#1262

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 1

Re: 15-03-950301-0024-04-01 (Keiter)

Hearing held December 5, 1995 in Columbus, Ohio

Decision and Award issued December 30, 1995

APPEARANCES

Union
Paul L. Cox, Esq., Chief Counsel
Ron Moening, Associate
Beth Klopfstein, Paralegal
Tpr. Tracy Keiter, Grievant

State
Robert J. Young, Sergeant/Advocate
Richard G. Corbin, S/Lt./Witness
Rodney Sampson, OCB Representative
Tom Choezdin, Exercise Physiologist/Witness

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant is a trooper and an 11 year veteran of the State Patrol. She filed a grievance on March 1, 1995, because she was denied the opportunity to work extra-duty. The denial was based on the Employer's position that she had failed to make sufficient weight loss progress under the Highway Patrol Fitness Program. In 1994, she was deemed not eligible for overtime and extra duty because she was overweight. She was tested 10/24/94 and although she did not show sufficient progress on weight, she did show at least a 5% improvement in body fat to be deemed as making sufficient progress. At her next 90 day test at the Academy, Grievant demonstrated progress of at least a 2 and 1/2% reduction in body fat. She was told at her post, however, that she was not eligible for extra duty because she must lose 1/2 lb. per week and be weighed each week to show she is making sufficient progress. The grievance deals with overtime and extra duty opportunities for the three month period following the January 25, 1995, test. Thereafter, Grievant came into compliance with the physical standards and was no longer denied opportunities.

II. ISSUE

The arbitrator finds the issue to be:

Whether the Employer violated Article 40 by denying Grievant overtime and extra duty opportunities and, if so, 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 40.02, "Health and Physical Fitness," which provides:

> The Employer's "Health and Physical Fitness Program," File 00-9-500.27, effective June 1, 1988, as included within File 9-500.23, effective July 17, 1991, shall be the program by which overall wellness will be maintained.

Section 40.04, "Progressive Discipline," which provides in part:

> . . . . Those persons placed on discipline shall not be eligible for voluntary overtime or special off-duty until they are retested and have been found to be making sufficient progress toward their goals. The failure to maintain sufficient progress shall disqualify the employee from overtime and off-duty assignments. Sufficient progress shall be defined as losing one pound (1lb.) per week for the first thirteen (13) weeks and one half (1/2 lb.) per week, thereafter, until the weight standard is met. . . . . .

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 seeks to apply the height and weight policy to deny Grievant overtime opportunities in a manner contrary to the contract and contrary to its policy. The Union argues that Section 40.02 specifically states that the health and physical fitness program shall be the program applied and that Chart G. of that program (p. 16) provides a specific guide to determine progress for Article 40 purposes. That chart and guide

specifically provides that weight improvement or improvement in body fat levels shall qualify as sufficient progress. In the Union's view, Grievant qualified by showing a 2.5% improvement in body fat over the previous measurement.

The Union also points to Policy 9-500.18 (Rev. 01-27-95) which states that employees placed on discipline for failing to meet physical fitness and health standards shall not be eligible for extra-duty patrol services. The Policy goes on to state "Eligibility for extra-duty patrol services shall be restored when a retest demonstrates the employee has made sufficient progress toward the minimum standards defined in Policy 9-500.23 (eg. one pound per week)." The Union asserts that by use of e.g., the Employer has conceded that there are other ways to demonstrate progress.

In the Union's view, Grievant was eligible for overtime when she showed "sufficient progress" by retesting on a body fat basis. The Union notes that some people have muscle that makes them exceed the traditional weight standards and that the program has created an exception for such people on page 8. It asserts that Grievant was making sufficient progress based on body fat standards and that she was therefore eligible for overtime. In response to Employer arguments about the difficulties of regular testing, the Union asserts that there was no need to test her week by week. Rather, Grievant should be eligible for the 90 days following her demonstration of sufficient progress. In the Union's view, Grievant should have been eligible for

overtime and should be made whole for the opportunities she lost during the three month period in question.

B. The Employer

The Employer asks that the grievance be denied. It points to the language of Article 40, which has been unchanged since 1992, stressing that Section 40.04 nowhere makes mention of body fat as qualifying a person for overtime if that person is not in compliance with the fitness standards. The Employer points to contract changes in 1992 from language that qualified a person for 3 months upon a successful retest to the current language that requires the employee to maintain sufficient progress toward the weight standard to remain eligible for voluntary overtime or special off-duty. The Employer asserts that weekly weight testing at the post has been a regular practice since 1992 for those employees on weight related discipline who wish to maintain eligibility for extra duty.

The Employer argues that the Union's interpretation would penalize those who get weighed each week by holding them to a much more difficult standard than those who are body fat tested. Further, the Employer asserts that it would be impossible to test body fat every week in that body fat testing is done only at the Academy and that body fat testing is not accurate enough to measure variants which would be the equivalent of the 1/2 lb. per week standard.

The Employer's position is that the current program gives employees an incentive to reach their goal of

continued progess toward full compliance. This is accomplished by the practice, in effect since 1992, of requiring weekly weigh-ins for employees seeking to qualify for overtime under the sufficient progress standard. The Employer argues that the grievance should be denied.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has considered the testimony of witnesses, the collective bargaining agreement, the exhibits produced at hearing and the arguments of the parties. The arbitrator understands that there is federal court litigation between the parties regarding the validity of the physical examination policy. This understanding does not affect the arbitrator's analysis of this grievance which is limited to applying the parties' contract. The issues and arguments of the lawsuit were not before the arbitrator in this case.

The central issue appears to be whether an employee can be deemed to be making "sufficient progress" under Section 40.02 to become eligible for voluntary overtime if that employee has demonstrated "sufficient progress" under the alternate body fat procedures of Chart G. to avoid progressive discipline. It seems clear that an employee who meets that body fat improvement standard (5% improvement for 90 day period and 2.5% improvement thereafter) can avoid the next level of discipline under the Health and Physical Fitness Program. (See HFPP Compliance & Discipline, 9-500.23, Rev. 03-07-94, p. 16)

It is apparent that the manner in which an employee is determined to be making sufficient progress toward the minimum standards has been altered over the years. Policy 9-500.23, which is specifically referred to in Section 40.02, does set forth a procedure for retesting that, in Chart G (p.16), measures sufficient progress on body composition as either 1 pound per week improvement for one 90 day period and 0.5 pound per week thereafter OR 5% improvement over previous body fat measurement for a 90 day period and 2.5% improvement over the previous measurement thereafter." Article 40.04 does state that "Those persons placed on discipline shall not be eligible for voluntary overtime or special off-duty until they are retested and have been found to be making sufficient progress toward their goals." The Employer's Policy 9-500.23 deals with retesting and defines "sufficient progress" to include the alternate body fat improvement measure. Policy 9-500.23 is referred to in Section 40.02 and thereby somewhat incorporated into the contract. This would seem to indicate that a person can become eligible after satisfying the retest standards on body fat improvement. Employer Policy 9-500.18 is not necessarily to the contrary. It states, at page 2, that "eligibility for extra duty patrol services shall be restored when a retest demonstrates the employee has made sufficient progress toward the minimum standards defined in policy 9-500.23 (eg. one pound per week.)" The use of e.g. (for example) before the one pound per week

example rather than i.e. (that is) seems to indicate that the one pound per week language is merely demonstrative rather than the only way in which a retest can demonstrate sufficient progress. For these reasons, the arbitrator finds that the 40.04 language indicating that persons shall not be eligible "until they are retested and have been found to be making sufficient progress toward their goals" does include the Chart G definitions of sufficient progress within its meaning. This means that, as of January 25, 1995, Grievant was eligible because she was "retested and ... found to be making sufficient progress toward (her) goals" in the language of Section 40.04.

This does not mean that she stayed eligible for 3 months, however. The contract states, immediately after explaining how to become eligible:

> The failure to maintain sufficient progress shall disqualify the employee from overtime and off-duty assignments. Sufficient progress shall be defined as losing one pound (1lb) per week for the first thirteen (13) weeks and one half (1/2lb.) per week, thereafter, until the weight standard is met.

The arbitrator believes that this standard for maintaining eligibility, unlike the standard for becoming eligible after retest, has not been modified. The reasons for this interpretation follow.

1. There has been no explicit modification by Policy or by practice. The Chart G Sufficient Progress chart appears to apply to the retesting procedure (Appearing immediately under Section C, Retesting, in the Compliance and Discipline

Section of the Program.) It deals with "retesting to determine level of compliance" not maintaining sufficient progress for extra duty purposes.

2. The maintaining sufficient progress language of Section 40.04 specifically sets a weekly goal of 1/2 pound per week. It does not mention body fat levels.

3. Even Chart G. speaks of a "2.5% improvement over the previous measurement." Since this is half of the prior 90 day goal, it seems to be targeted to the 90 day retesting period, not the weekly maintenance of eligibility period.

3. Practically, body fat levels cannot be measured on a weekly goal basis. The Program sets standards for the scales that will be used for weight measurement at the post level. There is no practical way to measure body fat levels at the post level. Both caliper testing and immersion testing require training and equipment. Further, the arbitrator credits testimony that caliper testing is not accurate enough to determine weekly progress at the rate of 1/13 of a 2.5% improvement. Finally, caliper testing and immersion testing are done at the Academy with tested employees on paid status. For employees from all over the State to come in for weekly testing is not something mentioned in the contract or in any of the policies that allegedly modify it. The arbitrator does not believe it was agreed to by the parties as the means by which employees are to demonstrate that they are maintaining sufficient progress.

VI. SUMMARY

The arbitrator believes that Grievant, by showing sufficient progress on her retest (which has come to be defined as including sufficient improvement in body fat measurement) became eligible for voluntary overtime or special off duty. At that point, however, the contract placed on her the obligation to demonstrate that she was "maintain"ing sufficient progress, which the contract defined as losing 1/2 lb. per week until the weight standard was met. This means that she was eligible the first week after her retest but not the weeks thereafter because she failed to demonstrate she was losing 1/2 lb. per week thereafter.

VII. AWARD

The grievance is granted in part and denied in part. If Grievant was denied voluntary overtime she would have worked in the first week after her January 25 retest, she is to be made whole for the loss. For the remainder of the 3 month period in question, the grievance is denied.

Respectfully submitted,

December 30, 1995
Columbus, Ohio

Douglas E. Ray
Arbitrator