

**VOLUNTARY RIGHTS ARBITRATION
STATE OF OHIO**

In The Matter of Arbitration Between:

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

EMPLOYER,

and

OHIO STATE TROOPERS ASSOCIATION

UNION.

**GRIEVANTS: JAMES DANAHER AND MARK VISVARY
GRIEVANCE NOS.: 15-00-980306-0041-04-01
15-00-980306-0042-04-01**

**Arbitrator's Opinion and Award
Arbitrator: Dr. David M. Pincus
Date: August 16, 1999**

Appearances

For the Employer

**Robert R. Young
Susan M. Rance
Captain Bill Cubbison**

**Rhonda Bell
Sheldon W. Senek**

Position

**Advocate
Observer
District Headquarters
Commander
OCB-LRS
Assistant Superintendent
for Operations**

For the Union

**Trooper Mark E. Visvary
Elaine N. Silveira
Trooper James Danaher
Sergeant Robert Stitt
Herschel M. Sigall**

**Grievant
Legal Assistant
Grievant
OSTA President
Advocate**

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I. Issue

Did the Employer violate Article 34 of the contract? If so, what shall the remedy be?

II. Introduction

This is a proceeding pursuant to a negotiated grievance procedure in a labor agreement executed between the State of Ohio, Department of Public Safety, Division of the Ohio Highway Patrol (the Employer) and the Ohio State Troopers Association (the Union). The Union initiated the grievance on behalf Troopers James Danaher and Mark Visvary. 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. At the conclusion, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

III. Pertinent Provisions

Article 34 - Standards of Performance

The Employer and the Union are committed to providing the highest level of service to the citizens of the State of Ohio. Employees' performance will be measured utilizing standards which account for both law enforcement and administrative duties. Employees will be apprised of the relative standards of performance of their job, based upon the employee's duty assignment, hours of work, and other relative criteria and counseled if the employee

does not meet these standards. The Employer shall not establish a quota system for the issuance of law enforcement violations.

IV. Case History

Trooper James Danaher is a sixteen year veteran of the Ohio Highway Patrol. He is assigned to the 4:00 p.m. to 12:00 a.m. shift. He has served at the Steubenville Post for the last fourteen years. In 1997, he led the Steubenville Post in accident investigations. Prior to February 24, 1998, Trooper Danaher had never been called down to Cambridge District 7 Headquarters (DHQ).

On February 24, 1998 Trooper Danaher was called out to meet with DHQ Commander, Captain Charles Cubbison, because of Trooper Danaher's service. At that meeting, Danaher was praised for his accident investigations but was reminded that his traffic citations appeared to be below state standards. He was informed that the state standard for citations was 1.2 arrests (citations) per hour. He had averaged only one arrest every 2.7 hours.

Trooper Mark Visvary has been assigned to the Steubenville Post for six years. He works the 12:00 a.m. to 8:00 a.m. shift. Similar to Trooper Danaher, Trooper Visvary had never been summoned to DHQ before February 24, 1998. On that day, he was summoned so that he could be counseled as to his lack of traffic citations. He was informed that he averaged one arrest every 3.4 hours.

Both Trooper Danaher and Visvary were measured against standards of performance outlined in Article 34 of the parties' negotiated agreement:

The Employer and the Union are committed to providing the highest level of service to the citizens of the State of Ohio. Employees' performance will be measured utilizing standards which account for both law enforcement and administrative duties. Employees will be apprised of the relative standards of performance of their job, based upon the employee's duty assignment, hours of work, and other relative criteria, and counseled if the employee does not meet these standards. The Employer shall not establish a quota system for the issuance of law enforcement violations.

When Troopers Danaher and Visvary met with Captain Cubbison, they informed him that they work in very rural counties with little traffic after 9:00 p.m.. They noted a lack of interstate highways in Hamilton and Jefferson counties that decrease the amount of traffic flow and reduce the amount of commercial activity.

In addition, both troopers indicated that the number of arrests per hour is tempered by the actual amount of time spent patrolling the roads. They believe that investigating car accidents took a significant amount of time away from patrolling the roads and that Captain Cubbison was failing to take into account their significant accident investigations.

The troopers also alleged that you could not compare posts throughout the state because they have different styles of traffic. For example, the Lebanon Post, a very active post, was not an accurate comparison to the Steubenville Post. The Lebanon Post handles traffic on Interstate-71, the major thoroughfare heading to Kings Island and Cincinnati.

Trooper Danaher indicated that with respect to traffic stops for speeding, he did not stop motorists until they were six miles per hour over the speed limit. Trooper Visvary indicated that he would allow seven to eight miles per hour over the speed limit. Both troopers argued that these

variants in discretion skewed the state averages that were being applied to them.

Both troopers felt that Captain Cubbison was violating Article 34 in his evaluation of them because they were not being apprised of the relative standards of performance of their job based on their duty assignment, hours of work and other relative criteria. They argued that by not considering these other standards, and strictly focusing on the statewide average of 1.2 citations per hour, that the Employer was establishing a quota system for the issuance of law enforcement violations.

V. The Merits of the Case

The Employer's Position

The Union has fallen fall short of establishing sufficient evidence to prove a violation of Article 34. The entire Union case is built upon its perceptions, not upon any supporting or independent evidence, to establish the existence of a quota system. Captain Cubbison's review of Troopers Danaher and Visvary was a routine common negotiated performance counseling.

The Union's real interest in this case is furthering its own political interests and creating animosity toward management by suggesting the establishment of a quota system. The Union has aggressively pursued a campaign where it contends it is against the quota system and the Employer's attempts to establish one.

The Union simply cannot establish the existence of a quota system or a violation of Article 34. It is jumping on the fact that statewide numbers were used in the counseling. These numbers are averages from patrol posts, covering all shifts from throughout the state. The elements listed in

Article 34 were considered by Captain Cubbison in his performance counseling of Troopers Danaher and Visvary.

The evidence the Union uses to support its position demonstrates a sophisticated and appropriate use of available data as a measure of performance. The counseling undertaken by Captain Cubbison was based on statewide averages of peers, and demonstrates that Troopers Danaher and Visvary are performing below average.

The Union's Position

Captain Cubbison counseled the grievants solely on their failure to meet the state average of 1.2 citations per hour. This counseling did not include any of the other standards of performance in Article 34 such as the employee's duty assignment, hours of work, and other relative criteria. The sole focus of the counseling was to require Troopers Danaher and Visvary to increase their traffic citations. This is a direct violation of Article 34 that prohibits the Employer from establishing a quota system for the issuance of law enforcement violations.

Even assuming the Employer's counseling of Troopers Danaher and Visvary for below average traffic citations is not a quota system, the counseling was nonetheless a violation of Article 34 because it did not consider each trooper's relative standards of performance based on his duty assignment, hours of work, and other relative criteria. Counseling the troopers based on state criteria violates Article 34 because it does not consider a direct comparison of similarly situated troopers' performances based on their shift, hours of work and job location regarding traffic activity. The counseling was therefore not based on relevant standards and thus a violation of Article 34.

VI. The Arbitrator's Opinion and Award
Regarding the Merits of the Grievance

From the evidence and the testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, it is this Arbitrator's opinion that the grievants were counseled for cause in accordance with Article 34 of the parties' negotiated agreement. This Arbitrator does not believe the Union sustained its burden of proof that the Employer's counseling of Troopers Danaher and Visvary regarding their below average traffic citations was the imposition of a quota.

This Arbitrator does note, however, that future counseling for purposes of performance evaluation should not only consider state averages, but also a comparison of officers between shifts in similarly situated posts regarding traffic and other law enforcement activity.

VII. Analysis

This whole case boils down to whether the Employer's counseling of Troopers Danaher and Visvary for below average traffic citations amounts to the imposition of a quota prohibited by Article 34 of the contract. This Arbitrator believes Article 34 is ambiguous. It only mentions the undefined phrase "quota system" and makes vague references to "standards." Nothing in the contract defines quota or standards. The Union also failed to present any bargaining history regarding a clear cut operational definition of a quota.

The thrust of the Union argument is to infer that if one does not characterize or evaluate performance using all of the standards in Article 34, that it becomes a quota system. This Arbitrator cannot buy that argument. Even assuming that the Employer's counseling interview with

Troopers Danaher and Visvary was somewhat flawed, it did not mean that Captain Cubbison was imposing a quota system.

Rather than rely on the Union's dictionary definition of a quota, this Arbitrator decided to do some research about what is considered a quota. For example, in *SERB v. City of Canton*, 7OPER(LRP)P7908(1990), the City of Canton committed an unfair labor practice for a refusal to bargain by unilaterally implementing a quota system regarding DWI arrests and traffic citations. In that case, the City of Canton implemented a specific minimum production standard for patrol officers whose responsibilities included traffic law enforcement. The minimum production standard required the accumulation of a certain number of points reflecting DWI arrests, moving violations and parking tickets. SERB found that the quota was an absolute standard that placed a limitation on the officer's ability to utilize his professional discretion and diminished his subjectivity in the exercise of his law enforcement authority.

The federal government had previously passed legislation that imposed a mandated quota system on the State of Ohio requiring state law enforcement officers to arrest a specified percentage of speed limit violators per year to ensure federally funded aid for highways. See 23 U.S.C. Section 154. The statute was relevant when the speed limit was fifty-five miles per hour.

The pertinent portions of that federal statute, however, are worth repeating here:

(1). . . [I]f the data submitted by a State pursuant to subsection (e) of this section show that the percentage of motor vehicles exceeding fifty-five miles per hour is greater than seventy percentum, the Secretary shall reduce the State's apportionment of Federal-aid

highway funds under each of Sections 104(b)(1), 104(b)(2), 104(b)(6) of this title, 23 U.S.C. Section 104(b)(1), (2), and (6).

(2). . . [I]f the data submitted . . . show the percentage of motor vehicles exceeding fifty-five miles per hour is greater than sixty percentum, the Secretary shall reduce the State's apportionment of Federal-aid highway funds . . .

(5). For the twelve-month period ending September 30, 1983, and for each succeeding twelve-month thereafter, if the data submitted by a State pursuant to Subsection (e) of this section for that year show that the percentage of motor vehicles exceeding fifty-five miles per hour is greater than thirty percentum, the Secretary shall reduce the State's apportionment of federal-aid highway funds under each of Sections 104(b)(1), 104(b)(2), and 104(b)(6).

Cited in State of Ohio v. Claire Kelly, 1987 Ohio App. LEXIS 8111 (Portage Cty. 1988).

Finally, in a case very analogous to the issue here, a court found that a police lieutenant's expectations that officers issue two traffic citations per hour was not considered a quota. Michael Lewis v. Village of New Albany, Ohio, 1997 Ohio App. LEXIS 2107 (Franklin Cty. 1997). In that case, a lieutenant informed officers that the village police chief wanted the officers to issue two traffic citations per officer per shift. One of the officers questioned the validity of the lieutenant's instructions and approached the chief to ascertain the accuracy of the lieutenant's instructions. The chief stated that the message was not communicated properly and that the village did not have a ticket quota system.

The officer nonetheless complained to the village councilpersons and the media about the alleged ticket quota. After an investigation, indicating that the chief had clarified that the lieutenant's instructions were not a quota, the police officer was disciplined for his errant criticism of the chief's alleged

imposition of a quota. The court's rationale for upholding the discipline was that the officer's criticism was not protected by the First Amendment because his allegation that a quota system existed under the facts there was false.

Clearly, a quota system is one that establishes firm and definite standards that must be met and which limit a law enforcement officer's discretion. No such absolute written standard exists here.

Article 34's operative language is **relative standards**. The average Captain Cubbison used was based on statewide performance standards of other troopers. Those standards are not firm and definite. Indeed, they are controlled by the collective individual performance of all the troopers statewide. That standard will differ at any point in time when the average is measured.

Also significant is that the standard under Article 34 does not limit a trooper's independent discretion. Because the standard is relative to the individual discretion and performance of each officer, it is arguably a collection of an average of the total independent discretion statewide as opposed to a strict limitation on it. This Arbitrator therefore concludes that the Employer's counseling here and its review of statewide average citations per hour was not an imposition of a quota system.

But the Union's concerns that future counseling for poor performance based solely on statewide averages may not be accurate is not completely unfounded. While the statewide averages encompass all of the performance factors, they do not necessarily account for individual differences in law enforcement activity. As a check and balance on the statewide average, before counseling an officer for poor performance, the Employer may very

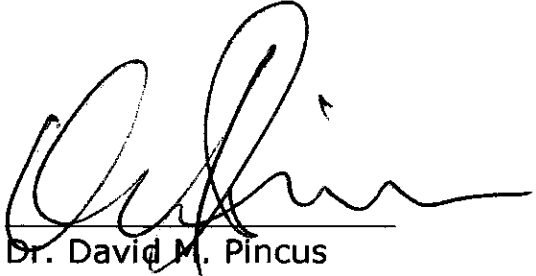
well consider a comparison of a trooper assigned on a night shift in a rural county with low traffic activity to a similarly situated trooper.

If that comparison confirms below average performance, then the statewide average is an accurate barometer. If this direct comparison does not indicate below average performance to a degree of significance, then the statewide average may have to be examined more closely to determine if certain variables were weighted in a way that skewed the state average when applied to the trooper being reviewed.

VIII. Award

The grievance is denied.

August 16, 1999
Moreland Hills, Ohio



Dr. David M. Pincus

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