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VOLUNTARY ARBITRATION PROCEEDINGS
CASE NO. 15-03-940224-021-04-01

STATE OF OHIO	:	
DEPARTMENT OF HIGHWAY SAFETY	:	
DIVISION OF STATE HIGHWAY PATROL	:	
	:	
The Employer	:	
	:	
-and-	:	<u>OPINION AND AWARD</u>
	:	
FRATERNAL ORDER OF POLICE,	:	
OHIO LABOR COUNCIL	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Lieutenant Richard Corbin, Advocate
Sergeant Robert Young, State Highway Patrol
Lieutenant Robert L. Jones, Post Commander, New Philadelphia
Captain W.E. Lanning, State Highway Patrol
Georgia Brokaw, Office of Collective Bargaining

For the Union:

Paul L. Cox, Chief Counsel
Brent C. Laner, Grievant
Ed Baker, Staff Representative
Renee Englebach, Paralegal

MARVIN J. FELDMAN
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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on September 7, 1994, at the conference facility of the employer, in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant is a state highway patrolman (trooper) assigned to the New Philadelphia, Ohio, post. That particular post has law enforcement responsibilities for Tuscarawas County and Carroll County. The pertinent facts concerning Tuscarawas County revealed the following:

"Tuscarawas County

Population	84,090
Total area	555 square miles
Total road mileage:	
State routes	186 miles
County roads	469 miles
Township roads	603 miles"

The pertinent facts concerning Carroll County revealed the following:

"Carroll County

Population 26,521
Total area 388.59 square miles
Total road(sic) mileage:
State routes 145 miles
County roads 307 miles
Township roads 415 miles"

While assigned on the midnight shift as a trooper the grievant during the window period allowing for the same, requested a day of vacation for the scheduled shift of July 16, 1994. On that same shift, a sergeant, who is not a member of the same bargaining unit as the grievant, had requested a two week vacation. That two week vacation encompassed the one day of vacation that the grievant had requested. As a result, the request for leave by the grievant was denied on the following language:

"Remarks

A SATURDAY MORNING-FRIDAY NIGHT APPROVAL WOULD LEAVE 2 OFFICERS DUE TO SGT BLUMENAUER FROM THIS WORK GROUP ON A 2 WEEK VACATION DURING THIS DATE. HIS REQUEST ALSO RECEIVED DURING VACATION WINDOW BEGINNING ON 7-6-94."

As a result of that denial and by way of timely protest a grievance report form was filed. The language in that grievance form revealed the following:

"STATEMENT OF GRIEVANCE (GIVE TIMES, DATES, WHO, WHAT, WHEN, WHERE, WHY, HOW), BE SPECIFIC.

On 021394 I received a leave request that had been denied, the request was for 071694 and had been submitted during the Bid Window. The request was denied based on the fact that the midnight supervisor was on vacation. No other member of my bargaining unit is on leave on that date from the

midnight shift."

The step 1 response to that grievance by management indicated and stated the management position. That step 1 response revealed the following:

"STEP 1 RESPONSE

This leave was denied for Saturday morning/Friday night (12 midnight shift) July 16, 1994 due to operational necessity. Sergeant Blumenauer from this work group also requested vacation leave during the same vacation window period for July 4 through July 23, 1994. His two week vacation was granted over this one day vacation. Approval of both vacations would limit this Friday night/Saturday morning shift to two officers, where a minimum of three is required based on traffic volume, crashes and DUI offenses."

A step 2 meeting was waived and management's finding at step 3, in pertinent part, revealed the following:

"In the instant case, management has limited the number of employees permitted on leave at one time, per work shift, based upon operational necessity, namely the increased calls for service experienced in the post area on specific days identified through statistical data and experience. Such action is expressed as a management right pursuant to Article 43.04 of the FOP/OLC labor agreement.

Keeping this right in mind, management was faced with concurrent leave requests from officers of differing bargaining units and could only accommodate one of the officer's request for leave due to the normal predicted work load experienced on the day in question. Management approved the supervisor's request.

The chief factor in this decision was based upon the fact the supervisor's vacation request covered an approximate three week period. To approve the grievant's one day request and still maintain an

adequate work shift, management would have to split the supervisor's vacation. That option is not reasonable, is contrary to common sense, and negates good morale.

Labor contends a decline in post manpower has lessened opportunities for officers to mutually trade shifts/time off in order to take vacation leave when a conflict such as we are addressing arises, therefore management should permit more leave requests per shift. Labor fails to recognize manpower may rise or fall, the work load - the operational necessity - does not. Labor's argument lacks merit.

Labor specifically contends management violated Article 43.04A which in part states vacation leave, submitted timely, shall be granted based upon seniority. This argument also lacks merit. Article 43.04A addresses the issue of concurrent vacation requests from bargaining unit members. It has no impact on management's resolution of concurrent vacation requests of different bargaining units."

The step 4 answer revealed the following:

"The Office of Collective Bargaining has reviewed the above cited grievance. You allege that Management has violated Contract Article 43.04, when you were denied vacation leave.

On February 13, 1994, you were notified that your requested vacation leave for July 16, 1994 had been denied. This leave was denied due to operational necessity. A supervisor at your post will be on leave from July 4 through July 23, 1994. Approval of both vacations would limit the shift to two officers, where a minimum of three is required.

This Office does not find that Management violated the Contract. Therefore, this grievance is denied."

The employer promulgated unilateral policies concerning leaves and in pertinent part that policy revealed the following:

"A GENERAL LEAVE GUIDELINES

This policy provides specific guidelines for granting or denying permissive leave requests considering the leave rights of the employee and the right of the employer to regulate leaves in order to provide the proper service to the public. For bargaining unit employees, additional specifics are contained in the applicable labor agreement.

This policy is intended to set a maximum number of employees of like classification to be on leave at any one time. The numbers do not set a standard of how many employees of like classification shall be granted leave. Commanders may restrict leaves, or deny all leaves, based on legitimate operational necessity.

1. Leave shall be taken only at times mutually agreed to by the employer and the employee. The employer reserves the right to deny all leaves based on legitimate operational necessity.

2. Such conditions as traffic volume, crash experience, special details, holiday periods, illnesses and other existing problems shall be given proper consideration in determining the result of the leave request. Post commanders may consider personnel loss as the result of projected events and details (such as the annual Ohio State Fair detail) in restricting permissive leaves (vacation, compensatory make-up time, and non-emergency personal leave) at the post during this time.

3. At the post or facility level, commanders may consider the total number of employees per work shift group in addition to the maximums outlined in each classification, and may restrict the number of concurrent leaves on a work-shift group, based upon operational requirements. ---

-and-

4. When concurrent requests are made from different classifications on the same work shift group, the timing of the request, operational necessity and bargaining unit seniority (when the employees are in the same bargaining unit) shall be used to determine which leave shall be granted or denied."

It might be noted that the pertinent contractual sections revealed

the following:

"43.04 Vacation Leave

Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee. The Employer may restrict the number of concurrent vacation leave requests at a work location based on work shifts.

A. Subject to the above limitations employees who submit vacation leave requests no more than thirty (30) days and no less than twenty (20) days prior to the first day of the permanent shift dates referred to in Section 26.01 shall be granted vacation leave based upon seniority."

Certain other factual indications in this particular matter were revealed by the evidence. The evidence showed that there were thirteen uniformed officers for road duty generally at the facility in New Philadelphia. That included the sergeants who in addition to being assistant post commanders and doing administrative tasks at the post also shared road duty with the troopers. The sergeants were not members of the same bargaining unit as the troopers were. Of the thirteen uniformed officers including the sergeants there is generally five assigned to one shift and four to each of the other two including the sergeant. The grievant was on a shift that had four men assigned to it. (Three troopers and a sergeant). With the sergeant off by way of a two week vacation, there were three uniformed people left for work on that particular weekend shift in July.

Unrefuted statistics of the employer showed that July was one of the two busiest months for traffic violations and that weekends were notorious for that event. The post commander indicated and stated by way of evidence that less than three uniformed troopers on that shift

would have been detrimental to the operational needs of the employer and on that basis, the grievant was therefore denied such vacation day. Evidence further revealed that the grievant during the year 1993 had received some 232 hours of leave time; that the grievant was only one of many that had been turned down from time to time; that the post commander had received some 150 requests for leave at or near the time the grievant had filed his request for the date of July 16, 1994 and that the grievant was not treated any differently than any other bargaining unit member.

The employer further revealed that there were several times, namely 14 weekends in question when there were only two uniformed troopers on duty but in relation to that, the employer pointed out that during the same period of time, 128 shifts were at full duty. There was no evidence that the grievant was singled out or treated in any manner other than any other trooper. The employer admitted that the grievant had a right to vacation time as did others under the terms of the collective bargaining agreement, but did not have a right to the exact date of vacation since the dates were subject to the operational needs of the employer.

The union on the other hand indicated and stated that lack of staffing is really not the same as an operational requirement. Staffing is controlled by the employer whereas operational requirements are controlled by circumstances as they occur during the course of a shift. The union further argued that the sergeant that took off on a two week vacation that was approved so as to defer the grievant's one day request was not a member of the same bargaining unit as the grievant and the

needs of other bargaining units should not impact upon the members of the instant bargaining unit.

Article 4 entitled, Management Rights, found in the contract retained for management certain rights and authorities and in full article 4 revealed the following:

"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. The exclusive rights and authority of management include specifically, but are not limited to the following:

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, supervise, evaluate, or hire employees;
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;
5. Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
6. Determine the adequacy of the work force;
7. Determine the overall mission of the employer as a unit of government;
8. Effectively manage the work force;
9. Take actions to carry out the mission of the public employer as a governmental unit;
10. Determine the location and number of facilities;
11. Determine and manage its facilities, equipment, operation, programs and services;
12. Determine and promulgate the standards of quality and work performance to be maintained;
13. Take all necessary and specific action during emergency operations situations;
14. Determine the management organization, including selection, retention, and promotion to

positions not within the scope of this Agreement."

It was upon those statements, denial, allegations and facts that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

The New Philadelphia, Ohio, post of the state highway patrol was manned by thirteen uniformed officers including three sergeants. There were three shifts that operated seven days a week, twenty-four hours a day and one shift had five uniformed officers assigned to it and the other two shifts had four each. Each shift was manned by a sergeant and three or four troopers. The duties of the sergeant included acting as an assistant post commander during the time that the lieutenant in charge was absent; to accomplish all administrative duties assigned and to perform road duties such as the troopers accomplished during the course of their tours. The thirteen individuals were assigned for eight hours each, on tours that covered seven days a week. It was very seldom that there were less than three uniformed officers on the road.

There was a certain window period that those uniformed troopers generally requested leave time. The grievant worked on the midnight shift. The sergeant on that midnight shift during the window period under his collective bargaining agreement request, requested and received a two week vacation. The grievant requested a one day vacation and by coincidence it occurred during the same two week period that the sergeant requested and received permission to obtain his two week vacation period. The grievant's request was denied and a protest was filed by the union on a timely basis, all of which found its way through

the grievance procedures and came before this arbitrator for decision.

It might be noted that at article 4 of the contract of collective bargaining, there was retained for management, certain rights. One of those rights was to determine the adequacy of the work force. Under the monetary constraints and table of organization it had been determined by management pursuant to that contractual clause that thirteen uniformed officers were sufficient to maintain the necessary duties on the extensive roads and areas of Tuscarawas and Carroll Counties in Ohio. It had also been determined by management that there should be no less than three uniformed patrolmen on the road at all times. It is apparent under the terms of the retained rights as stated in article 4 of the contract, that management had the right to determine the adequacy of the work force. That is not subject to negotiations at this particular time period since that had been negotiated and made part of the contract of collective bargaining by and between the parties at a prior date. Given that situation, it must be determined that management had the right to determine that thirteen uniformed individuals should man the facility and that no less than three uniformed individuals should man the area at any one time in the given counties of the New Philadelphia post.

Further, the language of the contract at article 43 revealed that vacation leave shall be taken only at times mutually agreed to by the employer and employee. In other words, if the employer refused to grant a vacation, that refusal must be based upon the language of the contract. It might be noted in this particular case that if the grievant had been allowed to take a concurrent vacation day during the same work shift on which the sergeant had been given a two week

vacation, the rule of less than three uniformed individuals on a shift at this post would be broken all a a result of two vacation leaves.

The union has pointed up that such was the case on fourteen occasions during the summer months during which the one day leave of the grievant was denied. During the same period of summer months that there were fourteen occasions of a breakdown of the three uniformed rule, there were 128 occasions on which the rule was followed. In each event of breakdown there was a situation of sick leave, of special detail, of comp time, of personal days or of occupational injury. In no event were there two vacations granted for the same period by the employer so as to cause the three uniform rule to be broken. The evidence does not reveal that at any time a breakdown of the three uniform rule was caused by the employer granting a vacation to more than one person for more than one period. A practice in that regard was never established.

The union has raised a thought that the contract only refers to a concurrent vacation leave of another bargaining unit member of the same unit. In this particular instance, it is apparent that the thirteen uniformed employees include three sergeants who are in another bargaining unit. Those three sergeants are part and parcel of the work unit in which the grievant was involved. That being the case, the concurrent vacation leave rule must also apply to the sergeants who are in the same work unit as is the grievant.

The arbitral rule concerning vacations must be understood. Wages, benefits and fringes are creatures of the contract of collective bargaining. They do not exist under the statutory law nor do they exist

under the common law. They exist by virtue of the exact written understandings between the parties. The written understanding between the parties in this particular case stated that the employer may restrict a number of concurrent vacation leave requests at a work location based upon work shifts. Since that clause does not contain concurrent vacations "within the same bargaining unit" language, the instant bargaining unit cannot now seek to gain that language and meaning by way of arbitral modification to the written words of the collective bargaining agreement as it was negotiated through the collective bargaining process.

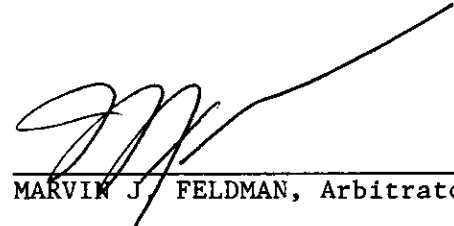
It is apparent under the contract that the contract directs itself to those receiving concurrent vacation leaves on the same location and work shift without regard to the bargaining unit mentioned. If and when the union desired to reach only the bargaining unit members with that language, then in that event it should have negotiated for that language and placed it in the four corners of the agreement. In other words, from all of that, it is apparent that the addition of thought that the bargaining unit desired in this matter would be a supplement to the instant contract language and therefore not allowable as a caveat to be followed in this particular matter.

I have reviewed the opinion and award of Arbitrator Leach in grievance number 87-1221. I find it to be non-dispositive of the issues at hand. Further, there is no evidence in this particular matter of any discrimination nor is there evidence in this particular matter of any unevenhanded treatment that the grievant received. All troopers were treated alike. Some had their requests granted and some had their

requests denied but it is apparent that there was good reason for the situation that was denied in this particular matter.

IV. AWARD

Grievance denied.


MARVIN J. FELDMAN, Arbitrator

Made and entered
this 18th day
of September, 1994.