11/03/78
SOCCER REFEREE	11/04/85
SOFTBALL UMPIRE	07/20/76
SPORTS OFFICIAL	06/05/85
SPORTS OFFICIAL	10/16/87
SPORTS OFFICIAL/WRESTLING	11/13/90
ST MARY'S SCHOOL/CLEANER	02/10/89
SUB SCHOOL BUS DRIVER	10/27/89
SUB SCHOOL BUS DRIVER	02/27/90
SUBSTITUTE BUS DRIVER	03/22/90
SUBSTITUTE TEACHER	12/23/77
SYSTEMS ANALYST	04/21/88
TRUCK DRIVER	10/30/87
TRUSTEE UNION TOWNSHIP	11/09/89
TUTOR COUNSELOR	06/16/90
UMPIRE BASEBALL	06/22/82
VOCATIONAL INSTRUCTOR	01/19/90