#734

OCB - FOP/OLC VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration	*	
Between:	*	
	*	Case Nos. 15-03-900404-0032-04-01
THE STATE OF OHIO	*	15-03-900404-0033-04-01
Department of Highway Safety	*	15-03-900506-0037-04-01
State Highway Patrol	*	15-03-900731-0056-04-01
	*	
-and-	*	
	*	
THE FRATERNAL ORDER OF POLICE	*	Decision Issued:
Ohio Labor Council, Inc.	*	February 10, 1992
State Unit 1	*	

APPEARANCES

FOR THE STATE HIGHWAY PATROL

Sergeant Richard G. Corbin	Patrol Advocate
Meril Price	Second-Chair Advocate
Colonel Thomas W. Rice	Superintendent
Lieutenant Robert Cassidy	Post Commander
Anne Arena	Labor Relations Officer

FOR THE FOP/OLC

Paul Cox	FOP/OLC Chief Counsel
Edward F. Baker	Staff Representative
Renee Engelbach	FOP Paralegal
David Plunkett	Grievant

ISSUES: Article 46 and other provisions: Rights and liabilities of Employee on Occupational Injury Leave.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTES

An Ohio State Highway Trooper, was involved in a two-car crash on Wednesday, September 27, 1989, while on duty. He suffered disabling injuries and was off work seven months. As a member of the Troopers' Bargaining Unit represented by the Ohio Labor Council, Inc. (the collective bargaining arm of the Fraternal Order of Police), he was entitled to occupational injury leave (OIL), guaranteeing his usual pay for up to 1500 hours.

Occupational injury leave actually was a statutory allowance predating the parties' first negotiations by nearly eight years. In 1978, the Ohio General Assembly enacted Ohio Revised Code §5503.08 which stated in part:

> **§ 5503.08 [Occupational injury leave.]**
>
> Each state highway patrol officer shall, in addition to the sick leave benefits provided in section 124.38 of the Revised Code, be entitled to occupational injury leave. Occupational injury leave of one thousand hours with pay may, with the approval of the superintendent of the state highway patrol, be used for absence resulting from each independent injury incurred in the line of duty, except that occupational injury leave is not available for injuries incurred during those times when the patrol officer is actually engaged in administrative or clerical duties at a patrol facility, when a patrol officer is on a meal or rest period, or when the patrol officer is engaged in any personal business. The superintendent of the state highway patrol shall, by rule, define those administrative and clerical duties and those

> situations where the occurrence of an injury does not entitle the patrol officer to occupational injury leave.
>
> . . .
>
> When its use is authorized under this section, all occupational injury leave shall be exhausted before any credit is deducted from unused sick leave accumulated under section 124.38 of the Revised Code, except that, unless otherwise provided by the superintendent of the state highway patrol, occupational injury leave shall not be used for absence occurring within seven calendar days of the injury. During that seven calendar day period, unused sick leave may be used for such absence.

The statute specified prerequisites for obtaining and continuing OIL, including the responsibility of an eligible employee to apply for the allowance and the Patrol Superintendent's right to require periodic medical examinations and reports.

In 1987, a year after adoption of the first Troopers' Agreement, the General Assembly amended §5503.08, increasing the maximum per-injury benefit from one thousand to fifteen hundred hours -- the same number as in the Agreement.

The negotiated OIL language is in Article 46 of the Agreement. For the most part, it incorporates and mirrors the law, but it also contains Sections which enhance rights of both Management and affected employees. Article 46 states:

ARTICLE 46 - OCCUPATIONAL INJURY LEAVE

Occupational Injury Leave shall be governed by the rules promulgated on this subject and the Ohio Revised Code 5503 as they exist on ratification of this contract. All employees in the bargaining unit shall be entitled to occupational injury leave.

§46.01 Maximum Hours of Occupational Injury Leave

Each employee, in addition to normal sick leave, is entitled to one thousand five hundred (1500) hours of occupational injury leave at regular rate per independent injury incurred in the line of duty, with the approval of the superintendent.

§46.02 Injuries

Injuries incurred while on duty shall entitle an employee to coverage under this Article. An injury on duty which aggravates a previous injury will be considered an independent injury. O.I.L. is not available for injuries incurred during those times when an employee was engaged in activities of an administrative, or clerical nature, when an employee is on a meal or rest break, or when an employee is engaged in any personal business.

§46.03 Waiting Period

Occupational injury leave may not be used within seven days of the date of injury. Normal sick leave may be used during this time period.

§46.04 Requests for Occupational Injury Leave

The request for occupational injury leave will be submitted through established channels following the procedure as outlined by the Employer.

§46.05 Authority to Approve or Disapprove

Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. shall not be unreasonably denied.[1]

§46.06 Light Duty

The Highway Patrol will make reasonable efforts to arrange for light duty for employees experiencing partial disability. Such efforts will be made at the employee's assigned post.

The injured Employee applied for and was granted OIL in accordance with the Agreement. The first seven days of disability were charged to sick leave, and all the rest (except for the last week) were compensated by OIL. Although he received his normal wage without additional deductions from sick-leave, the Union maintains that he did lose wage benefits because Management arbitrarily changed his shift and disregarded his negotiated entitlements. Four separate grievances resulted, each demanding compensation for an alleged violation of the Agreement. The complaints are:

1. Article 60, §60.10 of the Agreement provides an inclement weather allowance of $250 for each Trooper who works during December. Although he was on OIL throughout the qualifying period in 1989-1990, Grievant technically worked a day in December by attend-

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[1] Italics added for emphasis. As will be observed, this Section plays a significant role in one of the grievances.

ing a labor-management meeting. He also made a required court appearance in his official capacity as a Trooper on December 28, 1989. One of the grievances protests the Employer's refusal to pay him the inclement weather supplement.

2. When Grievant began his leave, the Employer placed him on an administrative shift, Monday through Friday, 8:00 a.m. to 4:30 p.m. This was a paper change designed to facilitate the Patrol's record keeping and scheduling tasks. Although his regular shift was 10:00 p.m. to 6:00 p.m. with Saturdays and Mondays off, the change made no difference on the surface since he was not scheduled to work. As it turned out, however, the administrative schedule did have impact on his wages. He lost court pay for appearances he was required to make during his OIL, and he lost holiday pay premiums. Article 26 of the Agreement provides that shift assignments are permanent and cannot be changed unilaterally. The Union maintains that the Employer overstepped its authority when it changed Grievant's schedule.

3. Grievant's bid vacation period coincided with his last week of claimed disability. He took his family to Jamaica. When he returned, he learned that the Highway Patrol Superintendent had canceled his OIL and charged the week to his vacation allowance. The Union demands restoration of the vacation days since nothing in

the Agreement or the law prohibited the Employee from completing his recuperation in Jamaica.

4. Grievant's leave application was supported by medical documentation. From the Employer's perspective, however, it was insufficient to support the claim that he was still disabled the last week of March, 1990, the week of his vacation. After he returned to duty, he was directed to obtain a clarifying statement from his physician, and he complied. His grievance claims that he should have received report-back pay for the doctor's visit. Report-back pay is a contractual guarantee applicable to an employee required to return to work after shift's end to perform "unscheduled, unforeseen or emergency work."

* * *

The grievances were combined into a single case and appealed to arbitration. They were heard in Columbus, Ohio on April 11, 1991. At the outset, the State stipulated that the disputes were procedurally arbitrable and the parties agreed that the Arbitrator was authorized to issue conclusive awards. The following limitations on arbitral jurisdiction, set forth in Article 20, §20.08, of the Agreement, should be noted and observed:

5. Limitations of the Umpire

> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration.
>
> The umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement.

Following the presentations of evidence and testimony, the parties' Advocates obtained additional time for post-hearing briefs.

GRIEVANCE-BY-GRIEVANCE EXAMINATION OF FACTS AND CONTENTIONS; THE ARBITRATOR'S OPINIONS

Grievance No. 15-03-900404-0032-04-1; Inclement Weather Pay

Article 60, §60.10 of the Agreement provides a conditional "foul weather" stipend for uniformed officers. It states:

> **§60.10 Inclement Weather and Protracted Extra Duty Assignment**
>
> In recognition of the problems of increased traffic activity, inclement weather, and protracted extra duty assignments during the month of December and the first part of January, uniformed members of the bargaining unit

> who are employed during this period shall receive a special supplement of two hundred fifty dollars ($250) which shall be paid in the pay check for the first full pay period in January. The right to receive this supplement shall accrue to employees who work during the month of December.

The grievance protests the fact that Grievant was not paid the allowance in January, 1990.

As the Section clearly provides, the benefit is restricted to employees who work in December. The Union concedes that Grievant would not have earned it had he remained on OIL and performed no job duties during the qualifying month; but he did work in December. The quantity of work was negligible, consisting only of attendance at a labor-management meeting and a two hour fifty minute court appearance, but the Union maintains it was sufficient to vest his entitlement to the benefit.

The evidence confirms that both of the activities which the Union characterizes as "work" were parts of the Employee's job. The Labor-Management Committee is the creation of Article 15 of the Agreement. It meets "at least quarterly" to discuss employment issues. The concluding sentence of Article 15 forecloses reasonable debate on the issue of whether or not the meeting was a duty assignment. It states: "All meetings will be held while the committee members are in an on-duty status." Likewise the court

appearance was a job requirement. In the arbitration hearing, the Patrol Superintendent testified candidly that Grievant would have been disciplined had he failed to perform the obligation.

The Union calls attention to the fact that §60.10 contains no limiting definition of "work." It does not require that uniformed officers actually encounter inclement weather or perform protracted duty assignments. It states only that they must work in December, and Grievant met that criterion. In the Union's judgment, the State's refusal to pay the allowance is an attempt to add conditions to the contractual language through Management fiat or arbitral revision. Neither is permissible; the Section can be amended, but only at the bargaining table.

The Patrol's rejection of Grievant's claim is based on the presumption that the negotiators never intended to create a bonus for everyone when they adopted §60.10. They stated their purpose clearly in the first part of the provision; it was to provide extra compensation, "[i]n recognition of the problems of increased traffic activity, inclement weather, and protracted extra duty." Grievant's "work" was markedly shy of meeting this objective; it did not even come close. As the Employer stated in its Level III grievance response:

> It is a well known tenant of contract construction that in the absence of an explicit definition, a term will be given its common meaning.
>
> Webster defines work as to perform expected function. The expected function of the grievant, an Ohio Highway Patrol trooper assigned to the road, is to investigated and report all motor vehicle accidents, render assistance to needy motorists, enforce motor vehicle laws, etc. This work involves the daily appearance of the employee on the job, in this case, on the road.
>
> During the month of December, 1989, the grievant was on Occupational Injury Leave. He was reportedly unable to fulfill even a light duty function, such as sitting desk at his assigned patrol post. "Work" involves more than a voluntary appearance for a meeting and several court cases. The grievant was not fulfilling the spirit of meaning of work as described in Section 60.10 of the contract.

* * *

It is not difficult to relate to the Patrol's position. Inclement weather pay undoubtedly was meant to compensate Troopers for performing regular duties at unusually demanding times of the year. Grievant's claim that he is entitled to the subsidy for a single court appearance and voluntary attendance at a labor-management meeting seems exploitative and beyond anything envisioned by the Patrol negotiators when they agreed to §60.10.

The Arbitrator frankly prefers the Employer's position to the Union's. Nevertheless, the restrictions on arbitral authority in Article 20, §20.08 prevents him from adopting it. The Section

states that an arbitrator "shall have *no power* to add to, subtract from or modify *any* of the terms of this Agreement." Section 60.10 offers no guidelines concerning what "work" is required for the inclement weather supplement. It contains no quantitative or qualitative definitions. It states simply that the right to collect $250 accrues "to employees who work during the month of December."

The Agreement was constructed by experienced negotiators. Its language was prudently crafted. There is every reason to believe that the bargaining teams knew what they were doing when they chose the words for §60.10. Certainly the Patrol's representatives understood that without a restrictive definition for "work," there was potential for abusing the supplement. They were (or should have been) fully aware of the problems inherent in the link between OIL and the foul weather allowance. It is more probable than not that §60.10, with all its ambiguities and uncertainties, was the product of purposeful collective bargaining. The Arbitrator is not at liberty to improve the provision, even if he agrees that improvement is desirable. It states that work in December entitles an employee to the benefit, and the evidence confirms that Grievant's court appearance and meeting attendance were work duties. Accordingly, this grievance will be sustained.

Grievance No. 15-03-900404-033-04-01
The Administrative Shift

Grievant's regular on-duty hours were 10:00 p.m. to 6:00 a.m.; his days off were Saturday and Monday. He obtained that assignment by bidding for it in accordance with Article 26, §26.01 of the Agreement. The provision states that shifts are distributed by seniority preference and cannot be changed unilaterally:

> **§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 continue on a rotating schedule as in the past. Shifts 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. [Italics added for emphasis.]

Grievant's night workhours accorded him a wage advantage with respect to court leave. He, like most Troopers, frequently had to appear in court to testify regarding arrests he had made. Since his appearances were required in the daytime (when court was in session) and not during his regular working hours, he was entitled to extra compensation. Article 51, §§51.01 and 51.02 provides that

Troopers required to testify in cases arising out of their employment are to be paid for a minimum of two and one-half hours at straight-time rates. The stipend does not apply to those making court appearances during their scheduled workhours:

ARTICLE 51 - COURT LEAVE

§51.01 Granting of Court Leave

The Superintendent shall grant court leave with full pay at regular rate to any employee who:

(1) Is summoned for jury duty by a court of competent jurisdiction, or

(2) Is subpoenaed to appear, based on any action arising out of his/her employment, before any court or other official proceedings.

§51.02 Compensation

. . .

B. Employees appearing in a court or other official proceedings based on any action arising out of their employment during their off duty hours shall be guaranteed a minimum of 2.5 hours, at their regular rate or their actual hours worked, whichever is greater. *The Employer shall not change an employee's schedule or scheduled shift in order to avoid payment for court time incurred during off duty hours without the consent of the employee involved.* Payment shall be made in cash or compensatory time at the discretion of the employee. Employees shall notify their immediate supervisor when they are required to appear in court. [Italics added for emphasis.]

Grievant responded to court subpoenas five times while on OIL -- November 8, 9, December 28, 1989, January 24 and 25, 1990. If he had been on his regular working schedule rather than the administrative schedule, he would have collected thirteen hours' court leave. In addition, he would have received extra pay for three holidays which fell on his normal days off -- Columbus Day (October 9, 1989), Veterans Day (November 11, 1989), and New Year Day, 1990. The extra compensation would have been required by the following provision of Article 44:

> **§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.* [Italics added for emphasis.]

The Patrol introduced several defenses to Grievant's claims. They need to be considered only in the event of a finding that the administrative schedule violated Article 26. That is the underpinning of the grievance. If, as the Patrol argues, the Superintendent had authority to place the Employee on a Monday through Friday daylight schedule throughout the leave period, the grievance cannot be sustained. The parties recognized this reality, and the Union focused its presentation on the premise that the Superintendent was not so authorized.

The evidence confirmed that Grievant was not treated disparately. Scores of employees received OIL in the past; all of them were transferred to administrative shifts for record keeping purposes. The routine was followed without exception before the parties negotiated in 1986, during the first contractual term, and throughout the term of the current (second) Agreement. This dispute is the first to challenge the long standing *policy* of assigning administrative schedules.[2]

A factor seeming to support the Patrol's assumption of right is the first paragraph of Article 46 which provides that OIL "shall be governed by the rules promulgated on this subject and the Ohio

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[2] Article 26, §26.01 of the first Agreement (1986-1988) was substantially the same as the provision governing this case. It also stated that shifts were to be permanent.

Revised Code 5503." Both the statute and the Article expressly grant the Patrol Superintendent authority to make rules controlling OIL, and it is reasonable to suppose that the administrative-shift policy is such a rule. The Union argues, however, that it is not; that a "rule" is a term of art regulated by the Ohio Administrative Procedure Act (Revised Code Chapter 119). The Superintendent's policy did not comply with statutory guidelines for promulgating "rules." It was attended by none of the formal prerequisites of filing, public notice, pre-adoption hearings, etc.[3]

The argument that the administrative-schedule policy was not a "rule" in the statutory sense was obscure and was not pursued in the Union's post-hearing brief. Instead, the brief emphasized the fact that Article 26 of the Agreement clearly makes an employee's bid shift assignment permanent and allows for no exceptions. Article 44, §44.02, subsections b and c underscore the restriction on Management Rights with respect to holidays. They state that an employee on leave of absence, in "no-pay status" is not entitled to holiday pay. The Union points out that this is a specific, negotiated exception. If Grievant had been in a no-pay status, he would have had no claim to the holiday-pay benefit. There is no similar language pertaining to employees on OIL, and the Union concludes:

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[3] See Ohio Revised Code §119.03.

> If the parties had intended to allow the employer to unilaterally change the schedule of employees using OIL, they could easily have included such a clause in the contract. They did not do so because they did not intend to do so.
>
> . . .
>
> Had the FOP intended to agree to permit the employer to change an employee's shift without the consent of the employee, it could have agreed to specific language dealing with that issue. Allowing the employer to change the schedule in such a manner negates the basis of Article 26 and the shift bidding process. The grievant relied on the plain language of the contract negotiated by the parties and is entitled to payment for both the holidays requested and for the court time for which he was subpoenaed.[4]

The Patrol views the Management Clause of the Agreement, Article 4, as authorizing it to change schedules of employees on OIL. It places special emphasis on Subsections (1), (2), (3), and (4) of the Article which recognizes the Employer's "exclusive" rights to:

> (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
>
> (2) Direct . . . employees;

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[4] Union brief, 6, 7.

> (3) Maintain and improve the efficiency and effectiveness of governmental operations;
>
> (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

The Patrol argues that its prerogative to adopt and follow the policy in question has been tacitly acknowledged by the Union itself. As stated, Grievant was treated no differently than any other employee who suffered a disabling occupational injury. He was not singled out for the shift change; the administrative schedule was not an innovation. It was a practice followed routinely for as long as the OIL allowance existed. The Union unquestionably was aware of it. If it wished to abolish the practice, it had the opportunity when it bargained for the 1989-1992 Agreement; but its negotiators presented no bargaining-table proposal to change or do away with the policy.[5]

The Employer maintains that Grievant was not harmed by the administrative schedule. He was not deprived of holiday pay; he was paid for all seven holidays which occurred during his leave <u>without deductions from his remaining OIL hours.</u> Admittedly, he did not receive extra wages for court appearances. The Patrol notes, however, that the appearances certainly qualified as "light

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[5] See Employer's Level III grievance response.

duty" and were totally compensated by the daily wage Grievant received under OIL. Summarizing its position, the Patrol argues:

> To assume an injured employee is entitled to benefits afforded a working employee is not reasonable. Working employees receive extra benefit for shift work, a monetary bonus for working holidays, and minimum court show up pay for appearing in court outside of their regular shift. All of these benefits were negotiated in direct response to the nature of law enforcement work. There was no language negotiated which would change the employer's policies regarding employees on OIL. OIL was legislated and has been administered to insure a recovering employee receives his/her regular rate of pay in a non-stressful environment. The legislature did not guarantee the same benefits earned by an employee actually performing the duties of a trooper.

* * *

The "permanent-shift" language in Article 26, §26.01 makes no distinction between working shifts and schedules of employees on leave. Standing alone, it seems clear and supportive of the grievance. But it becomes ambiguous when read in conjunction with another contractual provision, at least with respect to OIL. Article 46, §46.01 requires the Employer to try to arrange light-duty assignments for partially disabled employees. It states:

§46.06 Light Duty

> The Highway Patrol will make reasonable efforts to arrange for light duty for employees experiencing partial disability. Such efforts will be made at the employee's assigned post.

This is a good example of language calling for application of the precept that expressing one thing in a contract excludes everything else that could have been expressed (*"expressio unius est exclusio alterius"*). The provision places an express limitation on the Employer's power to assign light duty. It states that the assignment must be at the employee's regular post. It does not state that it must be on the employee's regular shift. It follows that the Patrol is implicitly authorized to create administrative schedules for partially disabled employees on light duty.

It is patently unreasonable that individuals at work on light duty can be given shifts other than those for which they bid, but totally disabled employees who are not scheduled to work cannot. It is inconsistent with the obvious purpose of permanent shifts -- to provide employees the right to select permanent *working* schedules. Employees on leave do not have such schedules; they do not report to work on any shift.

The inconsistency is not determinant of the grievance, but it does reveal an ambiguity in the permanent-shift language. A widely

accepted method for resolving ambiguities is to look to practices and customs to discover how the authors, the parties themselves, have interpreted it. The Patrol Superintendent testified without refutation that throughout the years before, during, and after the first Collective Bargaining Agreement, numerous Troopers were given OIL and all were placed on administrative schedules. If Grievant had been treated differently than any of the others, the Union might have had a viable complaint. But he was treated the same.

The Arbitrator finds that the permanent-shift language in Article 26 was not intended to circumscribe the Patrol Superintendent's authority to create new schedules for employees on OIL. In arriving at this decision, he rejects the Union's novel argument that the Patrol must follow the Ohio Administrative Procedure Act to establish rules or policies. The power to direct the workforce is conferred by contract, not by law. Rule-making is and always was the expected means for exercising this Management Right.

Grievance No. 15-03-900731-0056-04-01
Cancellation of OIL

Article 43 of the Agreement provides a window for employees to select preferred vacation periods by seniority. The window opened while Grievant was on OIL, and he chose the last week of March,

1990. According to his testimony, he did not know whether or not his disability would be over by then, but he intended to take his family to Jamaica in any event. As soon as the selection was approved, he made arrangements for the trip including advance purchases of low-fare airline tickets (with penalties for cancellations).

Once before, Grievant took his vacation while on OIL. On that occasion, a disagreement arose between the Employee and Supervision. The Patrol did not want to continue his leave, presuming that if he had recovered enough to go on vacation, he was well enough to report to work. Apparently, the Employer did not take action then, but it did in March 1990. First it scheduled a fitness-for-duty examination for the Thursday which fell in the middle of Grievant's vacation period. Grievant responded that he would be in Jamaica and unable to keep the appointment. That set up an arguable basis to end the Employee's leave status. The OIL statute, Revised Code §5503.08 provides:

> A patrol officer is not entitled to use or continue to use occupational injury leave if he refuses to submit to a medical examination or the physician examining him reports that the independent injury does not prevent him from attending work.

Grievant reported for duty on April 1, 1990, immediately after returning from his Jamaica vacation. It was then that he learned that his pay for the week of March 25 had been charged to vacation rather than OIL. He grieved, contending that he needed the week to fully recuperate and was not required to remain at home or in a hospital while on OIL. In the Union's judgment, the Superintendent's unsupported action violated the following portion of Article 46:

> **§46.05 Authority to Approve or Disapprove**
>
> Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. *shall not be unreasonably denied.* [Italics added for emphasis.]

* * *

It is obvious that the Superintendent canceled OIL because he believed Grievant was malingering -- that he had recovered sufficiently to report for duty. The belief was not altogether conjectural. The Employee was offered light-duty work as a Dispatcher at the beginning of his leave. He turned it down because his injury allegedly would not permit him to sit for long periods of time. It was clear from the facts that he had healed enough by the last week of March for the long airport and airplane sitting he would have to

endure to go to Jamaica. That did not mean he was required to return to work. He was entitled to take vacation but, in the Superintendent's judgment, he was not entitled to use OIL for that purpose and save his allotted vacation allowance for another time.

After returning to work the Employee furnished Supervision with a letter from his physician intending to prove that his disability continued through the week of March 25. The letter seemed contrived. It did more to confirm the Superintendent's position than support Grievant's. It did not state in so many words that the disability continued through the vacation week, and it obviously was not generated by a recent examination. It looked more like an accommodation to a patient than a bona fide medical report. It stated:

> The above individual has been on disability for problems with his foot. He has, as a result of this problem been unable to perform in his full capacity at work. Although the injury was serious enough to warrant not working as an officer, it was not serious enough to stop him from vacationing.

The Patrol does not rely on these facts to fortify its position. Instead, it stresses the Superintendent's statutory authority to cancel OIL of any employee who fails to report for a scheduled fitness-for-duty examination. Admittedly, the examination was

set for the period that the Employee had selected for vacation, but the Patrol had no prior knowledge that he intended to leave the country. It did not find that out until Thursday of the preceding week when a supervisor telephoned Grievant to advise him about the fitness-for-duty exam. It was then that the Employee said he could not keep the appointment because he would be in Jamaica. In its brief, the Patrol explains why this information led to ending the OIL:

> The grievant testified he first notified his immediate supervisor of his intention to vacation in Jamaica on the Thursday before his Saturday departure. At the time of the conversation with his supervisor he was informed a physical had been scheduled one week later. The physical had been set to determine the grievant's fitness for return to full duty. The employer did not know the grievant was going to be in Jamaica when the doctors appointment was made. The grievant stated he would not be in the country and therefore could not appear for the physical.
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> . . .
>
> It was the grievant who chose not to timely inform the employer of his intention to be out of the country and therefore not appear for a medical appraisal. The Superintendent in good faith could not authorize the expenditure of tax dollars based on untimely and vague medical information knowing the employee was spending the week on a pre-scheduled vacation in Jamaica.

The Patrol emphasizes that its action imposed no economic loss on Grievant. He received forty hours' pay for March 25 - April 1.

But he was forced to exhaust a week of vacation to obtain it. The consequence stemmed from Management's judgment call, and the Employer requests that the Arbitrator not substitute his judgment for the Superintendent's.

The Employer's rationale is convincing. The grievance will be denied.

Grievance No. 15-03-900506-0037-04-01
Report-Back Pay

When the Employee returned to duty, a week after his OIL was canceled, Supervision asked him to provide new medical documentation covering March 25 to April 1. He declined, offering to sign a release so that the Patrol could write his doctor for a report. The Employer found that unacceptable and issued a written directive ordering him to get the information. Of course, Grievant complied; he would have been disciplined if he had not. Since his regular shift began at 10:00 p.m., it is obvious that his compliance required him to see the physician during off-duty time. Consequently, he demands report-back pay under the following provisions of Article 27:

§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. [Italics added for emphasis.]

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.

The Patrol rejected the claim, arguing that "[e]mployees on OIL, including the grievant, furnish medical documentation at their expense to demonstrate eligibility for benefits."

In the Arbitrator's opinion, the Patrol's argument is correct, but its application to this dispute is in error. Grievant did not voluntarily see his physician to support a request for leave. Arguably, he could have been required to furnish a doctor's report while on leave for his disability, but he was no longer on OIL. He was back at work. The Superintendent had already made and acted upon the decision not to grant continuation of OIL for the week in question. The only conceivable purpose for requiring the new medical statement was to strengthen that decision.

The written directive required a "report-back" as defined by Article 27, §27.04. It was a command to Grievant to perform a duty on his own time. The work was not an emergency; it may not have

been unforeseen; but it was certainly "unscheduled." Accordingly, the grievance will be sustained. The Patrol will be required to compensate Grievant in accordance with Article 27, §27.04 B of the Agreement.

AWARDS

Grievance No. 15-03-900404-0032-04-1;
Inclement Weather Pay

The grievance is sustained. The Patrol is directed to pay Grievant the two hundred fifty dollar ($250) inclement weather allowance for January, 1990.

Grievance No. 15-03-900404-033-04-01
The Administrative Shift

The grievance is denied.

Grievance No. 15-03-900731-0056-04-01
Cancellation of OIL

The grievance is denied.

Grievance No. 15-03-900506-0037-04-01
Report-Back Pay

The grievance is sustained. The Patrol is directed to pay Grievant four hours' report-back wages, at the rate in effect in April, 1990, in accordance with Article 27, §27.04 B of the Agreement.

Decisions issued at Lorain County, Ohio, February 10, 1992.

Jonathan Dworkin, Arbitrator