

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 649

OCB GRIEVANCE NUMBER: 15-03-900821-0067-04-01 and  
15-03-890214-0022-04-01

GRIEVANT NAME: RICHARDSON/CALDERWOOD

UNION: FOP UNIT 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: KEENAN, FRANK

MANAGEMENT ADVOCATE: ARENA, ANNE

2ND CHAIR: KIRSCHNER, PAUL

UNION ADVOCATE: COX, PAUL

ARBITRATION DATE: APRIL 18, 1991

DECISION DATE: AUGUST 8, 1991

DECISION: GRANTED

**CONTRACT SECTIONS**

**AND/OR ISSUES:** GRIEVANT'S DAYS OFF SCHEDULE WAS CHANGED CAUSING HIM TO USE SICK LEAVE TO COVER A DOCTOR'S APPT. GRIEVANT DID NOT RECEIVE 72 HOURS PRIOR NOTICE OF THIS CHANGE IN SCHEDULE.

**HOLDING:** "MANAGEMENT HAS ALWAYS HAD THE RIGHT TO CHANGE AN EMPLOYEE'S SCHEDULED DAYS OFF IN THE EVENT THAT OPERATIONAL NEEDS .....JUSTIFY SUCH A CHANGE. IN SUCH AN EVENT, THE EMPLOYER MUST GIVE THE EMPLOYEE ADEQUATE NOTICE (ORDINARILY 72 HOURS)." EMPLOYER FAILED TO GIVE GRIEVANT 72 HOURS NOTICE AND IS DIRECTED TO RETURN THREE (3) HOURS SICK LEAVE TO GRIEVANT.

**COST:** \$652.92



ARBITRATION

BETWEEN

THE OHIO STATE HIGHWAY PATROL

and

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

Grievance No. 15-03-900821-067-04-01

*and 15-03-890214-0022-04-01*

APPEARANCES:

For the Patrol:

Anne K. Arena  
Personnel/Labor Relations  
Ohio State Highway Patrol  
Columbus, Ohio

For the F.O.P.:

Paul Cox, Esq.  
FOP/OLC, Inc.  
Columbus, Ohio

*Calderwood/Richardson*  
*#649*

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan  
Labor Arbitrator

The Grievance:

The grievance in the case, filed by Trooper Kevin J. Calderwood, herein the Grievant, on August 21, 1990, reads in pertinent part as follows:

". . .

6. STATEMENT OF GRIEVANCE . . . On 8-11-90 I noticed that my days off had been changed. On the bid schedule my days off were 8-13 and 8-14, they had been changed to 8-14 and 8-15. I contacted the first available supervisor about this at 11 p.m., Sgt. Thompson. I told him I wanted my original days off because of a doctor's appointment I had scheduled for my son. I also wanted to know if Management was allowed to change a unit's days off. He said he would check on it and check with Sgt. Moline. On 8-12-90, when I came in for work at 3 p.m., Sgt. Moline told me that when I bid on the schedule I bid on the afternoon shift and not my days off, so I would have to work on 8-13 and take 8-14 and 8-15 as my days off. I worked on 8-13 as I was told to do. This caused me to use sick leave to go to the doctor's appointment. I would like my three hours sick leave back and I would like clarification on when Management can and can't change days off."

The Contract:

The Contract provides in pertinent part as follows:

" ARTICLE 26 -  
HOURS OF WORK AND WORK SCHEDULES

Section 26.01 Permanent Shifts

Permanent shifts shall be established. Shift assignments will be made by the facility administrator on the basis of seniority on the first day of the pay period which includes March 1st and September 1st of each year. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur, except for the relief dispatcher, who shall be bid between 30 and 20 days prior to the beginning of the new assignment. The normal work week shall be forty (40) hours.

The relief dispatcher shall be paid shift differential at the highest differential rate for all hours."

The Patrol also points to the following Contractual provisions:

"                   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. . . .

                  ARTICLE 26 -  
                  HOURS OF WORK AND WORK SCHEDULES

26.04 Split Shifts

Members of the bargaining units will not be required to work any split shifts except in local emergency situations.

26.05 Double Backs

At any time when the starting times of shifts worked by a member are less than twenty-four (24) hours apart, the members will receive one and one-half (1-1/2) times his or her hourly rate, including premium pay for the second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

\* \* \* \*

ARTICLE 27 - OVERTIME

. . .

27.04 Report-Back Pay

A. "Report Back" occurs when a member of the bargaining unit is called to return to work to do unscheduled, unforeseen or emergency work after the member has left work upon the completion of the regular day's work, but before he or she is scheduled to return to work.

B. When a member reports back, he or she shall be paid a minimum of four (4) hours pay at his or her regular rate, plus shift differential if ordinarily paid.

C. Working a shift as the result of a mutually-agreed to shift trade shall not constitute a report back.

D. Regularly scheduled shift hours following report back are to be paid at straight time.

For report back purposes scheduled time is that time that has been scheduled by a post commander during the shift selection process set out in Article 26.

#### 27.05 Standby Pay

Whenever an off-duty employee is placed on a standby basis by the Employer, he/she will be paid one-half of his or her regular rate of pay for all hours that he or she is actually on standby.

\* \* \* \*

...

#### 43.04 Vacation Leave

...

F. If an employee is called to work from a scheduled vacation leave period, or if an employee's previously approved vacation leave is cancelled, the employee will have the right to take the vacation leave at a later time and will be paid at time and one-half (1-1/2) for the time the employee is in on-duty status. Upon submission of appropriate evidence, the employee shall also be reimbursed for any non-refundable travel and lodging costs incurred as a result of cancelling or returning from his/her vacation.

#### Statement of the Case:

The case was heard at Columbus, Ohio on April 18, 1991. Testifying on behalf of the F.O.P. were the Grievant, and one of its negotiators for the past and current Collective Bargaining Agreement, Paul Cox. Testifying for the Patrol was Captain Darryl Anderson, who served as one of the Patrol's negotiator's for the past and current Collective Bargaining Agreement.

Captain Anderson was also in charge of Labor Relations for the Patrol from September of 1986 until August of 1989.

The record reflects that in January 1990, the Grievant signed up for and was awarded the 3:00 p.m. shift (commonly designated and known as the 3P shift), set forth on an Ohio State Highway Patrol Duty Assignment form, designated and known as an HP-29. This Duty Assignment form reflected August 13 and 14, 1990 as days off. The Grievant indicated that one of the reasons he signed up for and picked the 3P shift was because of the days off on 3P as reflected on the Duty Assignment to be signed up on.

According to the Grievant, long before August 13, 1990, he scheduled a doctor's appointment for his child. However, the Grievant's schedule was changed, and his off days changed from August 13th and 14th to August 14 and 15, 1990. The Grievant, contrary to custom, was not consulted prior to the change in his work schedule being made. In this regard the record reflects that bargaining unit employees are customarily and normally given seventy-two (72) hours notice prior to any changes being made in their scheduled days off. As the grievance text accurately reveals, notice to the Grievant as to the change in his off duty days was not given to the Grievant within this customary time frame. As the record reflects, it appears that the distracting change in Post Commanders transpiring at the time accounts for the lack of such customary notice to the Grievant.

In order to meet the doctor's appointment scheduled on the 13th, the Grievant was obliged to use some sick leave.<sup>1/</sup>

It was Captain Anderson's testimony that the question of Management's right to change a bargaining unit employee's time off days after the schedule is posted came up often under the old Contract and under the current Contract. Management has always taken the position that it has simply retained the right to do so, a position bolstered by the party's collective bargaining history, tempered by the tenets of good personnel management and equity, in light of the Trooper's expectations, to make an effort not to change a Trooper's days off, except upon some notice, except where the exigencies of the situation simply preclude meaningful notice.

With respect to the parties' collective bargaining history, Captain Anderson pointed out that in the 1985 negotiations for the parties' first Contract, the F.O.P. proposed on September 4, 1985, at paragraph C. and D. within its "Hours of Work and Work Schedules" proposal, in relevant part, as follows:

"C. Duty Assignments. The Employer will post complete duty assignments one year in advance. Work re-assignment by classification may be made to meet operational needs of the Employer with less than six months notice, but any employees who are reassigned within that six months will be paid at a rate of time and one-half their total rate of pay for the adjusted hours."

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<sup>1/</sup> The Grievant did change shifts voluntarily on August 13th with another employee and executed a "Waiver of Work Schedule Assignment" form, HP-30, relinquishing any double back pay. The parties are agreed that these circumstances are irrelevant to the resolution of this grievance.



D. Shift Assignments. Permanent shifts will be established. Shift assignments will be made by the facility administrator on the basis of seniority on March 1st and September 1st of each year. The assignments made March 1st will be for the period from September 1st to February 28th, and the assignments made on September 1st will be for the period from March 1st to August 31st. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur. The day shift will begin between the hours of 6:00 and 8:00 A.M., the afternoon shift will begin between the hours of 2:00 and 4:00 P.M., and the evening shift will begin between the hours of 8:00 P.M. and 12:00 A.M.

Anderson's notes on the parties' discussions reflect in relevant part, the following comments by F.O.P. negotiator Cox:

". . . Our duty assignment proposal permits people to plan ahead and gives Patrol financial incentive not to change schedules. Shift assignment here to prohibit swinging-rotating shifts around clock, which is detrimental to well being. Worded so shift start times maintained . . . [B]ut who makes decision and what standards apply for 'operational necessity. . . . Of course if you eliminate rotating shifts, you eliminate double backs."

Anderson went on to testify that there was some discussion to the effect that "operational necessity" contemplated "a good reason," and one that "outweighed the inconvenience to the Trooper."

Captain Anderson also indicated that in the round of negotiations for the current Contract in 1988 the F.O.P. made the following pertinent proposal on November 18, 1988, as part of its Article 26, Hours of Work and Work Schedules proposal:

"26.01 Permanent Shifts

. . . .

(b) When an employee who is scheduled to have Monday-Tuesday or Thursday-Friday days off on a regular rotation of days off, finds that the schedule has been modified to change that pattern of rotation for days off, he/she will be paid for an additional sixteen hours of active pay status in each week that such a modification occurs. This pay will be at the premium rate including all supplements."

As Captain Anderson pointed out, this did not make it to the Contract. It was the Captain's contention that this failed F.O.P. proposal demonstrates that the F.O.P. had an opportunity in the parties' second collective bargaining agreement to contractually prevent Management from changing a Trooper's time off day, but withdrew it, with the consequence that it must be inferred that the F.O.P. acknowledges the existence of Management's right to change a Trooper's days off.

Negotiator Cox retorted in his testimony that one has to look at the F.O.P.'s proposal of September 4, 1985 in light of the reality that no agreement was reached in the matters therein until some seven (7) months later, and that in any event it was simply the Union's intent therein to nail down the amount of time to be worked without overtime, and the manner or way in which

employees were scheduled to work. As to its November 18, 1988, proposals for the parties' second Contract, specifically Section 26.01 (b), it was negotiator Cox's testimony that said Section was proposed to meet the situation at some Posts where, instead of regular rotating days off, Management would vary the pattern of off days and these managerial changes perforce made the schedule less attractive. It was Cox's testimony that this provision was intended to prevent such managerial changes through financial disincentives. Furthermore, if the posted-for-bid-schedule was unattractive in the first instance, this proposed Section 20.01 (b) would enhance its attractiveness before it was even bid on. These F.O.P. intendments were explained to the Patrol at the bargaining table, asserts negotiator Cox. On the other hand, Captain Anderson testified that he did not leave the bargaining table with any such perception.

The F.O.P. also introduced two arbitration decisions, purportedly supportive of their position: one rendered by the undersigned on December 7, 1988 in OCB Grv. #15-03-880131-0012-04-01, involving Trooper Ronald L. Greenwood, et al., involving Section 26.01 and 26.05 Double Backs, and the other, a decision rendered by Arbitrator Harry Graham in the Matter of Arbitration between the State of Ohio, Department of Liquor Control and the F.O.P., O.L.C., Inc., Case No. 21-04-880610-0006-05-02, rendered June 7, 1989.

The F.O.P.'s Position:

The F.O.P. takes the position that the Grievant "signed up for a shift and a schedule and on that schedule August 13 and 14, 1990, were off days." But, asserts the F.O.P., there was a unilateral change of the Grievant's scheduled day off and as a consequence he was forced to use three hours sick leave credit on August 13th. This unilateral change, and indeed all unilateral changes to an employee's scheduled days off is violative of the Contract, in particular Article 26, Section 26.01, argues the F.O.P.

Asserting that while the Patrol argues that Section 26.01 doesn't expressly address the subject of "days off," and whether or not they can be changed by the Patrol, said Section does implicitly address the subject because it talks of a "permanent" shift. In point of fact and as a practical matter, employees bid on permanent schedules reflecting fixed days off, and Management is aware of that reality. These schedules, therefore, are not subject to change. The F.O.P. asserts in essence that the "shifts" referred to in Section 26.01 only find expression in posted schedules for bid and hence the Patrol's contention to the effect that because "permanent schedule" terminology is not utilized in Section 26.01, the F.O.P. has no case, is unpersuasive.

The F.O.P. additionally asserts that this case is the first occasion that Management has asserted the unilateral right to simply change a scheduled day off. To the extent changes in

scheduled days off were attempted in the past, the attempts to do so were arbitrated and the arbitrators tended to implicitly support the contentions the F.O.P. makes here. These guidelines, asserts the F.O.P., have been recognized for a long time. Were the Employer allowed to change a bargaining unit employee's days off at its whim, various assumptions underlying the Contract would be upset.

So it is that the F.O.P. urges that the grievance be sustained.

The Patrol's Position:

The Patrol's position is set forth in its Level III contentions and finding, and in its opening statement. Thus the Patrol points to Article 26, Sections 26.04 and 26.05, and to Article 27, Sections 27.04 and 27.05, and to Article 43, Section 43.04 (F), and asserts that therein "the Union has successfully negotiated limitations on the employer's right to make unfettered scheduling adjustments. . . . These articles provide premium pay to bargaining unit members, or limit the employer's right to schedule. No such limitation has been negotiated regarding the management right to schedule or adjust time off days. Bargaining unit members are not guaranteed any particular time off day. There has been no violation of an express provision or provisions of the agreement. . . . Article 26 does not expressly, or implicitly restrict the employer's right to change time off days. The changing of time off days has been a topic of bargaining. The Union has failed in their attempts to negotiate limits on the

employer's right to schedule or change time off days." It is the Patrol's contention that "the employer's right to change time off days is key to meeting the mission of the Highway Patrol. Unpredictable changes in operational needs necessitate scheduling flexibility. Every effort is made to avoid time off day changes. In this case an operational need impacted by the State Fair manpower allocation required a time off day change. . . . Changes in Post management resulted in failure to verbally notify the Grievant which is the customary practice."

It is the Patrol's contention that "although the Union did make proposals concerning time off days during negotiations, they cannot point to language in this contract regarding the right to fixed time off days--it does not exist.

The language concerning hours of work and scheduling was derived almost entirely from union proposals. This language established the mechanics of the shift bid process, which was well established by the second round of bargaining. The union was aware through the efforts of its bargaining team that the employer did in fact change time off days. In fact, the employer told the union they would definitely be changing time off days regularly in response to a union request for doubleback pay for training at the academy. Management would only agree to relinquish the exemption because time off days could be changed. This was clarified by management at the time of the negotiations.

The union has failed in their burden, they have provided no evidence, contractual or otherwise, to support their position in

the instant case. The parties have twice negotiated over time off days. According to Article 4 - Management Rights, "Except to the extent modified by this Agreement, management reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs." There is no language fettering Management's right to change time off days.

Additionally, the grieved language concerning scheduling and permanent shift--Article 26.01, Permanent Shifts--is clear and unambiguous; the plain meaning shall prevail.

. . . [W]e are confident, Mr. Arbitrator, you will agree there has been no violation of the contract. The grievance must be denied."

Issue:

The Patrol perceives the issue to be:

"Has the Employer violated Article 26, Section 26.01 of the collective bargaining agreement by changing time off days? If so, what shall the remedy be?"

The F.O.P. perceives the issue to be:

"Has the employer violated the collective bargaining agreement and Article 26, Section 26.01 of the collective bargaining agreement by unilaterally changing the days off originally assigned to the employee? If so, what shall the remedy be?"

I find the issue to be best stated as follows:

"Has the Employer violated the Collective Bargaining Agreement and/or past practice by its unilateral change of the Grievant's days off and, if so, what shall the remedy be?"

Discussion and Opinion:

As the Patrol points out there is no specific and express contractual language which preserves an employee's right to the same off days as initially indicated on the schedule he opts for and bids on, nor is there such language in the Contract prohibiting the Patrol from changing an employee's days off. And in my judgment, given the nature of the Patrol's mission, and the vagaries of the threats to the public's safety, only the strongest of implications could serve to deprive the Patrol of the ability to unilaterally change an employee's off duty days in response to legitimate operational needs. Directly to the point, no such implications are found in the contractual language the parties have utilized. To the contrary, the written proposals of the F.O.P., during the negotiations for both the initial Contract and its successor (the current Contract) give rise to the inference that the F.O.P. recognized as inherent the Patrol's right to make changes in a Trooper's off duty days. Thus in 1985 the F.O.P. proposed that "complete duty assignments" be posted a year in advance, with an economic disincentive for changes thereto. By inference this concept of "complete duty assignments" embraced both the work assignment and the days off. In seeking to discourage changes, the F.O.P. implicitly



recognized that changes, including perforce changes to the days off, could and were in fact being made. Then in 1988 the F.O.P. proposed in its 26.01 (b) proposal an economic disincentive for modifications to the schedules of employees with certain scheduled days off, whose "schedule has been modified." Thus while to be sure there is a meaningful conflict in the testimony as to the motivation for making this proposal, nonetheless in my view the inescapable inference from the language utilized by the F.O.P. is that the F.O.P. clearly recognized that changes in off duty days were in fact being made by Management and further that some express contractual provision was needed to discourage and/or prohibit same.

At the same time the record will only support the finding that by practice, changes in a trooper's off days are only made in response to initially unforeseen operational needs (and not whimsically, as the F.O.P. legitimately expresses a concern), and that a significant effort is put forth by the Patrol to avoid changing a Trooper's day off because, in essence, it recognizes that, as the F.O.P. asserts, Troopers bid on a 26.01 permanent shift in part because of its anticipated off duty days. And even on those occasions where a change in an off duty day is necessitated, it is the Patrol's practice, a practice having by now assumed binding status, to, absent exigent circumstances (and no such circumstances were shown to exist here) give to the Trooper seventy-two (72) hours notice of such a change. Here, apparently due to the confusion attendant upon the change in Post Commanders, this requisite notice was not given to the Grievant.


In my judgment the prior arbitral opinions relied on by the F.O.P. simply don't address the issue at hand. In sum, the Contract and evidence establish that Management has always had the right to change the employee's scheduled days off in the event that operational needs consistent with sound management practice justify such a change. In such an event, the Employer must give the employee adequate notice (ordinarily 72 hours notice, except in exigent circumstances, would be adequate).

In this case the Employer failed to give this Grievant notice because of the transition of Management personnel at the Post.

Award:

For the reasons noted above, it is directed that three (3) hours sick leave be returned to the Grievant.

Dated: August 8, 1991

  
Frank A. Keenan  
Arbitrator