

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY,  
DIVISION OF THE STATE HIGHWAY PATROL

and

OHIO STATE TROOPERS ASSOCIATION

Re: Gr. 15-03-960924-0075-04-01, Rogols

Hearing held September 11, 1998

Briefs mailed October 2, 1998

Decision issued October 28, 1998

APPEARANCES

Employer

Lt. Robert Young, Advocate  
Jillian Froment, OCB Intern  
Camille Wilson, OCB Intern

Union

Herschel M. Sigall, Esq., Chief Legal Counsel, OTA  
Bob Stitt, President, OTA  
Elaine Silveira, Asst. to General Counsel  
Tpr. Marc Rogols, Grievant

Arbitrator

Douglas E. Ray

## I. BACKGROUND

This case arises out of a September, 1996, grievance filed by Trooper Marc Rogols, an 18 year veteran who was assigned to the Office of Investigative Services at the time the grievance arose. The grievance alleges in part that Grievant was assigned to supervise and control the evidence associated with the Lucasville riot investigation and that control of evidence, as specified under State Patrol procedure, is limited to supervisory positions. He requested supervisory pay for the period of the assignment.

Grievant was assigned to the Lucasville investigations and worked at the Lucasville location. Eventually, the evidence (which was estimated to include 20,000 pieces of evidence) was transported to Columbus and stored in three locked rooms in General Headquarters. Grievant had at least substantial responsibility for the care, custody and control of the Lucasville riot evidence and was given a key to the rooms containing the evidence. He helped prosecutors and other lawyers obtain access to the evidence and provided access to trial testimony when needed for appellate proceedings. The grievance was filed in September, 1996, and Grievant was relieved of responsibility for the evidence in February, 1997.

## II. ISSUE

The parties were not able to stipulate with regard to the issue. The arbitrator finds the issues to be:

Is the matter arbitrable?

If so, did the Employer violate Section 32.01 of the collective bargaining agreement with regard to Grievant's job assignment?

If so, what shall the remedy be?

## III. CONTRACT PROVISIONS

Article 32, Section 32.01 of the Unit 1 Collective Bargaining Agreement provides in part:

The Employer may temporarily assign an employee to replace an absent employee or to fill a vacant position within the bargaining unit during the posting and selection process. If the temporary assignment is for a continuous period in excess of four (4) days, the affected employee shall receive a pay adjustment which increases the employee's step rate of pay to the greater of: a) the classification salary base of the higher level position, or b) a rate of pay at least five (5) percent above his/her current step rate of compensation. The pay adjustment shall in no way affect any other pay supplement which shall be calculated using the employee's normal classification salary base. The employee shall receive the pay adjustment for the duration of the temporary assignment.....

Article 59, Section 59.02 B. provides in part:

If an employee believes that he/she has been assigned duties substantially beyond the scope of his/her current classification, and the assigned duties have been performed for more than five (5) consecutive work days, then the employee may file a grievance with the agency designee. The grievance must state specifically the different duties performed, the higher classification that contains those duties and how those duties differ substantially from the ones normally assigned to the classification of the employee. ....

The agency designee will review the grievance filed, conduct an investigation if necessary, and issue a written decision within fifteen (15) calendar days.

The section goes on to state that if the designee determines that the grievant is performing such duties outside his or her classification, the designee will direct that the grievant stops performing these particular duties and will issue an award of monetary relief for the difference in pay rates, such award not being retroactive beyond five days' prior to the filing of the grievance. Subsections C. and G. provide that the Union may file an appeal from the decision with the Office of Collective Bargaining and that grievances under this Article shall not be arbitrable.

Article 20, Section 20.08 (5.) provides in part that the umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of the Agreement.

#### IV. POSITIONS OF THE PARTIES

Both parties made extensive arguments at hearing and in post-hearing briefs. Their positions are only briefly summarized below.

##### A. The Union

The Union asks that the grievance be upheld. It argues, first, that the arbitrator has jurisdiction. It points out that the Employer raised the issue of arbitrability just two days before the hearing and asserts that the Employer has waived its right to contest arbitrability by not raising the issue earlier, citing

numerous arbitration decisions. It further asserts that by requiring Grievant to continue working the contested duties for months after the grievance was filed, the Employer violated the express terms and policies behind Article 59. With regard to Article 32, the Union asserts that Section 32.01 entitles Grievant to additional pay for the months he performed sergeant's duties. It asserts that Grievant's responsibilities for the evidence constituted the duty of, at a minimum, a Sergeant. It points to Highway Patrol Policy indicating that two sergeants or a sergeant and a lieutenant should be in charge of evidence as "Property Custodian" and argues that Grievant should be compensated for the time he performed these duties.

B. The Employer

The Employer asks that the grievance be denied. It argues that the essence of the Union's claim is one for relief under Article 59, a claim which neither the Union nor Grievant made. It points out that Article 59 provides a procedure specifically dealing with employees assigned duties beyond the scope of their classification and that grievances filed under such Article are explicitly made non-arbitrable. The Employer argues that since this is essentially an Article 59 claim, the arbitrator lacks jurisdiction. It argues that an argument as to an arbitrator's jurisdiction is not one that can be waived, citing numerous arbitration decisions.

If the merits are reached, the Employer argues that the grievance should be denied. It asserts that Section 32.01 applies only to positions within the bargaining unit and points out that sergeants are not within the bargaining unit. It argues further that there was no vacancy for Grievant to fill and that Article 32 does not apply. It further argues that collecting and preserving evidence are part of the duties of a Trooper and that Grievant did not perform the duties contained in the job description for Sergeant. The Employer concludes by asking that Grievant not be awarded additional compensation merely for performing his assigned job duties within his classification.

#### V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has reviewed the collective bargaining agreement, the testimony produced at hearing, the exhibits introduced into evidence and the arguments of the parties.

As to the issue of arbitrability, the arbitrator agrees that an argument as to jurisdiction would not be waived under the circumstances of this case. To the extent that the grievance raises requests for relief under Article 59, the arbitrator is without jurisdiction. The contract specifically states that grievances brought under Article 59 are not arbitrable.

The grievance is not, however, framed under Article 59. Section 20.04 of the Agreement provides that the grievant must cite on the grievance form the specific articles or

sections alleged to have been violated. On the grievance form, Grievant cited Section "32.01 Temporary Working Level." The arbitrator believes that the Union is entitled to an opportunity to make its case under Section 32.01 and that the arbitrator does have jurisdiction over allegations concerning Section 32.01.

The Employer has argued that Section 32.01 applies only where it temporarily assigns "an employee to replace an absent employee or to fill a vacant position within the bargaining unit during the posting and selection process." (emphasis added.) It asserts that this means Section 32.01 would not apply to a temporary assignment to a job outside the bargaining unit such as a sergeant's position. The arbitrator does not reach the merits of this argument in light of the following analysis.

The arbitrator finds that even if Section 32.01 could reach the assignment of a trooper to do sergeant's duties, an issue that is specifically not reached here, the requirements of Section 32.01 have not been met in this case. First, there appears to be no "absent employee" or "temporary vacancy." This alone could defeat the grievance. The duties assigned Grievant were unique due to the broad scope of the Lucasville investigation. He was not filling the position of another on a temporary basis. Second, Grievant did not step into a position performing the duties of a sergeant. There is much more to the sergeant's job classification than the duties Grievant performed. Grievant


supervised evidence. Sergeants supervise people. Although the Union points to Policy OSP-103.10 for the proposition that assistant property custodian is a job to be performed by sergeants, the Policy in question appears to be designed for the storage and disposition of evidence at the Post level rather than the unique situation here. In any event, Grievant did not perform other duties normally performed by a Sergeant. In addition, the Trooper position description does include "collects and preserves evidence" among its job duties.

The arbitrator finds that Section 32.01, if applicable, was not violated. The remaining part of Grievant's claim has to do with the argument that he was assigned duties beyond the scope of his job classification. Such claims would be governed by Section 59.02. Article 59 was not made the basis for the grievance and, in any event, Article 59 claims are not arbitrable.

#### VI. AWARD

The grievance is denied.

Columbus, Ohio  
County of Franklin  
October 28, 1998

  
Douglas E. Ray  
Arbitrator