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IN THE MATTER OF THE ARBITRATION BETWEEN: * Grievance No.
* 15-03-950119-003-04-01
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*Grievant: Tpr. Lepear
* Smith, et.al., Class
* Action Grievance
*
*
FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC., UNIT 1
-and-
OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF STATE HIGHWAY PATROL

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the FOP:

Paul L. Cox, Chief Counsel
Renee Eryclach, Paralegal
Beth Klopstein, Paralegal
Ed Baker, Staff Representative

For the State:

Lt. Richard G. Corbin, Advocate
Rodney Simpson, OCB
Lt. Lawrence L. Meresith, Assistant District Commander, OSP D-3

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RECEIVED

The Grievance was brought by Tpr. Lepear Smith, et. al. (hereinafter, "the Grievant(s)") and the Fraternal Order of Police, Ohio Labor Council, Inc., Unit 1 (hereinafter, "the FOP" or "the Union"), claiming that the Division of State Highway Patrol (hereinafter, "the State") is violating the parties' collective bargaining agreement (JX-1) in its application of Article 43.04 regarding vacation leave. The Hearing was held in Room 703, Office of Collective Bargaining, 106 North High Street, Columbus, Ohio, at 10:00 a.m. on November 6, 1995. Both parties were represented and stipulated that this case is properly before the Arbitrator. They had a full and fair opportunity to present all evidence and testimony in support of their positions and to cross-examine that presented by the opposing party.

ISSUE

The parties did not agree on a statement of the issue. The FOP asserts that the issue is whether Article 43, in its entirety, was violated by the State's denial of certain vacation requests. In contrast, the State contends that the issue is whether Article 43, Section 43.04 was violated by the manner in which the vacation policy was applied.

After careful consideration of the entire record, the Arbitrator determined that the issue is:

Did the State violate the provisions of Article 43 by refusing to "lock in" vacation time for troopers unless they had sufficient, accrued leave, at the time the request for vacation was made? If so, what is the proper remedy?

EXHIBITS

JX-1 Collective bargaining Agreement, effective 1994-1997.

JX-2 Grievance trail.

PERTINENT CONTRACT CLAUSES

ARTICLE 26. HOURS OF WORK AND WORK SCHEDULES

Section 26.01 Permanent Shifts

Permanent shifts shall continue. 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 . . .

ARTICLE 43. VACATION ALLOWANCE

Section 43.04 Vacation Leave

Vacation leave shall be taken only at a time 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

B. Vacation leave requested at any other time shall be granted on a first-come, first-serve basis. The Employer shall approve these vacation leave request without unnecessary delay but in no event later than thirty (30) days after submission of the request.

...

F. If an employee is called to work from a scheduled vacation leave period, or if an employee's previously approved vacation leave is canceled, the employee will have the right to take the vacation leave at a later time and will be paid at time and one-half (1 ½) for the time the employee is in on-duty status. Upon submission of appropriate evidence, the employee shall also be reimbursed for any non-refundable travel and lodging costs incurred as a result of canceling or returning from his/her vacation.

BACKGROUND

The FOP filed a class action Grievance on January 19, 1995, (J.-2) claiming that the Highway Patrol Administration practice of denying Trooper vacation requests, unless they had sufficient accrued vacation leave to cover a request at the time it was made, is in violation of the parties' collective bargaining Agreement. This matter was not resolved at Steps 2 or 3 of the grievance procedure and is now before this Arbitrator for hearing and decision.

FOP POSITION

According to the FOP, Article 43 was incorporated into the parties' first Agreement which took effect in 1984. It maintains that, in subsequent negotiations, Union proposals were incorporated into the Agreement which enabled senior Troopers to select and to "lock in" certain vacation dates before union employees made a selection. In this respect, the

FOP argues, Article 43.04 “dovetails” with Article 26.02 in that seniority is the sole and controlling factor in locking in both vacation and shift preferences. It is the FOP’s position, therefore, that as long as senior Troopers can accumulate the requisite vacation hours by the beginning date upon which such leave is requested, management has no contractual or other right to deny “lock in” of that request at the time it is made. The practical effect of the State’s practice to the contrary, the FOP contends, is that it denies the Grievants two rights guaranteed by the Agreement: (1) the right to take a vacation; and (2) the right to exercise seniority in obtaining a specific vacation period.

In support of this position, the FOP asserts that the Agreement contains no language prohibiting the approval of leave before it is earned. It further contends that the State’s policy, enunciating such a prohibition, is invalid because it is contrary to the terms and conditions set forth in the Agreement.¹ Finally, the Union claims that the State’s reason for reliance on this policy, one emergency in fifteen years when employees had to be recalled from vacation leave, is not an adequate evidentiary basis for concluding that the policy should prevail over seniority in locking in vacation rights set forth in Article 43 of the Agreement.

The Union asks, therefore, that this Grievance be granted. As remedy, the FOP requests that the State be ordered to cease and desist from applying the 1989 policy, and that the identified Grievant, and others similarly situated, be awarded appropriate recompense, such as twenty-four hours’ vacation leave.

¹ During the course of the Hearing, both parties referred to this policy, but neither provided a copy for the record. The State’s assertion that this policy has been in effect since 1989, was not rebutted by the FOP.

STATE POSITION

The State denies that it has violated the Agreement in any way. It points out that no language is found in Article 43, or elsewhere in the Agreement, that invests senior employees with a right to “lock in” leave prospectively for periods that they do not, at the time a request is made, have sufficient, accrued leave to cover.

Additionally, the State argues that its policy of not granting vacation leave when time to cover it has not yet been earned is not new, but rather has been in effect since 1989, and is well known to the FOP, but no protest prior to the instant case, has been voiced. As evidence, the State claims that two Troopers have been denied advance leave in accordance with the policy. It maintains that one such occurrence was two years prior to the instant grievance, and one in November of 1994. The State emphasizes that in neither instance did the FOP resort to the negotiated grievance procedure.

Another defense offered by the State is that there has been no harmful effect of its policy. In so asserting, the State stresses that Trooper Smith, and others, while being denied “lock in”, still received the vacation time requested by utilizing Article 43.04B of the Agreement.

The State also offered two other arguments. First, locking in vacations as demanded by the Union could subject the State to undue hardship under the liability language contained in Article 4304 F. Of the Agreement. Second, the State argues that efforts to “lock in” vacations under the terms the Union advocates have been used deliberately and unfairly by some Troopers and, thus, create a morale problem which interferes with management’s right to direct and control the workforce.

For these reasons, the State asks that this Grievance be denied.

DECISION

This is a case of first impression for these parties. There is not dispute that the Agreement lacks specific language governing the outcome of their dispute. Each party has its own interpretation of what the absence of controlling language means. The FOP contends that the absence of language permits the State to approve vacation leave in the manner claimed by Tpr. Smith. The State asserts that the absence of language means that management retains the right to restrict approval of vacation leave requests to those situations where Troopers have sufficient, accrued leave at the time the request is made.

After a thorough review of the record, the Arbitrator holds in favor of management. In accordance with fundamental principles of labor arbitration, the State is correct in asserting that, where the collective bargaining agreement is silent, management's retained right to act is unrestricted, unless it can be shown that decision-making was arbitrary and capricious. No such showing was made.

In the instant case, moreover, it is a fact that a policy has been in effect since 1989, which enunciates the position taken by the State in this proceeding. The Union was aware of this policy, did not attempt to alter it through contract negotiations, or to grieve its application until the instant case. Thus, the Arbitrator finds that the FOP has acquiesced to the policy and is not entitled to receive through arbitration that which it never has made any effort to seek at the negotiating table.

Additionally, the Union's case was not convincing that accepting the State's position

violates either the vacation or the seniority rights of Troopers. A fact of this case is that Tpr. Smith, and most similarly situated employees, have obtained the vacation time they sought to “lock in” through Article 43.04 B. of the Agreement. Similarly, the 1989, policy does not diminish seniority rights, but rather requires that all Troopers have sufficient, accrued leave to cover the vacation time they are endeavoring to “lock in”. In terms of the evidence and testimony presented in this proceeding, the liability considerations related to Article 43.04 F. were of de minimis importance in determining the outcome.

Based upon the foregoing analysis, the Arbitrator concluded that the grievance shall be denied.

AWARD

The grievance is denied.

Date: November 25, 1995

Mollie H. Bowers
Mollie H. Bowers, Arbitration