

1491

OPINION AND AWARD

In the matter of Arbitration

Between

The Ohio State Troopers Association, Inc.

And

**The State of Ohio, Department of Public Safety,
Ohio State Highway Patrol**

Regarding

**Grievance Number OCB# 15-00-9908-0100-04-01
(Jack P. Holland)**

APPEARANCES:

FOR THE STATE:

**Charles J. Linek, Advocate
Kevin Teaford, Human Resources
Major D.L. Anderson, witness**

FOR THE UNION:

**Herschel M. Sigall, General Counsel
Elaine N. Silveira, Advocate
Jack P. Holland, Grievant
Bob Stitt, President
Ron Moening, Staff Representative
Lt. Virgil Wright, witness
Sgt. D.L. Larue, witness
Sgt. M.A. Paris, witness**

An arbitration hearing was conducted March 23, 2001 at the Office of Collective Bargaining, Columbus, Ohio. The parties provided the arbitrator with a stipulation stating the issued to be: **"In conformance with Article 20, Section 20.08 of the Collective Bargaining Agreement the parties submit the following statement of issue for resolution by the arbitrator.**

"Did the Employer violate Section 40.02 of the labor agreement by removing Grievant from the state fair detail because of alleged non compliance with the health and physical fitness program? If so, what shall the remedy be?"

Section 40.02 states:

40.02 Health and Physical Fitness

The Employer's "Health and Physical Fitness Program, File 9-500.23, shall be the program by which overall wellness will be maintained. Employees who exceed the maximum weight allowance of the program by not more than ten percent (10%) shall be tested to see if they meet or exceed all other fitness requirements. If they perform those requirements at the Ribbon Level, excluding body fat, they shall be deemed to have met physical requirements, and their excess weight, not exceeding ten percent (10%) of the allowance shall be disregarded.

In addition the parties jointly provided the arbitrator with the following stipulated exhibits:

1. A copy of the Unit One Collective Bargaining Agreement,
2. The documents comprising the grievance trail, and
3. A copy of the Fitness Program bearing the number OSP 500.23 last revised 09/30/99.

Verbal testimony was offered by five witnesses. In addition management provided two documents: 1. An Inter Office Communication dated June 27, 1999 and 2. An Inter Office Communication dated July 22, 1999. All testimony and materials, along with closing briefs, were reviewed and considered by the arbitrator in reaching this decision.

Both parties were given full opportunity to examine and cross-examine witnesses, pose arguments and present their respective cases. Both sides did so professionally and competently.

In that this case deals with a matter of contract interpretation, the union assumed the burden of proof and presented its case first.

Union Position:

The facts are not really in dispute in this matter. The union contends that Trooper Jack Holland, a 14-year veteran of the State Highway Patrol had applied to work the overtime detail at the Ohio State Fair. In order to work the overtime at the fair a trooper must be in compliance with the Health & Physical Fitness Program (HPFP). Trooper Holland had not been compliant in previous years due to exceeding the maximum allowable weight. In addition to the opportunity to work overtime, a trooper who is HPFP compliant receives a monthly stipend of \$75.00.

The union acknowledges that not only must the trooper be HPFP compliant for the month of the fair but also that the trooper be compliant for three consecutive months preceding the Fair.

Trooper Holland was weighed at his post in May, June and July as well as August. Trooper Holland was compliant with HPFP at all those weigh-ins. His regular August weigh-in was conducted on August 2. He was within the guidelines. He received the \$75 stipend. Because Trooper Holland was in full compliance on August 2 he met all the rules and thus should have been allowed to work the overtime.

Even though the union disagrees with the next steps in the process, it argues that the grievant was still in compliance.

Trooper Holland was one of 126 officers to report for duty at the Fair. The Colonel ordered Holland to be removed and weighed at the Academy, which is located at the Fairgrounds. The results showed that Trooper Holland was 1.5 pounds over his maximum allowable weight. The Colonel was apparently also unhappy with Trooper Holland's haircut. The grievant was sent home on the morning of August 5, 1999. He was to report to his Post where an Administrative Investigation was to be conducted. A Staff Lieutenant from District Headquarters was ordered to the Ashland Post to conduct the investigation. Trooper Holland was ordered to be weighed again immediately upon his arrival at the Post. The Union believes that once Trooper Holland was found to be non-compliant, discipline would follow. The union argues that even if Trooper Holland was non-compliant he still was entitled to work the overtime at the Fair due to his compliance on August 2.

When Trooper Holland was weighed on August 5 he was found to be within his weight range provided in the HPFP. Commander Lt.

Virgil Wright also assessed the grievant's grooming and determined that it was within the employer's standards.

The Union argues that Trooper Holland was improperly denied 52 hours of overtime and asks that the Arbitrator grant the grievance and order the payment of the 52 hours.

Employer's Position:

The employer asserts that no violation of the Collective Bargaining Agreement or of Policy 500.23 occurred. The grievant was scheduled to work the first half of the Fair from August 5th. through August 14th. 1999. And Inter-office communication dated July 22, 1999 stated that officers working the fair would be inspected by the Colonel at 8:00 a.m. The Colonel thought the grievant looked overweight and sent him to the Academy to be re-weighed. He weighed 214.6 pounds. His maximum allowable weight was 213 pounds. The grievant was sent back to the Ashland Post for not being in compliance with the HPFP.

Management asserts through the testimony of Major Anderson, Commander of the Training Academy, that the scale at the Academy

is the "official" scale for the state. The scale was checked by the Office of Weights and Measures in August 1999 and had zero error.

Management argues that Section 40.02 does not grant the Employee the right to work overtime at the Fair.

Management also offered a 1987 Arbitration Decision (Grievance No. 86-24) rendered by Arbitrator Earl M. Curry, Jr., which established the right of the State to mandate a Health and Physical Fitness Program.

Management argues that the Colonel has the right to weigh an officer at any time. Trooper Holland was over the maximum allowable weight and thus was not in compliance with the program.

Management also stated that the Colonel was concerned about Trooper Holland's haircut.

Management asked that the grievance be denied.

DISCUSSION:

The existence of a Health and Physical Fitness Program within the Highway Patrol preceded the Curry arbitration hearing conducted on December 3, 1986. Arbitrator Curry rightly decided that the grievance before him must be denied. The characterization of what

that Arbitration means in the current situation is much different than offered by management in the opinion of this arbitrator. Article 40 of the Collective Bargaining Agreement in effect in December of 1986 merely stated that "the parties will, prior to January 1, 1987, 'jointly develop a systematic approach to physical fitness."

Arbitrator Curry went on to reason that "Not having done so by the time the instant dispute arose, clearly the management rights provision of the Agreement prevails." Mr. Curry goes on to state: "The assignment of the Fair Detail clearly falls within this provision and is a management prerogative, so long as it was not done in an arbitrary, capricious or discriminatory manner."

Having noted the impact of the Curry decision, it must be stated that the Union is not challenging the existence of the Health and Physical Fitness Program.

Subsequent to the 1987 decision a thoughtful, detailed program was put into place. The parties apparently invested much work in the HPFP program. It appears to be accepted and its existence is not at issue in the instant case.

The assertion of management that the Colonel can order a Trooper to be weighed at any time appears to be supported in Policy

500.23 on page 3 of 30 where it states: *The Superintendent may order an officer or other Bargaining Unit # 1 employee to submit to an HPFP, or phases thereof, at any time. These evaluations will be conducted at no cost to the employee."*

To this arbitrator, this also appears to be a non-issue. Trooper Holland was ordered to be weighed. He complied with the order each time it was given. The question that remains before the arbitrator is what impact does the collection of this further information have on the employee being ordered to undergo additional evaluations.

Management also asserts that the scale at the Academy is the "official" scale. This Arbitrator finds no evidence to support this view. It is understandable that Major Anderson may believe that his scale is more accurate or official than those at other locations, but the documents offer no such designation. Regular weighing takes place at the Post level. Policy 500.23 states on page 14 of 30:

"Once in the progressive discipline system, all retesting to determine level of compliance will be conducted at the Health and Fitness Center at the Academy with one exception.

Retesting to determine level of compliance within Phase One body composition (height/weight) will be at the district level until the

end of Level Three. At the end of Level Three, the officer will first be weighted at the district. If the officer has not reached his/her maximum allowable weight, he/she may be scheduled to be weighed and body fat measured at the Health and Fitness Center at the Academy. The officer will be removed from progressive discipline for any phase upon meeting the minimum standards for that phase."

There is no evidence that any scale has been designated as the "official" scale. Different locations have been designated for persons in the disciplinary track and all scales are inspected by the proper authorities. Therefore this arbitrator does not consider any particular scale to be more accurate than another.

Management is correct in noting that the language in the Contract is very brief. Like most major programs, other documents and policies must be promulgated to effect full implementation. Management has routinely done so by the issuance of *Inter-Office Communications* such as those provided by management. The Union has recognized the validity and application of these unilaterally developed documents.

In order to determine if Trooper Holland was in compliance with the HPTP program in relation to the State Fair overtime detail. The

statement on page two of the memo dated April 27 must be closely examined: *"In order to be eligible for the detail, all officers must meet all applicable HPFP standards. All officers must meet their height/weight standard at their May weigh-in period and each month weigh-in period thereafter until the Fair in order to qualify."*

The same document goes on to state: *"All first half units are to report on Thursday, August 5, 1999 at 8:00 A.M. for their briefing."*

Trooper Holland was in full compliance with this IOC. He met the weigh-in standards at each of the three necessary monthly weigh-ins as well as his August weigh-in. He reported at the required time.

Management issued a second memo on July 22, 1999. It states: *"All uniformed officers working the detail are to be reminded that Colonel Marshall will conduct an inspection prior to the briefings. Officers are to be prepared to stand the inspection in a cleanly pressed uniform, polished leather gear and meet divisional grooming standards."*

This arbitrator does not see how this memo changes the requirements of the April 27, 1999 memo. The July memo does put Troopers on notice that they are expected to meet uniform and grooming standards. While some testimony was offered regarding

the haircut of Trooper Holland, it does not seem to be an issue in this case. Major Anderson truthfully testified that he did not know what, if any, action the Colonel would have taken regarding the objectionable haircut. If there was an issue surrounding the haircut Trooper Holland could have been directed to have the hair trimmed. Further, Trooper Holland's haircut was observed and approved at the Post and by the Lieutenant sent to initiate the investigation on August 5.

Thus, the question in this arbitration rests solely on the height/weight issue.

Trooper Holland complied with all the stated expectations of management in that he met the required weigh-in for three months prior to the Fair detail and he was in compliance with the August weigh-in as evidenced by the fact he received the \$75 dollar stipend for August.

The additional weigh-in should have had no impact on Trooper Holland's right to work the available overtime.

AWARD:

For the reasons herein stated, the grievance is granted. Trooper Holland is to be paid fifty-two hours of overtime at the rate in effect during the period of August 5th. - August 14th. 1999.

It is so ordered at London, Ohio this 1st day of May 2001.

N. Eugene Brundige
Arbitrator

N. Eugene Brundige Arbitrator



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DAS/Division of Human Resources
Office of Collective Bargaining
106 N. High St., 7th floor
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Attn: Dispute Resolution Manager

BILLING DATE: 5/1/01
ACCOUNT ID: 100
PREVIOUS BALANCE:

ACCOUNT ACTIVITY

DATE	DESCRIPTION	TIME CHARGES	PAYMENTS
Mar. 23, 2001	Arbitration Hearing		\$700.00
April 13-May 1, 2001	Review of notes, tapes, briefs. Study and writing, time	two days	\$1,400.00
TOTALS:		\$0.00	\$2,100.00
PLEASE PAY THIS AMOUNT:			(\$2,100.00)

Thank you.

EACH PARTIES SHARE: \$1,050