

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 751

OCB GRIEVANCE NUMBER: 21-02-910518-014~~5~~05-02

GRIEVANT NAME: SNYDER, TIMOTHY; FORD, BETTY, ET.AL

UNION: FOP 2

DEPARTMENT LIQUOR

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: MILLER, SALLY

2ND CHAIR: SAMPSON, RODNEY

UNION ADVOCATE: COX,PAUL

ARBITRATION DATE: MARCH 31, 1992

DECISION DATE: APRIL 15, 1992

DECISION: DENIED

CONTRACT SECTION

AND/OR ISSUES:

DID THE EMPLOYER VIOLATE ART.57
WHEN IT FAILED TO PAY LIQUOR
CONTROL AGENTS SHIFT DIFFERENTIAL
PAY?

HOLDING: LIQUOR CONTROL AGENTS' HOURS ARE FLEXIBLE &
VARIABLE. AS SUCH, THE CONCEPT OF SHIFT WORK
WHICH CONNOTES A REGULARITY OF WORKING HOURS
IS INAPPLICABLE TO THIS POSITION. THEREFORE,
CONTROL AGENTS DO NOT HAVE THE REGULARITY OF
ASSIGNMENT THAT IS REQUIRED TO QUALIFY FOR
SHIFT DIFFERENTIAL PAY.

COST: \$765.07

In the Matter of Arbitration

Between

Fraternal Order of Police-Ohio
Labor Council

and

The State of Ohio, Department of
Liquor Control

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Case Number:

21-02-(91-05-18)-0142-05-
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Before: Harry Graham

#751

Appearances: For Fraternal Order of Police-Ohio Labor Council

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

For Department of Liquor Control

Sally Miller
Labor Relations Officer
Ohio Department of Liquor Control
2323 West Fifth Ave.
Columbus, OH. 43266-0701

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on March 31, 1992 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 agreed upon the issue in dispute between them. That issue is:

Did the Ohio Department of Liquor Control violate Article 57 of the Labor Agreement when it failed to pay Timothy Snyder, Betty Ford et al shift differential? If so, what shall the remedy be?

As part of the agreement on the issue, the Union indicated that should it prevail in this dispute remedy should not extend back prior to March 24, 1991. The Union also stipulated that the grievance under review in this proceeding was specific to the Cleveland District of the Department of Liquor Control.

Background: The parties agree upon the facts that give rise to the dispute between them. The Grievants, Timothy Snyder, Betty Ford and their colleagues are Liquor Control Agents assigned to the Cleveland District of the Department. They conduct the enforcement work of the Department. As such, they routinely are involved in checking various liquor outlets such as bars and package stores. They search for such violations as after-hours sales and improper sales to minors.

As Liquor Control Agents the Grievants routinely work in the afternoon, evening and early morning hours. They have a degree of flexibility in establishing their schedule but it is undisputed that a normal workday for the Agents would find them at work in the PM and early AM hours.

When Tim Snyder came to examine his paycheck stub for the pay period ending April 6, 1991 he saw no entry for pay for shift differential. This was in marked contrast to entries on the paycheck stub for such pay supplements as hazardous duty pay and longevity pay. In Mr. Snyder's opinion this represented an error of omission. At Article 57 the Agreement between the parties provides that shift

differential pay is to be made to members of the bargaining unit effective with the pay period including January 14, 1991. As no shift differential pay was added to his paycheck Mr. Snyder was of the opinion that the Agreement had been violated. In order to protest he filed a grievance which in due course came to cover the other Liquor Control Agents in the Cleveland District of the Department. The grievance was advanced through the procedure of the parties without resolution.

Position of the Union: The Agreement provides that shift differential pay be made effective with the pay period including January 14, 1991. No pay was made in that pay period. Employees have the perception that changes in pay often lag behind the date they are due to take effect. Consequently, bargaining unit members did not immediately file a grievance to protest what they regarded as a violation of the Agreement. They had every reason to expect it to be rectified. Only when it became apparent that the State did not intend to make the shift differential pay did the Union grieve. This was at the beginning of May, 1991. In addition, in the view of the Union the alleged violation of the Agreement represents a continuing violation of the Agreement. It occurs each time pay is made to bargaining unit members. In a dispute involving payment of travel pay to employees of the Department of Liquor Control I adopted the view that a continuing violation of the Agreement did not void a

grievance filed after the initial violation occurred. The same standard should apply in this situation according to the Union.

Turning to the merits of the dispute, the Union points to hours of work assigned to Liquor Control Agents as reflected in its Exhibits B-K. Covering the period from March 20, 1991 through May 22, 1991 those exhibits set forth the schedules for agents in the Cleveland District. For example, on March 20, 1991 Agent Snyder is assigned to work from 6:30 p.m. to 3:15 a.m. On March 26, 1991 he assigned to work from 4:00 p.m. to 12:45 a.m. On April 18, 1991 Mr. Snyder was assigned to work from 6:30 p.m. to 3:15 a.m. In the week of April 25, 1991 Mr. Snyder and his colleagues were all assigned a starting time of 6:30 p.m. This was also the case the week of May 2, 1991 and several other weeks during the period as well. Exhibits B-K indisputably indicate when Mr. Snyder and his colleagues were to start and finish their work days. The Employer scheduled the employees. The situation in the Cleveland District was different from that in other Districts of the Department of Liquor Control. Those Districts did not issue the sort of detailed work schedules issued by the Cleveland District in Exhibits B-K. Agents elsewhere in the State had more flexibility to schedule their tasks than was the case in the Cleveland District. The language of Article 57 provides that members of the bargaining unit who are "regularly assigned" to shift work

shall receive the shift differential pay. The schedules of Mr. Snyder and his colleagues, made up by the Employer, put the Grievants on shift work on a regular basis. Consequently, the State improperly denied the shift differential pay at issue in this proceeding to the Grievants in the Union's view. If the State wishes not to pay shift differential pay it may do so. It merely has to cease scheduling the Liquor Control Agents in the Cleveland District. Rather, if supervisors in the Cleveland District act in the same fashion as their colleagues elsewhere in the State, no shift differential pay will be due. As the State put the Liquor Control Agents in the Cleveland District on shifts, it must make the appropriate shift differential pay the Union asserts. It seeks an award of shift differential pay back to the pay period including March 24, 1991.

Position of the Employer: In the State's opinion the grievance under scrutiny in this proceeding is untimely. The State views it as being late. The Agreement at Article 57 is very clear and provides that shift differential will be paid to members of the bargaining unit effective with the pay period including January 14, 1991. The Grievance was not raised until months later. The State asserts that the Union has waived its rights to a hearing on the merits. If people had a claim, it should have been advanced according to the State. As it was not advanced until the Spring of 1991 it is obviously untimely and no consideration should be devoted to

the merits of the dispute the Employer asserts.

Should the grievance be found to be arbitrable, the State urges it be denied. Article 57 provides that shift differential pay is to be made to those employees who are "regularly assigned to work shifts...." There is no regular assignment to shift work made to Liquor Control Agents in the Cleveland District according to the State. Joint Exhibit 3A is a composite exhibit constructed from Mr. Snyder's Daily Activity Reports. The actual hours he worked deviated from the posted schedule about 25% of the time in the January 16-May 15, 1991 period. He has no regularly assigned shift. In fact, there are times in a given work week that Mr. Snyder works what may be termed afternoons, nights and days. His schedule is variable. On occasion he must make court or Commission appearances. There is no regularity to his work schedule or the schedule worked by his colleagues. As that is the fact, the Liquor Control Agents in the Cleveland District do not meet the test of "regular assignments to shifts" specified in the Agreement. Consequently, no shift differential pay is due in the State's view.

The language in Article 57 should be read in conjunction with language found elsewhere in the Agreement according to the State. Article 22 is concerned with work schedules. At Section 22.01 it provides that:

The normal work week for Wildlife Officers and Liquor Agents shall consist of five (5) eight (8) hour days.

That language indicates that Liquor Agents do not work particular, specified hours such as would be required to secure eligibility for shift differential pay. Rather, they work five eight hour days. The Agreement explicitly recognizes the flexibility inherent in the work performed by Liquor Control Agents.

Section 22.02 of the Agreement provides that "Shift assignments will be established by seniority...." That does not occur for Liquor Control Agents. They do not bid on shifts because there are no shifts. Liquor Control Agents work as assigned. Their routine is variable. Never in the history of the Agreements between the parties has the Union alleged that the Employer has violated Section 22.03 of the Agreement in the manner in which it has assigned work hours to Liquor Control Agents. This is indicative of the fact that shift work conceptually does not occur for Liquor Control Agents. Furthermore, Section 22.03 indicates that work schedules will consist of "fixed starting and ending dates or times whichever is applicable...." The reference to "dates" indicates that the Employer may specify particular dates for employees to work. It does not have to adhere to starting and ending times nor does it do so for Liquor Control Agents. In this respect, they are similar to Wildlife Officers. Those people work a schedule characterized by irregular hours. They do not receive the shift differential pay sought by the Union in this case. Nor should the Liquor Control Officers receive

that pay the State insists.

As the State recounts the history of negotiations concerning shift differential the Union initially sought such pay for all employees in the negotiations for the present Agreement. It later modified its position and agreed to exclude the Wildlife Officers and Liquor Agents from that benefit due to the variable nature of their work schedules. Given the exclusion of Liquor Agents from eligibility for Shift Differential pay the State asserts is found in the Agreement, plus the history of negotiations on the issue, the State insists the Grievance be denied should it be found to be arbitrable.

Discussion: The notion of timely filing of grievances is an elastic one. It is well known that neutrals are not disposed to determine a grievance not to be arbitrable unless it may be said with complete assurance that such a determination represents the agreement of the parties. In this situation that is not the case. There is the concept of the continuing violation that comes into play in disputes concerning timely filing of grievances and their advancement through the grievance procedure. This dispute represents the classic continuing violation situation. If the Employer has violated the Agreement by its failure to pay shift differential pay to Liquor Control Agents in the Cleveland District its violation occurs each time employees are paid. Affected members of the bargaining unit permitted some time to pass prior to filing

this grievance. They waited to see the shift differential pay appear in their pay. After determining to their satisfaction that the pay would not be made they filed the grievance. Given the repetitive nature of the contractual violation if indeed such a violation exists, the Grievance must be found to have been filed in timely fashion.

Article 57 of the Agreement which establishes shift differential pay is quite specific in regard to the circumstances under which it is to be made. Shift differential pay eligibility is conditioned upon employees being "regularly assigned" to shift work. It is the concept of regularity that determines whether or not an employee is eligible for shift differential pay. Examination of Joint Exhibit 3A, the summary of the Daily Activity Reports filed by Timothy Snyder, Betty Ford and Dwight Johnson, is not indicative of regular assignment to shift work for any of those people. The starting and ending times of each person enumerated on the Exhibit are variable to say the least. Even when a week might involve a start time in the afternoon, oftentimes the starting time varied. That variability supports the position of the Employer in this situation when the State refers to a conjunction between Article 57 and Article 22 of the Agreement. Section 22.01 of the Agreement makes specific the sort of work schedule to be worked by Wildlife Officers and Liquor Control Agents. Their workweek is to be five (5) eight (8) hour days. By implication, the


hours are flexible and variable. As such, the concept of shift work which connotes a regularity of working hours is inapplicable to Liquor Control Agents. This view is supported by Article 22.03 of the Agreement which permits the Employer to establish work schedules with fixed starting and ending dates. That the hours specified on Union Exhibits B-K and Employer Exhibit 3 do not reflect shift work is shown by the fact that Section 22.02 of the Agreement provides that "Shift assignments will be established by seniority within a classification." The Employer scheduled employees for the hours set forth in Union Exhibits B-K and Employer Exhibit 3. No grievance alleging that those work hours represented improper scheduling involving disregard of seniority was received from employees. In fact, those assigned hours of work were frequently modified. This was indicated at the hearing by the comparisons made between the assigned hours and the hours of work reported on the Daily Activity Reports. The schedule was modified at least 25% of the time in the period from January 16, 1991 through May 15, 1991. A work history replete with change of this magnitude can scarcely be termed regular. This frequent alteration of assigned hours and hours actually worked is further indication that Liquor Control Agents do not have the regularity of assignment that is required to qualify for shift differential pay.

The work assignments for Agents in the Cleveland District are not different from those in other Districts of

the Department. Employer Exhibit 2A represents schedules for Liquor Control Agents in various Districts in addition to Cleveland. On some work schedules a starting time is indicated. On others it is not. In essence, the Union is urging that shift differential be paid to Liquor Control Agents in the Cleveland District simply because managerial employees placed a start time on employees schedules. That some managerial personnel would indicate a start time and others did not is insufficient rationale to support the position of the Union in this dispute. Given the customary work day of Liquor Agents and the fact that the Agreement permits the State to schedule Agents by date, rather than by time, and that the working hours of Agents are characterized by extreme variability it must be concluded that the parties did not intend to provide shift differential pay to Liquor Control Agents.

Award: The grievance is denied.

Signed and dated this 15th day of April, 1992 at South Russell, OH.



Harry Graham
Arbitrator