

4/5/10

IN THE MATTER OF ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 1 and 15
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

Case No. 15-00-000202-0026-04-01 - et al,

UMPIRE'S DECISION AND AWARD

Appearances:

For the Employee Organization:

Herschel M. Sigall

Elaine Silveira

Robert Stitt

For the State of Ohio:

Renee Macy

Staff Lt. Kevin Teaford

Sandra Mendel Furman J.D.
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INTRODUCTION

This matter was heard before the undersigned on May 14, 2001 in Columbus, Ohio at the Office of Collective Bargaining. Ron Moening and Ed Richardson were present as union witnesses. Also present were Union President Robert Stitt and Attorney Elaine Silveira. General Counsel Sigall represented OSTA at the hearing. Sigall, Stitt, and Silveira presented closing arguments.

The State's witness was Major Corbin. Also present were Staff Lieutenant Kevin Teaford from central office of the Ohio State Highway Patrol (Patrol herein) and Bill Fodor from the Office of Collective Bargaining. Renee Macy represented the Patrol, and presented closing argument.

The collective bargaining agreement and the grievance trail were admitted as Joint Exhibits 1 and 2. Each side provided an additional exhibit in support of their respective position; these are referred to in the discussion below.

There were no procedural arguments presented. Each side was given the opportunity to call witnesses, cross-examine witnesses, and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were postmarked on May 31, 2001. The hearing was closed upon receipt of the closing arguments.

ISSUE:

The parties were unable to stipulate the issue. The Union frames the issue as: Was the representative of the Union wrongfully denied on duty contact with a grievant and a witness and denied contact on or off duty with a witness who was beyond the bargaining unit, in violation of Article 8.01 and 8.04 of the agreement? Is so, what shall the remedy be?

The Patrol asks the Umpire to decide: Pursuant to the Collective Bargaining Agreement, is the State obligated to pay for a separate union investigation or union witness preparation time?

APPLICABLE CONTRACT SECTIONS:

Article 8.01; 8.04; Article 20

STATEMENT OF FACTS:

There is no fact dispute. OSTA staff representative Ronald Moening, an employee of OSTA, was assigned in the normal course of his duties to investigate a grievance filed by Trooper Jack Holland. The Holland grievance had been through all steps of Article 20 *except* arbitration. Although the appeal to Step 4 had already been made, the Union follows an internal grievance review process before the case goes to its attorneys for case preparation. The review committee consists of the President, Executive Director, and the General Counsel. If the grievance passes the review committee, then case preparation by OSTA's attorneys begins. According to Moening, it was his intention to gather enough information from grievant and other witnesses in order to assist the review committee in its determination. He gave advance telephone notice of his intended visit to Holland's worksite at the Ashland post. At that time of the telephone contact, he was told he had to do interviewing on non Patrol time. When Moening arrived at the post on January 24, 2000, he was denied permission to interview Holland on Patrol time; he was also denied the right to orally interview Post Commander Wright. He was given direction by the Post Commander that he could submit written questions to central office, which would be reviewed and presented to exempt potential witnesses. Union Exhibit 1 is a copy of the notes made of the interview with Holland. According to the face of the grievance, this interview took thirty minutes. Since Moening was denied the right to interview on company time, thirty minutes pay at the overtime rate is sought on behalf of Holland. Moening was the first OSTA staff contact with Trooper Holland in the processing of his issue grievance.

OSTA staff representative Ed Richardson contacted the Lebanon post to give notice of an intended meeting with Sgt. Phillips regarding a disciplinary suspension grievance that had previously been filed. He advised that he would be at the post on January 25, 2000, at shift change and would not disturb business operations. Unlike Moening's experience, Richardson was not aware prior to his arrival at the post that he would be denied the opportunity to meet with grievant Phillips on Patrol time. On January 25, 2000, the occasion prompting the instant grievance, Sgt. Phillips was told by Staff Lt. Slater in a telephone conversation that a meeting with Richardson would have to

be on his own time. Richardson also intended to interview Staff Lt. Ed Ferris. Ferris was a management witness to the Phillips matter. Staff Lt. Ferris stated that it would be inappropriate for him to discuss the Phillips matter with him. The Union seeks two hours of compensatory time on Phillips' behalf, as the interview took place after Phillips' shift.

Richardson said his intention was to prepare a grievance investigation report for the review committee after his meeting with Phillips. He was the first OSTA staff contact with Phillips following the filing of his suspension grievance.

Richardson stated that in disciplinary cases, he usually has received a copy of management's administrative investigation (AI herein) report prior to his on site interviews with the grievant. He stated that the management personnel knew his role and status as a union representative, and that he had been to the Lebanon post at other times. In the past, Richardson had sought and received permission to meet with unit members in various offices at the Lebanon post. Lt. Borden granted permission on the earlier occasions.

The parties stipulated that if Staff Sgt. Linek were called to testify, he would state that management interviews witnesses and potential witnesses on Patrol time. Linek is assigned to the Human Resources division of the Patrol and serves as a management representative.

Major Richard Corbin testified for the Patrol. Corbin is the Commander for Human Resources. Corbin stated that if a Union grievance has been filed, reasonable access to the grievant has been allowed by management. Management likewise allows access to the Union in advance of a grievance being filed. Corbin stated that it was a cost saving measure for the State when the staff representatives to investigate grievances instead of steward employees. The State does not deny access to staff representatives on a blanket basis; they have been permitted to go to the posts to meet with their members.

Corbin distinguished this "reasonable access" from a scenario where the Union would seek Patrol time to conduct its own investigation of a *discipline* grievance: he stated this would not be permitted. Corbin carved out a distinction between what is permitted in an issue grievance in contrast to a discipline grievance. In an issue grievance, OSTA is allowed to meet with the grievant pre arbitration on company time at its discretion. The Patrol retains the right to set limits on this type of meeting. In

discipline cases, the union members would not be paid for any time spent by the staff representative in his investigation of the facts and circumstances of the grievance. He also stated that the Union had no right to prepare its grievant or any witnesses for arbitration on Patrol time.

The State has not permitted and will not permit the Union to interview exempt witnesses on Patrol time. If such interviews have happened in the past, it was not with the blessing of the State. Corbin noted that the Union does not have to tell the Employer why it seeks access. He opined that an exempt witness could refuse to talk to an OSTA representative on its own time. The Patrol will not pay for OSTA to conduct its own AI, and he referred to Article 18.

7.04
20.00

Corbin identified Patrol exhibit 1; it is a Union bargaining proposal from the most recent contract negotiations between the parties for new language in Article 20. The language changes sought by OSTA in regard to paid time to prepare for arbitration were not accepted by management at the table. The Union withdrew the relevant (from management's perspective) part of the Article 20 language prior to fact finding.

Union Arguments

The Union states that it has the clear contractual right to investigate grievances on company time. It maintains that this right is not limited to interviews with the grievant and unit member witnesses, but also includes management witnesses who are aware of the facts and circumstances involved. The Union argues that the contract makes no distinction between its rights to administer the contract in an issue or a discipline grievance. It contends that it must be able to interview witnesses on company time to "level the playing field". It asserts that the grievance/arbitration procedure is the core of the contract, and that union efforts in support of the grievance/arbitration procedure are squarely in the ambit of Article 8.04. The Union acknowledges that its contacts for grievance discussions may not impede operations.

Patrol Arguments

The Patrol points out that the Union has the burden of proof. It argues that there is no contractual basis for the Union's claim that it may prepare witnesses-whether union or management- on company time; that there is no past practice supporting such a claim; and that the Union has no contractual right to conduct a separate investigation of a

grievance on Patrol time. The Patrol argues that the Union cannot get through arbitration what it failed to get at the bargaining table- paid time for its own interview of persons involved in an AI. A proposal for the Grievant to receive two hours paid time to help prepare for arbitration was likewise not approved at the table, further supporting the State's request that the grievance be denied.

DISCUSSION

The Umpire is limited by the language of Article 20 in her decision. She is admonished that she will "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 this Agreement." In deciding an issue grievance, the umpire is limited by the language in Article 20.08, section 8, as follows:

Prior to the start of arbitration under this Article, the Employer and the Union shall reduce to writing, the issue or issues to be placed before the umpire. In cases where such a statement of the question is submitted, the umpire's decision shall address itself solely to the issue or issues presented and shall not impose upon either party any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues. More than one issue may be submitted at the same time to arbitration, particularly if they are related to each other, by mutual agreement.

In this case the parties submitted separate statements of the issue. Each party's statement will be addressed below.

In response to the Union's statement of the issue, with respect to the particulars of Moening's contact of grievant Holland, the Umpire finds that Moening did not have an express contractual right to meet with him on company time. Moening intended to check with grievant Holland as to his version of events surrounding his grievance. The Holland interview was a part of the materials Moening needed to gather for OSTA's internal grievance review process.¹

Richardson's attempted company time contact with Phillips occurred after Phillips' case had been processed through the pre arbitration steps of the grievance procedure. As in the Holland matter, there was an internal review process to be

¹ According to union witnesses, arbitration preparation is done only *after* an internal union committee approves a case for arbitration, and is done only by the staff attorneys.

performed prior to case preparation by the staff attorneys. It is assumed that Richardson made some notes of his meeting with Phillips, and these notes and observations formed part of the Union's decision-making process in approving the case for arbitration. It is also likely that Richardson's input assisted the attorney in preparing the case. Although these steps by the Union are appropriate, it is the conclusion of this Umpire that the Patrol was not obligated to permit Richardson's post step three meeting with Phillips to occur on Patrol time.

The facts in this case show Moerning sought a thirty-minute contact with grievant Holland. On its face, this amount of time does not appear burdensome; there was no evidence presented by the Patrol that the denial of contact was based on a management exigency. The contact sought by Richardson –two hours- is on the high side of his own estimates of time needed to meet with a grievant or witnesses. There, too, contact was not denied based upon management operational needs. It appears that both staff representatives had been able to meet with members in the past, with no strictures. The record is *not* clear as to what the staff representative said prefatory to his contacts and meetings; the evidence presented at the hearing did not establish by a preponderance of evidence that a past practice existed that permitted post step three interviews by staff representatives.² Regardless of the Umpire's thoughts that there might have been minimal disruption if the meetings had taken place, that does not elevate into a holding that there is contractual support for this right.

Although the Umpire finds a lack of contractual support for paid time for the staff contacts with the employees *in these particular circumstances*, the Umpire emphasizes that the Union is not bound by the facts and conclusions set forth in the employer's AI when it is making its decision to proceed to arbitration. Therefore, it is essential that it be allowed reasonable access to its grievant **and** relevant witnesses up to the point that its contacts do not adversely interfere with operations. That access is secured by contract

² The evidence was equivocal that an express understanding existed between the parties as to union paid release time for processing a case that had been past step three of the grievance procedure. Management witness Corbin gave conflicting testimony as to the practice of the parties. He stated both a desire to have the Union process its cases in an unimpeded manner, but also stated that no arbitration case preparation had been knowingly permitted on company time. In the absence of proof that the State consistently allowed the Union staff representative to meet with its grievant and witnesses on company time under the same circumstances as were extent on January 24-25, 2000, the past practice argument fails.

sections 20.02; 20.07, 20.10, and 20.11. (Specific representational rights also exist as set forth in Articles 18 and 19.)

The next question submitted by the Union is whether it was wrongfully denied contact with an exempt employee witness either on the Patrol's clock or off? The Umpire concludes that the Union has no contractual right to interview exempt witnesses on the Patrol's clock. The Union has its statutory and contractual rights to all discoverable and relevant information provided by those exempt witnesses, and the scope of that right is beyond this decision. The Umpire finds no contractual limits on the Union's right to contact exempt witnesses off the clock. This does not solve any practical questions as to the manner of contact, the degree of cooperation required by the witnesses, or the like. The answer to those questions is clearly beyond the scope of the submission.

The Umpire does not condone or endorse a management request that the Union submit its proposed questions to exempt employees in writing to the central office. If a witness is useful or has first hand knowledge to the Union's case- be it issue or discipline- then the Patrol ought not to be restricting union access to that information. The language in Article 20.07 supports that principle.

The clear contractual right of the Union to administer its contract in Article 8.04 does not serve as the basis for untrammelled interviewing. It is possible that the Union can secure an interview, informal or formal, with an exempt employee if the employee so consents. But this Umpire does not believe that the Union bargained for and received the right to interview each and every exempt witness, regardless of whether the case is an issue case or a discipline case. It may have to make do in certain cases with summaries of proposed testimony, third step answers, AI documents, or the like.

The Umpire looked within the four corners of the contract for a definition of the phrase "purposes of administering this Agreement" but found none. The Umpire agrees with the Union that the Union is not limited to contact with its members solely to "explain union membership, services, or programs". The right the Union has to access its grievant(s) and necessary witnesses before it begins arbitration case preparation is necessary and appropriate as part of its statutory and contractual duties. The parameters of the right to investigate and prepare grievances through the step three appeal are wide.

But this right is circumscribed by the fact that the provision of services by the Patrol is paramount.

The Union argues that without the right to contact witnesses on Patrol time, the “playing field” is unequal and the Patrol thus exercises unfair advantage. That may be either true in a particular case or merely perception. It is true that management exercises its prerogative to interview any and all witnesses on Patrol time, and the Union lacks that access. That facial inequality is counterbalanced in Article 8, where the Union bargained for and received company time to administer its contract, and in Article 20. It bargained for and received the right to have the Patrol pay for time under 8.01; 8.02, and 8.03. It has release time and rights under Article 20, as well. But the meetings sought on January 24 and 25, 2000 were after step two hearings had been held and after the step 4 appeal had been filed. An express contractual right to paid time to further investigate either the Holland or Phillips grievance on company time is absent in the sections cited by the Union.

A similar result obtained in the case American President Lines (1997) 109 LA 793 at pp 795 –796 wherein it states:

If the company is to be required to pay union stewards for time spent in preparation for arbitration, the collective bargaining agreement must either expressly or impliedly says so, or, alternatively, there must be an enforceable past practice. There is no express language whatever granting either time or pay for the investigation and processing of arbitrations by stewards. **...In addition payment of stewards for time spent processing an arbitration is so antithetical to Company interests that mutual agreement should not be implied in the absence of strong evidence. It runs counter to common sense. Few employers would be willing to actually pay union members to take time away from their assigned duties in order to overturn the Employer’s decision in a quasi-judicial process such as arbitration.** (emphasis added)

In the federal sector, Arbitrator Rothman stated in Social Security Administration (1979) 73 LA 789 at pp 796-7:

...relinquishment of official time should be expressed in clear and unmistakable terms. In case of doubt or ambiguity, in the contract language used, the doubt or ambiguity should...militate against the interests and the side claiming that the government as the employing agency has waived the requirement that the employee perform his normal duties. It can be done, but the contract language should be clear and convincing. (emphasis added)

This Umpire similarly concludes that this Employer did not intend to grant OSTA paid time to further investigate its grievances at this step of the process. The Union withdrew a bargaining proposal that would have granted paid time to a grievant to prepare for arbitration. It made no such proposal regarding witnesses. The Umpire finds this undisputed fact to be telling, and the instant grievance arose pre bargaining for the current contract. *

Therefore, this Arbitrator concludes that the reach of Article 8.04 does not include OSTA's right to interview grievant(s) or witnesses- bargaining unit or exempt-in case preparation for arbitration cases on company time. It is stressed and emphasized, however, that there are *very* broad parameters on the Union's right to gather information preparatory to filing and processing a grievance. The limitation is the contact may not unreasonably interfere with the operations or the duties of the employer and that contact occurs only after permission has been sought from the appropriate management personnel. "It is essential that union representatives be given (an) opportunity as management is, to examine all circumstances surrounding grievances." Elkouri and Elkouri, How Arbitration Works 5th ed. (1979) p. 261. "Each party ordinarily should be free to interview any person who may have information relevant to a given grievance, provided the person voluntarily cooperates in the interview and the information sought is germane and appropriate to the proper presentation of an employee's case." Elkouri, *ibid.* p. 429. The Umpire finds that this is the intent of the parties' contract in Article 8 and Article 20, subject to the limits on notice and reasonableness. But having so stated, this does not mean that the State must pay for these interviews once the grievance has progressed to Step Four of the grievance procedure. >

The first part of the Patrol's statement of the issue is whether the State is required to pay for a separate union investigation. The Union has no contractual right to conduct an AI as defined by Article 18. (Union representation is available to a member during an AI-see Article 18.02.) To the extent that the Union intends to mimic or parallel an AI, it will not be able to do so on Patrol time. It can certainly investigate grievances or police the agreement, subject to the contractual limits described above.³

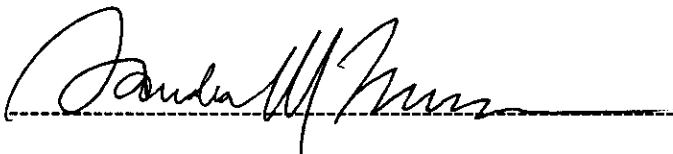
³ The Patrol suggested at the hearing and in its closing arguments that its AI in discipline cases would negate the need for the OSTA staff representative to interview a grievant or other potential witnesses. The

In response to the State's second question included in its statement of the issue, the Umpire has opined above that the Patrol has no contractual duty to pay for union witness preparation time *if* the preparation is for the arbitration case.

Article 8.04 and Article 20.07 may be construed together. This means that both grievants and witnesses may be interviewed prior to a Step Two hearing by either the OSTA representative or the steward.⁴ Such witnesses and grievant(s) may also be contacted by a staff representative in order to determine who may be necessary for the arbitration case; what a witness might say; and make an assessment as to the quality of the possible testimony. This contact is contemplated by the contract to occur prior to and during grievance meetings. Significantly, this right also benefits the Patrol, as the Union can and does withdraw grievances from arbitration after the staff representative is involved.

AWARD

The grievance is sustained in part and denied in part. The Union may interview and prepare its grievants and unit member witnesses for and through Step Two of the grievance procedure on company time, following the guidelines of Article 8.04 and Article 20. This right applies in either a discipline or an issue case. There is no contractual requirement that exempt witnesses must be made available for interview, either on or off company time. There is no monetary award.

A handwritten signature in cursive script, appearing to read "Sandra Mendel Furman", written over a horizontal dashed line.

Sandra Mendel Furman, Arbitrator

Issued in Columbus, Ohio on June 22, 2001

Umpire disagrees. The Union has the right to have its own representatives speak to the grievant and appropriate members of the bargaining unit, to obtain his/her version of salient facts and events. The rub is when and where and who pays.

⁴ A grievant and steward are paid for attendance at scheduled meetings under the grievance procedure. The contract prohibits overtime payment to the Grievant and steward while engaging in grievance activities. Clearly, this language cannot be ignored by the Umpire. It further buttresses her conclusion that the contract does not require nor permit pay to Holland or Phillips under the circumstances herein.