#1438

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety, Division of State Highway Patrol
-AND-
Ohio State Troopers Association, Unit 15

FOR DIVISION OF STATE HIGHWAY PATROL
CAPTAIN ROBERT CORBIN
FOR OSTA
HERSCHEL M. SIGALL, ESQ., ADVOCATE, GENERAL COUNSEL
ELAINE N. SILVEIRA, LEGAL ASSISTANT

GRIEVANCE NOS.
15-00-990910-0111-04-01
&
15-00-990914-0114-04-01

GRIEVANTS
TROOPER BRYAN L. BUTLER
DISPATCHER LORI K. TREADWAY

HEARING HELD
NONE

LAST BRIEF RECEIVED
MAY 23, 2000

CASE DECIDED
JUNE 2, 2000

ARBITRATOR: ROBERT BROOKINS, J.D., PH.D.
SUBJECT: DENIAL OF LEAVE AND VACATION

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I. The Facts

The essential facts in this dual-grievance dispute are straightforward and largely undisputed. Both grievances arose out of a decision by the State of Ohio, Department of Public Safety, Ohio State Highway Patrol (the Employer or OSHP) to deny the one-day-leave requests of Trooper Bryan L. Butler and Dispatcher Lori K. Treadway.[1] The Employer operates out of the Xenia Post, which is one of several OSHP Posts located within District 8 of the OSHP. Each of the other districts throughout Ohio also contains several OSHP Posts.

Trooper Butler was assigned to the second shift (from 4:00 p.m. to 12:00 a.m.), on December 31, 1999—New Year's Eve 2000. He submitted a request, on June 18, 1999, to take a one-day-leave of absence on December 31. Trooper Butler was the only trooper at the Xenia Post to request leave for December 31, 1999. The request was submitted within the contractual window-bid period, and because there is no showing to the contrary, the Arbitrator assumes that Trooper Butler was eligible to take the one-day leave.[2]

Nevertheless, on July 1, 1999, the Employer relied on "legitimate operational necessity" to decline Trooper Butler's request for leave. Trooper Butler initially accepted this decision. However, he later rejected it upon discovering that other OSHP Posts within District 8 and within the state of Ohio had granted employees' leave requests for December 31, 1999, without reference to "Operational Necessity." This decisional disparity between the Xenia Post and other OSHP Posts prompted Trooper Butler to file a grievance, on September 5, 1999,[3] contesting the denial of his leave request for December 31, 1999.

As previously mentioned, the circumstances triggering Dispatcher Treadway's grievance are essentially the same as those surrounding Trooper Butler's. On June 18, 1999, Dispatcher Treadway

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[1] The Arbitrator will use each Grievant's title and surname when referring to them individually and "the Grievants" when referring to them collectively.

[2] The window-bid period is, "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 leave based on seniority." Article 43.04.

[3] *See* Grievance No. 15-00-99014-0114-04-01.

requested permission to take January 1, 2000 as a vacation day. At the time, she was the most senior dispatcher in her section, at the Xenia Post and was scheduled to work from 8:00 a.m. to 4:00 p.m, on January 1, 2000. On July 1, 1999, the Employer denied Dispatcher Treadway's request for vacation solely because of "legitimate operational necessity." After learning that other OSHP Posts within District were granting leaves for December 31, 1999 and were not relying on operational necessity to deny such leaves, Dispatcher Treadway grieved the denial of her leave request on August 25, 1999.

The Employer offered several reasons to support its "operational necessity" rational. First, New Year's Eve is usually an inordinately active day for the OSHP, given the increased number of motorists, especially those imbibing alcohol. Furthermore, from the OSHP's perspective, New Year 2000 (Y2K) could be especially difficult, given world-wide complement of anxiety and "doom and gloom" predictions. According to the Employer, these heightened concerns caused all of Ohio's law enforcement agencies to be on high alert during New Year's Eve and New Year's day 2000.

Green County's OSHP Posts—which includes the Xenia post—were at a still higher level of readiness. The Commander of the Xenia Post (Lieutenant Cliff Schaffner) and other commanders in Green County's OSHP Posts agreed to remain in a state of high alert during the Y2K New Year. Accordingly, they decided to deny all troopers' requests for leave during that period and to mandate overtime among troopers. Moreover, all Xenia troopers were assigned to patrol the roads, including troopers who normally worked dispatch desks. As a result, dispatchers had to do twenty-four-hour desk coverage and, consequently, could not take leave during this time.

II. Issues

A. Procedural Issue

Whether the grievances were untimely and, thereby, waived under the Collective-Bargaining Agreement.

B. Substantive Issue

Whether the Employer violated the parties' Collective-Bargaining Agreement by denying the Grievants' requests for leave.

III. Relevant Contractual Provisions, Regulations, Policies

Article 20.07 - Grievance Procedure

Step 1 -Immediate Supervisor or Designee An employee having a grievance shall present it to his/her immediate supervisor within fourteen (14) days of the date on which the grievant knew or should have had knowledge of the event giving rise to the grievance.
Grievances presented beyond the fourteen (14) day limit will not be honored.

Article 43.04 - Vacation Leave

Vacation leave shall be taken only at times 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. 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 leave based on seniority.

Ohio State Patrol Policy 507.08 - Leave Requests

(A)(3) - General Leave Guidelines
At the post or facility level, commanders may consider the total number of employees per work shift group in addition to the maximums outlined in each classification and may restrict the number of concurrent leaves on a work shift group, based upon *operational requirements*.[4]

(C)(2) - Provisions for Specific Groups of Employees (Troopers)

A maximum of one trooper per work shift group may be on vacation or compensatory time per day at a post.

(C)(2) - Provisions for Specific Groups of Employees (Dispatchers)

Normally, one radio dispatcher or communications technician assigned to a post or a district headquarters communications center may be on vacation or compensatory leave at any one time.
More than one radio dispatcher, communications technician or cadet candidate may be on leave at any one time at a facility, provided adequate 24-hour radio coverage is maintained by other normally assigned communications technicians, radio dispatchers and cadet candidates.

IV. Summaries of Parties' Arguments

A. Employer's Procedural Argument

1. Article 20.07 prohibits consideration of the grievances, both of which were filed more than 14 days after July 1 denial of the requests for leave.

B. Employer's Substantive Arguments

1. If interpreted according to its routine or normal meaning, the language of Article 43.04 establishes the Employer's authority to deny the Grievants' requests for leave.
2. The Employer exercised sound and reasonable judgement by denying the leave requests Based on myriad concerns about Y2K-related problems.
3. Because the Employer's decision is neither arbitrary, capricious, nor discriminatory, it does not violate the Collective-Bargaining Agreement and should remain undisturbed.
4. A disparate-treatment argument fails because no two posts in the State of Ohio have exactly the same

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[4] (Emphasis added).

set of operational criteria, thereby frustrating attempts to rationalize operational decisions among posts across the state. For example, the Xenia post has an air force base within its jurisdiction.

C. Union's Procedural Argument

1. The Grievants learned of the Employer's contractual violations only after their leave requests were denied on July 1, 1999. After discovering those violations, the grievances were filed in a timely manner.

D. Union's Substantive Arguments

1. Denial of the Grievants' requests for leave was unreasonable because:
   a. Three troopers and one sergeant were available for cover for Trooper Butler. Also, one dispatcher was available to cover for Dispatcher Treadway.
   b. There was neither state nor district-wide "Operational Necessity." In short, the Union argues that for an "Operational Necessity" to exist at the Xenia Post, that "necessity must exist elsewhere within the district if not the state.
   c. The Employer has not offered a standard definition for "Operational Necessity."
      i. "Operational necessity" has been held to be "'synonymous with the *minimum shift* manning requirement to meet -the Post's coverage obligations.'"[5] However, the Employer has yet to establish minimum shift requirements.
2. Ohio State Patrol Policy 507.08(C)(2) provides that dispatchers may take vacation so long as 24 hour coverage is maintained.
3. Article 43.04 provides that leave requests within the window bid shall be granted based on seniority."
4. There was no "operational necessity," because posts within the same district as the Xenia Post as well as posts throughout the state of Ohio were granting employees' requests for similar leaves.
5. Granting the Grievant's requests for leave and supporting the Greene County Sheriff's office were not mutually exclusive goals.
   a. The gravamen of concerns about the Y2K New Year focused on events that might occur between 12:00 a.m. on January 1, 2000 rather than between 4:00 p.m. and 12:00 a.m., December 31, 1999 or between 8:00 a.m. and 4:00 p.m., January 1, 2000. The 12:00 a.m. to 8:00 a.m. shift was the most likely target for mishaps or mischief.
6. There was ample coverage for the Grievants' positions.

V. Discussion

A. Procedural Arbitrability

1. Timeliness of the Grievances: Arguments and Burdens of Proof

The nature of the issue in this dispute highlights two competing, yet generally accepted, arbitral principles or practices, each favoring one party to the instant dispute. Favoring the Employer is the principle that arbitrators lack jurisdiction to hear grievances filed without the parties' specific, agreed-upon contractual

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[5] (Emphasis added).

time limit.[6] Favoring the Union, is the arbitral practice of generally resolving doubts about violations of contractual deadlines in favor of arbitration, consistent with an even more fundamental arbitral resistance to "forfeitures of the right to process grievances"on mere procedural technicalities.[7]

2. Impact of Article 20.07

Step 1 of Article 20. 07 requires employees to present their grievances to their supervisor "within fourteen (14) days of the date when . . . [they] knew or *reasonably should have had knowledge of the event giving rise to the grievance.* Grievances submitted beyond the fourteen (14) day time limit will not be honored."[8]

This language of Article 20.07 spearheads the Employer's procedural attack against both grievances, which the Employer views as fatally flawed—and, hence, nonarbitrable— under Article 20.07. Having raised this procedural issue, the Employer must also shoulder the burden of persuading the Arbitrator of the fatal procedural flaw.

On the other hand, should the Employer satisfy its evidentiary burden, the Union has the burden of persuading the Arbitrator that the grievances are, nevertheless, arbitrable under Article 20.07, or some other

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6 FRANK ELKOURI AND EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, 276 (5th ed. 1997) (stating, "If the agreement does contain clear time limits for filing . . . grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested") [hereinafter Elkouri]; FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION, 83 (RAY A. SCHOONHOVEN, ED., 3rd ed. 1991) (stating, "When a grievance has not been filed within the time limits set forth in the Collective-Bargaining Agreement, the arbitrator generally will dismiss the claim as nonarbitrable. . . .") [hereinafter Fairweather, et al].

7 FRANK ELKOURI AND EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, 277 (5th ed. 1997) (stating, "[D]oubts as to the interpretation of contractual time limits or as to whether a party has met should be resolved against forfeiture of the right to process the grievance"); FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION, 84 (RAY A. SCHOONHOVEN, ED., 3rd ed. 1991) (stating, "In cases where the delay is not substantial, arbitrators are very reluctant to dismiss the grievance and may take considerable pains to construe the agreement in favor of timely filing") (citations omitted).

8 (Emphasis added).

relevant contractual provision. As a defense to the procedural charge, the Union seeks to position the grievances under the "notification requirement" of Article 20.07 by pushing back the time when that Article's time "clock" began to run. Specifically, the Union seeks to demonstrate this position by proving that the event which triggered the contractual time "clock" actually occurred after the July 1 denial of the leave requests. In addition, according to the Union, the Grievants neither knew nor should have known of that triggering event on July 1, 1999.

3. Assessment of the Employer's Argument and Evidence

In its brief, the OSHP relies on two statements to satisfy its evidentiary burden of proving that the grievances were tardy. First, it alleges that both requests for leave were denied on July 1, 1999. Although the arbitral record lacks any corroborating evidence to support this claim, the Arbitrator finds the Employer's statement credible simply because the Union does not challenge it.[9] Indeed, in its brief, the Union neither explicitly nor implicitly questions whether the leave requests were denied on July 1, 1999. Consequently, one has little reason to reject this proposition by the Employer.

Second, the Employer alleges that both grievances, in this dispute, were filed more than a month after the leave requests were first denied on July 1, 1999. Unlike the first allegation, this one has corroborative evidence in the record. For example, Trooper Butler's grievance was filed on September 5, 1999, approximately three months after his request was denied on July 1, 1999.[10] Similarly, Dispatcher Treadway's grievance was filed on August 26, 1999, more than a month after the Employer's July 1 denial of her leave request.[11] The Arbitrator therefore, finds that both grievances were filed more than 14 days after the

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[9] Because the parties opted to forego a hearing in this matter, their allegations and assertions are not subjected to cross-examination . Nor does the Arbitrator have an opportunity to make credibility assessments regarding witnesses' testimonies. Consequently, there is a premium placed on independent evidence that corroborates the parties' assertions and allegations.

[10] *Id.* at 8.

[11] Grievance trail at 1.

Grievants' leave requests were denied. Consequently, the Employer has satisfied its evidentiary burden. Moreover, unless the Union establishes otherwise, one may reasonably presume that the contractual "clock," in Article 20.07, began to run on July 1, 1999, when the Grievants were notified that their leave requests had been denied.

4. Some Evidentiary Considerations

Observe, at the outset, that parties who fail to file a grievance within explicit contractual time limits generally are deemed to have constructively waived their right to file that grievance, absent proof that the grievance falls within some recognized exception to the explicit contractual deadline. Furthermore, absent an agreed-upon evidentiary standard, the Arbitrator must establish one that preserves the integrity of the explicit contractual deadline, while fully recognizing legitimate exceptions thereto.

This need to preserve specific contractual deadlines precludes the acceptance of unsupported, conclusory allegations as proof of the applicability of recognized exceptions to those deadlines, which would warrant effectively extending them.

The upshot is that exceptions to explicit contractual deadlines must be established by preponderant evidence in the arbitral record, showing: (1) the date on which the Grievants actually discovered the alleged contractual violation, (2) that, after the June 1 denial of their leave requests, the Grievants acted with due diligence to discover the alleged violation,[12] and (3) that the Grievants ultimately filed their grievances within

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[12] Many Collective-Bargaining Agreements explicitly contemplate the "due diligence" factor. See, e.g., Air Express International USA, Inc. v. Teamsters Local 986, 101 Lab. Arb. (BNA) 654, 661 (Melvin R. Darrow, Arb. 1993) (noting the following contractual language:

> The time limits provided for in this Article shall be strictly followed and applied in each case unless the parties have, in writing, extended or waived a time limit with respect to any particular grievance. All grievances must be filed at Step 1, not later than the fifth (5th) work day following the date of the alleged violation giving rise to the grievance or the date on which the employee in the exercise of *due diligence* became aware or should have become aware of the

14 days after they discovered the alleged violation.

5. Application of the Above Standards to the Union's Evidence

These evidentiary standards ultimately proved fatal to the Union's case. To satisfy its burden of proof, the Union correctly points to the "notification requirement" as a recognized exception under Article 20.07. The "notification requirement" provides in pertinent part: "An employee having a grievance shall present it to his/her immediate supervisor within fourteen (14) days of the date on which the grievant *knew or should have had knowledge of the event giving rise to the grievance.*"[13]

In attempting to apply the "notification requirement," the Union argues that the grievances are timely because the Grievants neither knew nor should have known of a contractual violation when the Employer first denied their leave requests on July 1, 1999.

Unfortunately, this assertion is without corroborative evidentiary support in the arbitral record.

The Union's brief contains three *generalized* arguments about the Grievants' ignorance of the contractual violation on July 1, 1999, their subsequent discovery of that violation, and when they grieved that violation. First, the brief asserts that the Grievants discovered the purported contractual violation only after the July 1 denial of their leave requests. Second, the brief states that, after the Grievants discovered the

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event giving rise to the grievance.

(emphasis added).

Furthermore, even where due diligence is not mentioned in the contract, when deciding issues of procedural arbitrability, arbitrators commonly consider whether the party in error exercised due diligence in attempting to comply with the governing procedural rule. *See, e.g.*, Nicke's Pay-Less Stores v. Retail Clerks Union, 47 LA (BNA) 1153, 1157, Killion, Arb. 1966) (stating, "[D]enial of the Grievance is warranted because of the Grievant's lack of *due diligence* in pursuing her allegations") (emphasis added); Bakery, Confectionery and Tobacco Worker's Local 26 v. King Soopers, Inc., 1995 WL 793760 *40) (DiFalco, Arb.) (Same).

[13] Article 20.07 (emphasis added). At the outset, one notes that the Employer's argument impliedly concedes that the "notification requirement" in Article 20.07 determines when the contractual provision of limitations begins to run. Consequently, neither the function nor the capacity of the "notification requirement" is contested, in that respect. The only remaining issue is whether the Union has adduced preponderant evidence in the record as a hold to support its allegations.

contractual violation, both grievances were timely filed. Again, however, these generalized, conclusory allegations are not proof of the facts alleged.

Recognizing this lack of evidentiary support in the record and ever mindful of the desire to avoid needless forfeitures of the right to file grievances, the Arbitrator contacted the parties to inform them of the situation. Then, over the Employer's objections, the Arbitrator permitted the Union to submit any admissible evidence it had to support the allegations in its brief. In addition, the Employer was afforded the opportunity to respond in writing to the Arbitrator's decision to receive additional supporting evidence from the Union and to any additional evidence the Union chose to submit.

6. Parties' Responses to the Arbitrator's Concerns

a. Employer's Response

Both parties responded. The Employer essentially argues that the "notification requirement" is unavailing to the Union because the contractual "clock" began to run when the grievances were denied, on July 1, 1999, rather than when the Grievants later allegedly discovered that not all OSHP Posts referenced "Operational Necessity" when deciding to grant or deny employees' requests for leaves during the Y2K new year.

The Employer's argument unpersuasive, insofar as it suggests that July 1 is the only day on which the "clock" might have commenced running. In the Arbitrator's view, the "clock" could have started either on July 1, 1999 or at any time thereafter when the Grievants, acting with due diligence, first learned of the alleged contractual violation.

Such is the sum and substance of the "notification requirement," which is manifestly intended to initiate the contractual time "clock" only when employees—acting with due diligence—become aware of a potential contractual violation. As a general proposition there is no subject matter for a grievance until an aggrieved employee discovers that either the decision or the decisionmaking process allegedly violated his contractual rights. The essence of the grievances, in the instant case, is not that the Grievants were simply denied leave but that there was no "operational emergency" and, hence, no valid reason to have denied the requests. In short, it was the allegedly pseudo-rationale for the denials and not the denials themselves that

triggered the grievances.

b. Union's Response

In support of the allegations in its brief, the Union submitted three affidavits,[14] all of which, unfortunately, suffered from essentially the same shortcomings as the argument s in the brief. First, affidavits are paradigms of hearsay. The Employer had no opportunity to cross-examine the affiants or (as far as the Arbitrator can discern) to even inspect the affidavits. In addition, the Arbitrator had no opportunity to observe the affiants and make credibility assessments about their statements.

Although troubling, the hearsay problem is not fatal to the allegations. For example, arbitrators routinely admit hearsay evidence into the record for whatever that evidence is worth. Indeed, the American Arbitration Association has endorsed this practice with respect to affidavits: "The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection made to its admission."[15]

The second difficulty is decisive, however. The affidavits merely echo, the conclusory assertions in the Union's brief and, thus, also lack the required specificity—set forth in the above-mentioned evidentiary standards—to trigger the protective umbrella of the "notification requirement."[16] Restated, because the affidavits fail to add specificity to the original allegations that appeared in the Union's brief,

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[14] In addition to the affidavit of each Grievant, Ms. Nancy O'Bryon submitted an affidavit. Although Ms. Byron is not a grievant in this dispute, she also had a leave request denied, filed a grievance in response to that denial, but later withdrew the grievance. *See* affidavit of Ms. Nancy Byron.

[15] 9 U.S.C.A. Ch. 1, Rule 29, Labor Arbitration Rules (Including Expedited Labor Arbitration Rules) as Amended and Effective January 1, 1996. *See also*, ELKOURI *supra* note 6, at 451 (same) (citations omitted).

[16] Arbitrators generally are reluctant to accept unsupported, conclusory affidavits. *See, e.g.* Triborough Bridge and Tunnel Authority V. Local 1931, DC 37, AFSCME, 114 Lab. Arb. (BNA) 229, 241 (Gregory, Arb. March 7, 2000) (declining to accord probative weight to affidavits which contain a mere "recitation of therapy dates with no supporting documentation").

the Arbitrator can assign them no more probative value or weight than he assigned to the original allegations in that brief. Consequently, the affidavits cannot satisfy the Union's burden of persuasion regarding the "notification requirement."

Even though doubts in procedural issues such as this should be resolved in favor of arbitrating those issues, Arbitrators cannot effectively assess those doubts, unless evidence in the record creates them. Here, the Union simply did not adduce sufficient evidence to create genuine doubts as to whether the grievances came within the "notification requirement."

Because the Union failed to meet its evidentiary burden in this respect, the Arbitrator has no alternative but to dismiss this grievance as untimely and, thus, nonarbitrable, according to the strictures of Article 20.07.

VI. Award

For all of the foregoing reasons, the grievances are hereby **denied** in their entirety.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 9 day of June, 2000

Signature of Notary Public: Bruce Kleinschmidt

Printed Name of Notary Public: _____

My commission expires: _____

County of Residency: _____

BRUCE KLEINSCHMIDT
Marion County
My Commission Expires
April 3, 2008

Robert Brookins

Robert Brookins