

#1336

**DR. DAVID M. PINCUS**  
**Arbitrator**  
**4026 Ellendale Road**  
**Moreland Hills, Ohio 44022**

December 10, 1998

Mr. Mike Duco  
Chief of Arbitration Services  
106 North High Street  
Columbus, Ohio 43215-3019

-and-

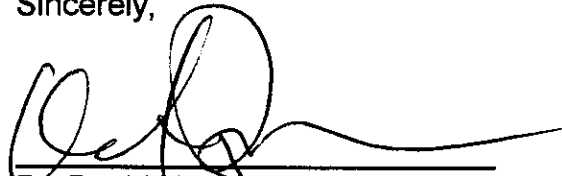
Mr. Herschel Sigall  
Ohio State Troopers Association  
6161 Busch Blvd., Suite 220  
Columbus, Ohio 43229-2553

Re: The State of Ohio, Ohio State Highway Patrol and Ohio State Troopers  
Association, Unit 15  
Grievant: Charles Bower, Jr.  
Grievance No.: 15-03-970725-0103-04-01

Dear Gentlemen:

Enclosed please find the Opinion and Award dealing with the above captioned matter. I have also enclosed an Arbitration Invoice for services rendered.

Sincerely,

  
\_\_\_\_\_  
Dr. David M. Pincus  
Arbitrator

**THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY,  
DIVISION OF THE STATE HIGHWAY PATROL AND  
OHIO STATE TROOPERS ASSOCIATION, INC.,  
UNIT 1 VOLUNTARY LABOR ARBITRATION PROCEEDING**

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**IN THE MATTER OF THE ARBITRATION BETWEEN:**

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

**-AND-**

**OHIO STATE TROOPERS ASSOCIATION, INC.  
UNIT 1**

**GRIEVANT: CHARLES R. BOWER, JR.  
GRIEVANCE NO.: 15-03-970725-0103-04-01**

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**ARBITRATOR'S OPINION AND AWARD  
ARBITRATOR: DAVID M. PINCUS  
DATE: DECEMBER 12, 1998**

**APPEARANCES**

**For the Employer**

Susan M. Rance  
Heather Reese  
Dennis Zwayer  
Robert J. Young

Observer  
Second Chair  
Post Commander  
Advocate

**For the Union**

Charles R. Bower, Jr.  
Bob Stitt  
Herschel Sigall

Grievant  
Local President  
Advocate

**INTRODUCTION**

This is a proceeding under Article 20 – Grievance Procedure, Section 20.08, Arbitration, of the Agreement between the State of Ohio, Ohio Department of Public Safety, Division of the State Highway Patrol (the “Employer”) and the Ohio State Troopers Association, Inc. Unit 1, (the “Union”), for the period July 1, 1997 to June 30, 2000. The Arbitration hearing was held on September 23, 1998, at the office of

Collective Bargaining, Columbus, Ohio. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. Issues of timeliness or other procedural and substantive technicalities affecting the merits of the grievance were not raised by either party.

At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties decided not to submit briefs, and rested with closing arguments.

### **STIPULATED ISSUE**

Was the Employer's denial of the grievant's request for personal leave on July 19, 1997, in compliance with the relevant provisions of the Collective Bargaining Agreement (Joint Exhibit 1) between the parties? If not, what shall the remedy be?

### **PERTINENT CONTRACT PROVISIONS**

#### **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, operations, 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.

**(Joint Exhibit 1, Pgs. 2-3)**

### **CASE HISTORY**

Charles R. Bower, Jr., the Grievant, has been employed as a Trooper by the Ohio Highway Patrol for approximately twelve years. For the period October of 1990 to March of 1998, he was assigned to the Circleville Post. The disputed incident took place while the Grievant was assigned to this post and working the 11:00 p.m. to 7:00 a.m. shift.

On July 16, 1997, the Grievant had a discussion with Sergeant Scott Holbert who was his Shift Commander. He told Holbert that he wished to take time off from 11:00 p.m. on July 18, 1997 to 7:00 a.m. July 19, 1997. The Grievant justified his request by noting he and his wife intended on "going somewhere with the kids." Holbert advised the Grievant that another midnight unit was on vacation. This information caused the Grievant to submit a Request for Leave form for personal leave (Joint Exhibit 3).

In terms of administrative action, Holbert recommended the request for personal leave. On July 17, 1997, however, the Post Commander disapproved the Grievant's personal leave request. In the remarks section, Zwayer justified the disapproval decision by noting:

\*\*\*

Unit 516 already on approved leave this date

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**(Joint Exhibit 3)**

In response to Zwayer's action, the Grievant, on July 19, 1997, filed a formal grievance. It contained the following Grievance Facts section:

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On 07-16-97, I submitted a request for personal leave for 07-19-97. There was one (1) unit on vacation, U-516, with 4 other troopers and one (1) Sergeant working. The 4 units included me. Sgt. S.S. Holbert approved my request for personal leave and it was left for Lt. Zwayer's approval. Lt. Zwayer denied request due to the reason that personal leave cannot be used to circumvent the leave policy. This is a violation of Article 45.05 and Procedure 9-507.08 which states that the "one employee per work shift group" concept shall not be considered as a factor in granting or denying personal leave requests. They may be decided due to staffing requirements. There was enough coverage that the request should not have been denied.

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**(Joint Exhibit 2)**

As a potential remedy, he requested eight hours of compensatory time for being unjustly denied personal leave on July 19, 1997.

The parties were unable to resolve the disputed matter during subsequent stages of the grievance procedure. The grievance is properly before the Arbitrator.

### **THE MERITS OF THE CASE**

#### **The Union's Position**

The Union argued that the Employer's denial of personal leave on July 19, 1997, was not in compliance with the relevant provisions of the Collective Bargaining Agreement (Joint Exhibit 1). This premise was based on a perceived misapplication of Article 45 – Personal Leave provisions and unfounded application of existent policies and procedures.

The initial denial of the leave request was based on an inappropriate criteria. Simply granting another unit on the shift vacation leave does not justify a per se refusal of the Grievant's request. In fact, such reliance explicitly conflicts with the Employer's Personal Leave policy which states in pertinent part:

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#### **4. Personal Leave**

\*\*\*

- d. The "one employee per work shift group" concept shall not be considered as a factor in granting or denying personal leave requests

...

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**(Union Exhibit 1, Pg. 6)**

Other assumptions used to justify the denial decision were equally unpersuasive since they were not based on negotiated contractual requirements. Nothing in the Agreement (Joint Exhibit 1), and more specifically Article 45, requires an employee to present reasons for personal leave requests. The Post Commander was operating under an unqualified misperception. He felt and undemonstrated personal leave request, one without emergency designation, was no different than a vacation request. This rationale caused him to erroneously deny the personal leave request.

The Employer was further confused about the general nature of personal leave. The Post Commander's testimony suggests he views an "emergency basis" as a necessary precondition to any personal leave approval. And yet, Section 45.04 contains a listing of reasons for personal leave use; including item #8, which specifies "Any other matter of a personal nature." As such, extraordinary and emergency reasons are not the only proper justifications that can be used when requesting personal leave.

Even if the Employer's attempt to justify its decision by referencing certain staffing criteria, this approach fails on grounds of reasonableness. The criteria suggested was inconsistently applied, and therefore, does not serve as a sufficient bar in this instance. The record fails to support the policy articulated by the Post Commander. The Post Commander justified his decision on staffing level requirements for the 11:00 p.m. to 7:00 a.m. shift on Friday/Saturday. Section 45.05 does reference peak times, but this construct should not be equated with the emphasis placed on "more active time." Nothing in the Agreement (Joint Exhibit 1) pre-conditions personal leave use based on the staffing policy proposed at the hearing.

When one reviews the HP 295 (Union Exhibit 6), the staffing schedule employed for the shift in question seems haphazard and inconsistent. To justify the denial of personal leave in this instance, on an inconsistent staffing protocol, would cause a significant erosion of this particular contractually derived benefit.

### **The Employer's Position**

It is the Employer's position that the denial in question was proper. Article 45 principles were not violated when the Post Commander failed to abide by the recommendation proffered by the Grievant's supervisor.

Several contract interpretation arguments were provided in support of the denial. Article 4 – Management Rights provides the Employer with the authority to determine adequate staffing, "except to the extent provided by this Agreement." Article 45, however, places certain restrictions on bargaining unit members and the Employer in terms of personal leave eligibility, use and approval. Section 45.04 prohibits the use of personal leave in place of vacation leave, but enumerates acceptable reasons for personal leave use including "any other matter of a personal nature." Article 45.05, however, discusses the need for "reasonable" denials, and allows restriction of concurrent leave requests.

The Employer reasonably denied the Grievant's request. The Post Commander's decision was based on judgments regarding the staffing needs in the evening/morning in question. The shift, on the day in question was viewed as highly active requiring manning at a certain level. Operational needs, therefore, necessitated the Grievant's attendance. The staffing histories (Union Exhibit 6) introduced by the



Union fail to veil the decision with any impropriety. Staffing levels may, indeed, vary. Yet, any variance is often a function of staff availability or other circumstances.

### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Employer did not violate the Agreement (Joint Exhibit 1) when it denied the Grievant's personal leave request.

As the third party neutral selected by the parties to be the official "reader" of their Agreement (Joint Exhibit 1), I am duty bound to apply any clear and unambiguous language negotiated by the parties. Language of this sort represents the parties' clear and unequivocal intent regarding subject matter, which has been negotiated and mutually agreed to. An alternative interpretation would cause this Arbitrator to fashion his own brand of industrial jurisprudence; and cause a modification in terms and conditions of employment.

The present dispute, and its related analysis, is a bit curious and unconventional. The clear language of the Agreement (Joint Exhibit 1) supports the denial. And yet, even though the several arguments used by the Employer as justifications are condoned by the Agreement (Joint Exhibit 1) and extra-contractual policies, their specific application were either misplaced or insufficiently supported by the record. When faced with this dilemma, an arbitrator must seek solace and guidance from clearly negotiated language. In this instance, the Employer's denial is affirmed, because the administered outcome is supported by language contained in Article 45, rather than any specific reliance on arguments or theories tendered at the hearing.

Article 45.04 states in pertinent part:

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Personal leave is not intended to be used by an employee in place of vacation leave.

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Here, the record clearly supports denial on this basis. The Grievant clearly intended to use personal leave in place of vacation leave.

The Grievant's own testimony supports this premise. Under direct examination the following exchange took place:

Union: Did you indicate to Sergeant Holbert that you wanted time off on the 19<sup>th</sup>?

Witness: Yes, I had inquired to Sergeant Holbert, whether or not I could have time off on that night. I was informed that there was another midnight unit on vacation, subsequent discussion between Sergeant Holbert and myself, I can't quite remember, but I submitted a Request for Personal Leave, which he saw no problem with.

Clearly, this particular exchange, and reasons given by the Grievant for requesting leave, establish the Grievant's initial desire to initiate a vacation leave request. Only after this course of action was somewhat derailed by Holbert's comments, did the Grievant submit the contested personal leave request.

The Union, in its remarks, asked the Arbitrator to take this opportunity to articulate a proper means of effectuating a personal leave protocol by relying on the record and pertinent contract language. I am unwilling to accept such an appointment based in this particular record, and the minimal intent evidence and testimony produced at the hearing. Critical elements would have to be introduced to achieve this desirous

end. A few reflections regarding the existing language contained in Article 45 should reinforce my misgivings.

Section 45.04 contains a listing of appropriate reasons for personal leave. The majority of the articulated reasons deal with unusual, unexpected and unplanned for circumstances. Only a few items deal with personal matters, which can be planned or anticipated, such as examinations, weddings, and religious holidays. Item 8, however, concerns "any other matter of a personal nature." Do matters of this sort necessitate an emergency or unanticipated circumstance or do they merely represent some catchall category of reasons. With this form of intentional ambiguity, some degree of intent testimony seems appropriate for clarification purposes.

Section 45.05 allows the Employer an opportunity to deny personal leave requests, as long as the denial is not unreasonable. In other words, some business necessity justification must be provided to avoid any arbitrary or capricious charge by the Union. One business justification noted by the parties deals with requests during employer-designated "peak times." The record is unclear whether "peak times" is a matter dealing with designated holiday periods, or whether they deal with post specific activity requirements. The Post Commander attempted to employ a post specific criterion based on activity during the Friday/Saturday midnight shift. Whether this is an appropriate application of the "peak time" criterion is unclear in my mind. If it is, the record failed to support a consistent and necessary application.

Another operational need exception is specified by the parties in the last paragraph of Section 45.05. This provision states "the Employer may (Arbitrator's Emphasis) restrict the number of concurrent leave requests at a work location based on

work shifts. The Employer, in making his decision, "may (Arbitrator's Emphasis) consider the nature of the employee's personal need and the timing of the request(s)." The underscored language evinces a permissive right in terms of restriction and the potential use of several criteria. When we clothes criteria within a permissive connotation, the Employer is not limited to the criteria specified. Rather, these and other operational need justifications may be applied as long as these are known prior to application and consistently applied.

In this instance, with a number of plausible operational need criteria available, the Post Commander selected a criterion in conflict with documented policy. The personal leave request was denied because "Unit 516 already on approved leave this date (Joint Exhibit 3). Policy OSP-507.08 (Unit Exhibit 1) specifies in particular part:

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4. Personal Leave

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- d. The "one employee per work shift group" concept shall not be considered as a factor in granting or denying personal leave requests. However, personal leave requests for non-emergency reasons may be denied based on legitimate minimum staffing demands per work shift group.

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**(Union Exhibit 1, Pg. 3)**

As such, the Employer's remark suggests a conflict with the "one employee per work shift group concept. Again, the Employer was not precluded from applying "legitimate minimum staffing demands." Here, greater depth in terms of supporting documentation and consistent application could have supported the denial on mis-basis.

Without a more concrete fact pattern, and some bargaining history, the prior analysis, excluding my ruling regarding the use of personal leave in lieu of vacation leave, should be accepted for what it is. A tentative and limited analysis based on a record void of pertinent evidence and testimony.

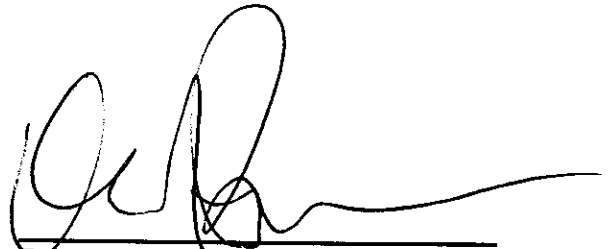
**AWARD**

The grievance is denied.

Date

Moreland Hills, Ohio

3/12/98

A handwritten signature in black ink, appearing to read 'D. Pincus', written over a horizontal line.

**Dr. David M. Pincus**  
**Arbitrator**