
In the Matter of Arbitration

Between

Fraternal Order of Police-
Ohio Labor Council

and

The State of Ohio, Department
of Liquor Control

*

*

*

*

*

*

*

*

*

*

*

*

*

Case Number:

21-04-(921207)-0164-05-02

Before: Harry Graham

Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul L. Cox
Law Enforcement Legal Association
222 East Town St.
Columbus, OH. 43215-4611

For Ohio Department of Liquor Control

Sally P. Miller
Labor Relations Manager
Department of Liquor Control
2323 West Fifth St.
Columbus, OH. 43266-0701

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on July 8, 1993 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the arbitrator on September 23, 1993 and the record in this dispute was closed.

Issue: The parties agree upon the issue in dispute between them. That issue is:

Did the Department of Liquor Control violate Article

46.04 on November 9, 1992 by its calculation of Court Pay? If so, what shall the remedy be?

Background: The facts in this proceeding are straightforward and not in dispute. In November, 1992 management personnel in the Enforcement Division of the Department of Liquor Control became concerned that Court Pay was not being consistently made. In order to deal with that situation the Department issued a memo intended to codify Departmental policy with respect to the payment of that pay. The memo indicated that if an investigator claimed Court Pay of 1.7 hours or less he or she would be credited with 1.7 hours of overtime or compensatory time. This would yield 2.5 hours at the regular rate. If the investigator claimed more than 1.7 hours of court time the actual time would be credited as overtime or compensatory time to yield more than 2.5 hours. This policy was viewed to be improper by members of the Department and A. Ronald Lewis filed a grievance to protest it. That grievance was not resolved in the procedure of the parties and they agree it is now properly before the arbitrator for determination on its merits.

Position of the Union: Since 1986 there have been three collective bargaining agreements between the Union and the Employer. In each of them there has been language dealing with Court Leave. Since the inception of the contractual relationship the Department of Liquor Control paid court pay in the same manner as did the Highway Patrol which is known

as Bargaining Unit One. Employees of the Department of Liquor Control are in Bargaining Unit Two. After the conclusion of negotiations in 1992 the Department of Liquor Control changed the manner in which it paid court pay. On November 16, 1992 Chief Jessie T. Baker issued a memo concerning payment of court pay. In that memo it was indicated that the payroll section did not have a code for court time. Consequently it was determined that investigators who claimed 1.7 hours or less of court time would be credited the 1.7 hours of overtime pay or compensatory time. People who claimed more than 1.7 hours of court time would be credited with the actual number of hours worked on the overtime pay or compensatory time payroll reports. In essence, the Department changed the manner in which it paid court time for the sake of convenience. When the parties were in negotiations earlier in 1992 no mention was made by the Employer of any concerns with payment of court time pay.

In the first agreement between the parties Section 22.09 indicated that in the appropriate circumstances people due Court Pay "shall be guaranteed a minimum of two (2) hours pay or actual hours worked, whichever is greater." The Agreement in 1986 indicated two hours, not 1.7 hours. In the 1989 Agreement the parties made alterations in the terminology of Section 22.09. It was moved to Section 46.04 and changed to read that people due court pay "shall be guaranteed a minimum

of 2.5 hours at the regular rate or actual hours worked whichever is greater." That language remains unchanged in the present Agreement. The term "regular rate" was used to eliminate the possibility of pyramiding of court pay. As the Union views this terminology, had the parties used the words "time and one-half" there existed the possibility that a person would claim court pay at the rate of time and one-half times time and one-half. (3.0T). This was to be avoided by the explicit understanding of the parties.

Examination of the Agreement between the Union and the Highway Patrol, Bargaining Unit 1, indicates that the language is identical in both Agreements. The Patrol makes Court Pay at the time and one-half (1.5T) rate. No reason exists for the Department of Liquor Control to differ the Union insists.

The Highway Patrol is denominated as Bargaining Unit 1. That notwithstanding, it has in its employ some people who are members of Bargaining Unit 2. These people are Police Officer 1's and 2's. The Patrol pays them in the same manner as it pays troopers with regard to Court Pay. They receive 3 hours pay, not the 1.7 hours being paid by the Department of Liquor Control.

In the present Bargaining Unit 1 Agreement there is the indication that the parties agreed to utilize an eight hour day for overtime purposes. This is not in the Bargaining Unit

2 Agreement. As the Union urges this difference be read, it supports its interpretation of the Agreement, not that of the Employer.

Until the change effectuated by the Employer in the Fall of 1992 Court Pay was made in the manner urged as being appropriate by the Union. In this dispute, the Union urges that the contractual 2.5 hours means exactly that, 2.5 hours. If the Employer were to prevail in this situation there exists a possibility that if an employee were to work less than 40 hours in a work week that he or she could receive 1.7 hours pay at straight time. That was not the bargain of the parties according to the Union.

The dispute over Court Pay must not be related to the concept of Report Back Pay in the Union's opinion. Report Back Pay is in the Agreement to discourage the Employer from calling employees back to work after completion of their scheduled tour of duty. Court Pay compensates people for appearances in court. Those appearances are scheduled at the convenience of the Court. Employees must report to the Court on their days off. Court Pay compensates them for the inconvenience they experience in such situations. Under the plain terms of the Agreement, such compensation must be at a minimum of 2.5 hours, not 1.7 hours as is being done by the Employer. Two and one-half (2.5) hours were paid in the past. That is what must continue to be paid according to the Union.

Position of the Employer: The State points out that the contractual changes relating to court pay have been minimal since the parties negotiated their initial agreement. The phraseology was moved from Hours of Work to Court Leave. The guaranteed minimum payment was increased from 2.0 to 2.5 hours pay. The term "at the regular rate" was added to ensure clarity of understanding on behalf of all concerned. As the Employer urges the record be understood court pay was intended to yield a guaranteed minimum payment to be paid at straight time unless actual hours produced a greater amount. When the parties first came to bargain the Union proposed that court pay be made at the rate of time and one-half (1.5T) with a minimum of four hours payment to be made at that rate. That proposal did not find its way into the Agreement. A similar proposal was made by the Union with respect to call-back pay. That did not survive the negotiating process either. Negotiating notes of the 1986 management negotiating team (Employer Ex. 5) indicate that the Union specifically disclaimed interest in securing court pay at the overtime rate.

In actual operation in the Department of Natural Resources court pay and report back pay are made in the same fashion. They are made at the minimum straight time rate until actual hours trigger pay at the time and one-half rate. In the initial agreement court pay was recorded in the

Department of Natural Resources at 1.36 hours at time and one-half to produce two hours pay. This was done unless the employee worked 1.37 hours or more. In the second and third agreements the Department recorded court pay at 1.7 hours and the time and one-half rate. This computation yields 2.5 hours pay and is used unless the employee works 1.8 or more hours. This procedure has been used at the Department of Natural Resources since 1986. Two grievances have been filed concerning the manner in which ODNR makes both court and report back pay. Both were withdrawn by the Union which ultimately agreed with the employer that those payments were to be made at the straight time rate. Resolution of these disputes was provided to other State agencies to serve as guidance regarding the proper manner in which Court Pay was to be made. Throughout State service it was accepted that Court Pay was to be made at the 2.0 (later changed to 2.5) hours rate or 1.5 times actual hours, whichever was greater.

As the State views this dispute, the terminology of the Agreement refers to the amount of pay, not the number of hours which must be paid. Thus, the initial agreement referenced "2 hours pay." The second and third agreements refer to "2.5 hours at the regular rate." Those words refer to pay, not hours as the State reads the Agreement.

The State in this dispute urges that the pay practices of the Ohio State Highway Patrol with respect to Court Pay are

incorrect. Even if the few Bargaining Unit 2 police officers working in Bargaining Unit 1 were being paid as viewed to be correct by the Union, the State says, "so what?" There are few people situated in that fashion and it is unknown how often, if ever, they have received Court Pay.

The Employer notes that in 1992 the language of the Bargaining Unit 1 Agreement was changed with respect to payment of court pay. No change was made in the report back language. As the State urges the Bargaining Unit 1 agreement be read, the change was for clarification purposes only. If a change had occurred to the extent urged as being correct by the Union it would have affected report back pay as well. No change in the making of such pay took place. In the Highway Patrol and in Bargaining Unit 2 report back pay is made in the same manner. The terminology of both agreements is identical. It has not changed since 1986. In the Highway Patrol a trooper called back to work is paid at time and one-half for any call back time less than 2.6 hours. This works out to four hours pay at the regular rate. If a trooper works more than 2.6 hours it calls for overtime pay. The call back pay is made in the same conceptual fashion in Bargaining Unit 2 though the applicable numbers vary. Hence, by analogy, court pay is being made correctly in Bargaining Unit 2 as well according to the Employer.

No change in the methodology of making court pay was made

in the Fall of 1992. Neither the documentation nor the evidence produced by the Union's witnesses support this contention according to the State. The evidence of the Daily Activity Reports submitted by both the State and the Union are inconsistent. Some support the position of the Union, some the position of the State. Some are erroneous whether looking at this issue from the standpoint of the Union or the State. There is simply no consistent practice with respect to payment of court time pay. Errors are legion. This is unfortunate but results in an evidentiary record supportive of neither party in this dispute. There is no past practice supporting the position of the Union in this dispute. Hence, the grievance should be denied according to the State.

Discussion: If ever there was a situation where the labor agreement meets the test of expressing itself in the proverbial "clear and unambiguous" language this is it. At Section 46.04 the Agreement provides that employees required to appear in court "shall be guaranteed a minimum of 2.5 hours at the regular rate or actual hours worked, whichever is greater." That provision must be read in connection with Article 55.01, D which defines "regular rate." The "regular rate is the base rate plus supplements, whichever apply." In this situation the Agreement requires that all members of the bargaining unit receive a minimum of 2.5 hours pay at the regular rate for each court appearance. Should employees

become eligible for overtime pay as defined in Section 22.07 of the Agreement court pay must be made at that rate. This is precisely what is sought in the grievance (Joint Ex. 1) and what is mandated by the Agreement. If an employee does not fall into overtime status in the week in which court pay is due the contractually mandated 2.5 hours pay may be made at the appropriate rate which would not include overtime pay. Should court pay become due in a work week in which the employee is eligible for overtime the employer must make court pay at the applicable rate.

In this situation the Agreement calls for court pay to be provided at a minimum of 2.5 hours at the regular rate. No matter what the mechanics of recording may be, the Employer must under all circumstances pay the minimum of 2.5 hours of court pay. This is the case even in those instances when an employee for one reason or another may work less than 40 hours in the week. Under all circumstances the Employer is required to pay 2.5 hours of court pay.

This award is concerned with hours, not pay. Those concepts are conceptually different. The holding in this case merely requires that under all circumstances employees remain eligible for the agreed upon 2.5 hours of court pay.

Award: The grievance is sustained. Employees are to record the contractually established 2.5 hours court pay on the appropriate form.

Signed and dated this 18th day of October, 1993 at
South Russell, OH.

Harry Graham
Harry Graham
Arbitrator