

#1056

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF HIGHWAY SAFETY  
DIVISION OF HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE  
OHIO LABOR COUNCIL, INC.  
BARGAINING UNIT 15

Re: 15-03-950217-0018-07-15 (Tincher)

Hearing held June 9, 1995 in Columbus, Ohio

Preliminary decision sent by Fax June 19, 1995

Final Award issued June 23, 1995

#### APPEARANCES

##### Union

Paul Cox, Esq., Chief Counsel  
Edward F. Baker, Sr., Staff Representative  
Sgt. Mark E. Tincher, Grievant

##### State

Anne Van Scoy, Management Advocate  
Rodney Sampson, OCB second chair  
Sgt. Robert Young, State Patrol

##### Arbitrator

Douglas E. Ray

#### I. BACKGROUND

Grievant is a 19 year veteran of the State Patrol. For the past 3 years, he has served as a sergeant and is assistant post commander of the Toledo Post. On February 17, 1995, he filed a grievance protesting the February 14 denial of his February 9, 1995, request for 8 hours compensatory time off on July 3, 1995. On his grievance form, he requested approval of the leave request and 8 hours

additional compensatory time added to his bank. The grievance alleges violation of Article 27, Section 27.06.

## II. ISSUE

The parties stipulated the issue to be:

Was the Employer's denial of the grievant's request for compensatory time on July 3, 1995, in compliance with the relevant provisions of the collective bargaining agreement between the parties? If not, what shall the remedy be?

## III. COLLECTIVE BARGAINING AGREEMENT

Among the provisions of the collective bargaining agreement referred to by the parties and consulted by the arbitrator are:

### Section 27.06

Requests for compensatory time off must be submitted in writing in advance of the anticipated time off. Such requests shall be given reasonable consideration. Requests made within twenty-four (24) hours in advance of the anticipated time off may be given reasonable consideration.

### Section 27.07

Compensatory time off shall be granted subject to the operational needs of the facility.

## IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments at hearing. Their positions are only briefly summarized below.

### A. The Union

The Union argues that the Employer did not comply with the contract and that the grievance should be sustained. The Union points out that Grievant was allowed off on the Independence Day weekend in 1993 and 1992 and that the Employer has produced no evidence that operational needs have changed since that time. In response to management testimony alleging increased activity on the three summer

holiday weekends, the Union argues that the Employer has provided no documentation. It points to its own exhibits indicating that accidents and arrests are not necessarily higher at these times. The Union points to the language of Section 27.07, arguing that leave "shall be granted" consistent with operational needs and stresses that operational needs did not change between 1993 when Grievant was granted leave and 1995 when he was not.

The Union points out that there are many times when a sergeant cannot be scheduled and that alternative coverage is then arranged, disputing Employer testimony that "chaos" would occur if a supervisor were not assigned all 24 hours of such holiday weekends. In summary, the Union argues that there was no operational necessity for denying Grievant's time off and asks that he be granted the leave. In addition, the Union asks for an additional 8 hours leave for Grievant as a moderate and reasonable penalty for the Employer's breach.

#### B. The Employer

The Employer asks that the grievance be denied. It points to the contract language of Section 27.06 and argues that Grievant's request was given reasonable consideration. The Employer asserts that, under the labor contract, there is a hierarchy of leaves with compensatory time off given the least priority. The Employer asserts that its decision was based on operational needs. It asserts that the denial was appropriate under a Patrol policy that 80 percent of

troopers be on duty for the three peak period summer holiday weekends and a District policy requiring 24 hour supervisory coverage during these peak periods. It asserts that high levels of traffic during these periods cause an increased likelihood of problems that may require a sergeant's attention and that the additional staffing increases the need for supervision. Consistent with this policy, Grievant was required to be on duty. The Employer asserts that Grievant was allowed time off during this weekend in the past only under narrow circumstances and that detriment to the public and co-workers did occur. The Employer asserts that its contractual management rights to assign the workforce should not be eliminated merely because it sought to help Grievant two times in the past.

The Employer argues that the Union has not met its burden of showing a contractual violation. In addition, it asserts that there is no contractual basis for the penalty requested by the Union here. It asks the arbitrator to dismiss the grievance.

#### V. DECISION AND ANALYSIS

The Union has made a detailed and thorough attack on management's failure to grant Grievant his requested day of compensatory time. Through use of accident logs, incident logs and attendance records, the Union has provided some support for its argument that the Independence Day holiday weekend does not necessarily involve more accidents or recorded incidents than do other periods of time, at least

at Grievant's post. After reviewing the collective bargaining agreement, the testimony, the exhibits introduced at hearing and the arguments of the parties, however, the arbitrator has determined to deny the grievance. The reasons for this determination follow.

1. The language of the collective bargaining agreement does not seem to create an absolute "right" to time off when requested. Rather, Section 27.06 states that written requests submitted in advance such as Grievant's "shall be given reasonable consideration" and that requests submitted within 24 hours of the anticipated time off "may" be given reasonable consideration. This is in contrast to other sections of the contract such as the personal leave provision which, in Section 45.05, states that personal leave "shall not be unreasonably denied." The "shall be given reasonable consideration" language seems intended to give management more latitude than those sections stating that leave "shall not be unreasonably denied."

The Union argues that the language of Section 27.07, which states that compensatory time off "shall be granted subject to the operational needs of the facility," does create a right due to the use of the word "shall." As the arbitrator reads it, however, the two sections are to be read together and what is promised is "reasonable consideration" with "operational needs" being the management interest to be considered. If the parties meant Section 27.07 to create an almost absolute right ("shall be granted"

unless operational needs are proven to override), the "reasonable consideration" language of Section 26.06 would have no meaning.

2. Procedurally, the Employer seems to have provided "reasonable consideration." Lt. Kolcum did not abruptly reject the request. The arbitrator credits testimony that he discussed the request with Captain Senik and District staff before turning it down. Their decision was based on their judgment as to operational needs and there is no evidence that it was based on hostility toward Grievant or discriminatory.

3. The Union argues that Grievant was allowed time off over the 1992 and 1993 Independence Day weekends and that management should have to show some new event warranting changed treatment. The arbitrator does not find that providing consideration to Grievant in the past necessarily created a "right" to the same treatment every year. The testimony indicated that Grievant was accommodated in 1992 because he had scheduled his vacation before his promotion and transfer to the post and had been promised that his promotion would not interfere with his long planned family vacation. Although Grievant was accommodated in 1993 as well by being allowed to take compensatory time on July 3 and the holiday on July 4 to go with his regular days off on July 5 and 6, the arbitrator credits testimony that operational problems arose as a result of this accommodation. While management testimony of "chaos" was not necessarily

supported, there was testimony that problems arose. The arbitrator notes that there was full supervisory coverage in 1994 and does not believe that accomodating Grievant in 1992 and 1993 creates a "past practice" which would effectively shift the burden of proof from the Union.

3. Although the Union pointed to duty assignment rosters for the Toledo and Swanton posts to show that sergeants had sometimes been off on holiday weekends, the arbitrator finds that this evidence does not sufficiently undercut management's case. First, many of the allegedly uncovered shifts involved the 11 p.m. shift on the last day of the holiday weekend, thus resulting in only one hour's uncovered time of an entire peak period (which ended at midnight.) Grievant's request, by contrast was for the entire eight hour shift in the middle of the peak period. Second, the records do not show that Grievant has been discriminatorily treated with regard to time off or peak periods. If anything, he has been given more consideration and the record seems to indicate that Grievant has taken much permissive leave in the past, apparently without interference.

4. The Union argued as well that adjacent area supervisors could respond to any problems on Grievant's shift and that this is how things are handled often when a supervisor is not available. The arbitrator credits testimony that there is more need for a supervisor on peak period weekends. For one thing, 80 percent of sworn

officers are scheduled for duties during these times, creating a higher demand for supervisors and adjacent area supervisors would have to abandon their own responsibilities to respond. Even when responding, their response time would generally be greater. Although this type of coverage sometimes works, it does not appear to be the most desirable.

5. By use of accident recap reports and case status reports, the Union sought to show that holiday weekends did not involve more accidents and arrests, as is commonly assumed. There was testimony, however, that the reports did not show all traffic stops nor all misdemeanors and the arbitrator credits management testimony that peak period weekends are so designated because of greater traffic flow necessitating greater on duty coverage. The arbitrator credits testimony from Lt. Kolcum that he had worked parts of many of the weekends in question, even when not listed on the assignment rosters for pay purposes, and credits his testimony as to the needs for operational supervision during the periods in question.

6. The Union asserts that because Grievant was granted permission to miss his shift on the upcoming July 4th, this demonstrates that the operational needs on July 3 are not as great as the Employer argues. This argument is undercut, however, by the fact that Grievant's July 4 shift begins at 11 p.m. Thus, he was scheduled only for one hour at the very end of the peak period which ends at midnight July 4.

This is different from leaving an entire shift uncovered during peak periods and does not demonstrate that the Employer regards the peak periods as unimportant. The arbitrator does not think that evidence showing that the Employer has been flexible in allowing Grievant and others as much time off as can be granted consistent with operational needs should be used to invalidate denials that cannot be avoided due to operational needs. Such a ruling could lead the Employer to deny leaves and time off that could otherwise be granted.

7. Finally, but not least important, the arbitrator is not sure that the parties have empowered him to second guess every management staffing decision, especially those that can possibly have an impact on public safety. Article 4, "Management Rights," reserves to the Employer the right, among other things, to manage its operations, direct employees, "determine the overall methods, process, means, or personnel by which governmental operations are to be conducted," "assign" and "schedule" employees, and "determine matters of inherent managerial policy" including "standards of services." Although Article 4 recognizes that these rights can be modified by other provisions of the Agreement, the arbitrator does not believe that a section promising "reasonable consideration" to time off requests can be used to overrule the decision of Patrol leadership to require 24 hour supervisory coverage during peak reporting periods such as the Independence Day holiday. Grievant's

job of sergeant and assistant post commander is an important one and, in this instance of a compensatory time off request, the arbitrator believes it is for management to decide whether he can be spared so long as the contractual reasonable consideration standard is followed and the decision is based on operational needs. The arbitrator believes that it was.

VI. AWARD

The grievance is denied.

June 23, 1995  
Columbus, Ohio

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Douglas E. Ray", with a stylized flourish at the end.

Douglas E. Ray  
Arbitrator