ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 653

OCB GRIEVANCE NUMBER: 25-12-901214-0045-05-02

GRIEVANT NAME: LICHT, BRIAN ET AL

UNION: FOP UNIT 2

DEPARTMENT: DEPT. OF NATURAL RESOURCES

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: WEISER, JON

2ND CHAIR: PRICE, MERIL

UNION ADVOCATE: DAVIES, ELLEN

ARBITRATION DATE: JULY 26, 1991

DECISION DATE: AUGUST 15, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: DID MANAGEMENT VIOLATE THE AGREEMENT BY ESTABLISHING DAYS OFF DURING THE WEEK THAT INCLUDED A HOLIDAY THAT WERE DIFFERENT FROM THE DAYS OFF IN THE OTHER WEEKS CONTAINED IN THE POSTED SCHEDULE?

HOLDING: SECTION 22.02 EXPRESSES THE AGREEMENT OF THE STATE NOT TO ALTER WORK SCHEDULES IN AN EFFORT TO AVOID OVERTIME. BY IMPLICATION, THE SAME AGREEMENT EXISTS NOT TO TAMPER WITH SCHEDULES TO AVOID MAKING THE SUPPLEMENTAL PAY FOR HOLIDAYS. THE STATE DID NOT SHOW THAT THE CHANGES WERE MADE TO ENHANCE EFFICIENCY. GREAT WEIGHT WAS GIVEN TO TESTIMONY OF BRIAN LICHT WHO IN HIS 12 YEARS OF SERVICE HAD NEVER BEFORE HAD HIS SCHEDULE CHANGED TO AVOID PAYMENT OF HOLIDAY TIME. GRIEVANTS IN THIS CLASS TO BE PAID 8 HOURS HOLIDAY PAY THUS ESTABLISHING A PAST PRACTICE BY THE STATE.

COST: $616.09

#653

In the Matter of Arbitration	
Between	Case Number:
Fraternal Order of Police-Ohio Labor Council	25-12-(12-14-90)-45-05-02
and	Before: Harry Graham
The State of Ohio, Department of Natural Resources	

Appearances: For Fraternal Order of Police-Ohio Labor Council

Ellen Davies
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For Ohio Department of Natural Resources

Jon Weiser
Ohio Department of Natural Resources
Fountain Square
Columbus, OH. 43224

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on July 26, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties were able to agree upon the issue in dispute between them. That issue is:

> Did Management violate the Labor Agreement by establishing days off during the week that included a holiday that were different from the days off in the other weeks contained in the posted schedule. If so, what shall the remedy be?

Background: The facts that prompt this proceeding are simple and are not in dispute. There are a number of Grievants in this case which was determined to be a class action grievance. The issue raised in the dispute was first initiated by Brian Licht, a Ranger at the Punderson State Park. Mr. Licht is on a work schedule that has consistently had Sunday and Monday as his days off. In November, 1990 the Employer altered that schedule. It was changed to indicate that Mr. Licht would have Monday and Tuesday as his days off in the week that included Veterans Day. Sunday was the Veterans Day holiday. As a result of the change in scheduled days off Mr. Licht lost 8 hours pay that he would have received had his schedule remained unchanged.

In order to protest that change Mr. Licht filed a grievance. A number of other people in the service of the Department who had experienced similar schedule changes did likewise. Those grievances were consolidated in this proceeding which the parties agree is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to the Labor Agreement at Section 22.02 and asserts that the schedule alteration at issue in this proceeding is prohibited by the language found in that Section. Section 22.04 provides in relevant part that "Work schedules shall not be established to avoid overtime but for efficient operations." The

alteration of Mr. Licht's schedule was done precisely to avoid overtime according to the Union. In fact, the same situation occurred during the week of New Year's Day, 1991. Once again, Mr. Licht's schedule was changed to make his scheduled day off and the holiday coincide. Once again, he lost eight hours pay. Such a situation is prohibited by the Agreement according to the Union.

There were no operational needs that were met by changing the work schedules of the Grievants. The Employer cannot point to a single instance of the necessity for a schedule change. The only reason for the change was to save 8 hours pay each time the change was made.

The Union acknowledges that Section 22.02 speaks specifically of "overtime" and that this grievance is concerned with "holiday" pay. According to testimony from Larry Ray, a member of the Union's negotiating team, the parties intended to deal with holiday pay and overtime pay in Section 22.02. As the Union urges the events under review in this proceeding be interpreted, the Employer clearly manipulated the work schedule to avoid the payment of holiday pay. That is prohibited by the Agreement. Accordingly the Union urges this grievance be sustained.

Position of the Employer: According to the State there has been no violation of the Agreement in this situation. Article 22 of the Agreement deals with "Hours of Work and Overtime."

The State has complied with the terms of that Article in its view. As required by the Agreement, work schedules were posted a minimum of four weeks in advance; each scheduled work day contained eight hours and each scheduled week contained forty hours of work. Each officer was provided two days off. In this case, the Union is merging the questions of holiday pay and overtime. That is improper according to the State. Holiday pay is covered in Article 38 of the Agreement. It calls for premium pay to be made at the rate of time and one-half. If overtime is worked on the holiday, it is paid at the two and one-half time rate. That language does not apply in this instance. What occurred in this situation was a schedule change. Employees received the holiday pay due to them. No violation of the Agreement took place.

Section 22.02 provides that schedules will not established "solely" to avoid payment of overtime. The word "solely" provides management discretion to act as it did in this instance it asserts. Furthermore, there was an element of "efficient operation" as contemplated by the Agreement in this situation. Scheduling as was done in this instance simplifies the selection of employees to work on the holiday. As the Employer met the strict provisions of the Agreement, it urges that the grievance be denied.

Discussion: The argument of the Employer is correct as far as it goes. That is, in posting schedules and providing 40 hour

work weeks and 8 hour work days the State was indeed within the requirements of Article 22 of the Agreement. The defect with the State's argument is that it does not go far enough. There is a commitment in the Agreement that the Employer will not establish work schedules solely to avoid "overtime but for efficient operations." If the State cannot establish work schedules to avoid overtime payment to employees, it follows that neither may the State change work schedules to avoid holiday pay. The concepts are identical. Furthermore, testimony was received from the Union's negotiator, Larry Ray, to the effect that the parties resolved the issue of schedule change to prevents avoidance of supplemental wage payments, eg. overtime and holiday pay, in Section 22.02 of the Agreement. This arbitrator believes that to be the case. The language in Section 22.02 expresses the agreement of the State not to alter work schedules in an effort to avoid making the premium pay associated with overtime. By implication, the same agreement exists not to tamper with schedules to avoid making the supplemental pay associated to employees whose day off coincides with a holiday.

In this situation there is no showing by the State that the schedule changes at issue resulted in any increased efficiency in operations whatsoever. There was no showing of unusual activity in the park. No heavy influx of visitors is on the record. No unusual events, eg. reported mass grave

sites, required immediate attention. The word "solely" does not support the action of the State in this situation. There was no showing that Mr. Licht's schedule was changed for any bona fide reason whatsoever. If it was not changed to avoid premium pay, why was it changed? In essence, the Employer is of the view that there exists a loophole in the Agreement through which it may walk and reduce its financial commitment to employees. That the Agreement does not contain the specific prohibition against altering work schedules to avoid holiday pay as is found in the overtime section does not make it less real. There was no need to negotiate a specific prohibition against schedule alteration to evade holiday pay as it was inconceivable to the Union that such a change would be contemplated. Testimony from Brian Licht indicates that in his 12 years of service this sort of alteration of his work schedule had never occurred. Never once in the more than 100 work schedules that applied to him over the years did the Employer make the change in work schedule and fail to pay holiday pay as is the case in this instance. The conclusion is inescapable that the principle of maintaining the integrity of work schedules and not altering them to avoid supplemental pay has been so uniformly accepted by the parties as to not require its itemization in each and every article of the Agreement when it might come into effect. Furthermore, by maintaining the work schedule unaltered for

many years prior to this situation the employer clearly created a practice. In order for a practice to be said to exist there must be mutuality of understanding and repetition of the action on a consistent basis. Those tests are met in this situation. The Employer understood well before the institution of collective bargaining that it was not to alter schedules in a holiday week. That this is so is shown by the unbroken record to this effect compiled by Mr. Licht in his twelve years of service with the state.

In the absence of any showing that the schedule change at issue in this proceeding was dictated by any considerations of efficiency whatsoever the conclusion must be that the Agreement in this instance has indeed been breached by the Employer.

Award: The grievance is SUSTAINED. The grievants found to be members of class at the hearing on July 26, 1991 are each to receive 8 hours holiday pay for those instances when their work schedule was altered.

Signed and dated this 15th day of August, 1991 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator