THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE STATE HIGHWAY PATROL AND THE OHIO STATE TROOPERS ASSOCIATION VOLUNTARY LABOR ARBITRATION PROCEEDING #1512

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

-AND-

THE OHIO STATE TROOPERS ASSOCIATION

GRIEVANT: LARRY K. PHILLIPS
GRIEVANCE NO.: 15-00-000118-0010-04-01

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: JULY 5, 2001

APPEARANCES

For the Union

Larry K. Phillips	Grievant
Wayne McGlone	Staff Representative
Elaine Silviera	Legal Counsel
Robert K. Still	President
Herschel M. Sigall	General Counsel and Advocate

For the Employer

Robert J. Young	Captain
Bradley A. Perry	Sergeant
Daniel W. Gibson	Staff Lieutenant
Neni M. Valentine	Office of Collective Bargaining
Charles Linek	Sergeant and Advocate

INTRODUCTION

This is a proceeding under Article 20 – Grievance Procedure, Section 20.07 – Grievance Procedure of the Agreement between the Ohio Department of Public Safety, Division of the State Highway Patrol (hereinafter referred to as the "Employer") and the

Ohio State Troopers Association (hereinafter referred to as the "Union"). The parties had selected Dr. David M. Pincus as the Arbitrator.

An arbitration hearing was held on April 24, 2001, at the Office of Collective Bargaining, Columbus, Ohio. At the hearing, the parties were allowed to present and introduce documents, testimony and evidence. They were, moreover, allowed to examine and cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they wished to provide post-hearing briefs. Both parties supplied briefs in accordance with guidelines established at the hearing.

PERTINENT CONTRACT PROVISIONS

ARTICLE 27 – OVERTIME

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27.03 Overtime Assignments

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Good faith attempts will be made to equalize overtime opportunities at any one installation.

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ARTICLE 20 – GRIEVANCE PROCEDURE

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20.07 Grievance Procedure

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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 reasonably should have had knowledge of the event giving rise to the grievance.

Grievances submitted beyond the fourteen (14) time limit will not be honored...

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(Joint Exhibit 1, Pg. 33)

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20.08 Arbitration

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8. Issues
Prior to the start of an arbitration under this Article, the Employer and the Union shall attempt to reduce to writing the issue or issues to be placed before the umpire. In uses 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 obligating 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.

(Joint Exhibit 1, Pg. 38)

STIPULATED ISSUE

Did the Employer violate Section 27.03 of the labor agreement by posting overtime opportunities at the Jackson Patrol Post and not at the salvage facility? If so, what shall the remedy be?

CASE HISTORY

Larry K. Phillips, the Grievant, has been a Trooper for approximately twenty years. For the past three and a half years, he has been assigned to the "CDL" facility as a Blue Title Inspector. In this capacity, the Grievant issues salvage titles after performing required inspections. These inspections are scheduled by appointment, which limit overtime opportunities.

The Grievant is the only uniformed officer at the "CDL" facility. The facility also houses the District 9 Plain Clothes Investigation Unit, and several civilian employees performing motor vehicle inspections.

The location of various facilities is critical to the disputed matter. District 9 Headquarters also houses the Jackson Patrol Post, with the Post at one end of the structure and District 9 Headquarters at the other end. The CDL facility, however, has a separate and distinct location. It is not part of the previously described building. Rather, it is located approximately seven miles away from District 9 Headquarters.

The record reflects that the Grievant is carried on the District 9 employee roster. For the purpose of overtime equalization, however, the Grievant is carried on the Jackson Patrol Post employee roster. It should be noted the Grievant reports to the CDL facility at the beginning of each shift. He is not required to report to District 9 Headquarters. In fact, his only regular contact with the Post or Headquarters comes about when he fills his cruiser with gasoline.

During mid-1999, the Grievant became aware that a Trooper temporarily assigned to the CDL facility was working a great deal of "desk" overtime. The Grievant allegedly wished to file a grievance, but was advised to wait until overtime was equalized at the end of the calendar year.

The overtime was not equalized in accordance with the Grievant's expectations. As such, a formal grievance was filed on January 6, 2000. The Grievance Facts section contains the following relevant particulars:

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> Myself and Tpr. L.E. Burnem, Unit 572, are both assigned to the D-9 District Headquarters, which is located in the same building as the Jackson Post. Tpr. Burnem is assigned as an MY2 Trooper out of this building. I am assigned as a Blue Title Inspector out of a separate building approximately 5-10 miles east of DH9. The calendar year of 1999 Tpr. Burnem was offered and worked 180½ hours of desk overtime. I was offered 0. In addition, I was only offered Federal Overtime on the 4th of July holiday and not Memorial Day or Labor Day. The overtime sign-up

sheet was faxed to our building for the 4th of July. Tpr. Burnem's seniority date is 11/6/92. Trp. L.K. Phillips seniority date is 2/25/81.

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(Joint Exhibit 2)

The parties were unable to resolve the disputed matter during subsequent stages of the grievance procedure. A procedural arbitrability claim raised by the Employer in its brief will be dealt with in the following section of this Opinion and Award.

THE ARBITRABILITY ISSUE

The Employer's Position

The Employer opined that the grievance is defective since it was formalized and submitted beyond the fourteen (14) day proviso contained in Section 20.07 – Step 1. The Grievant waited too long by filing the grievance on January 6, 2000. He should have filed the dispute within fourteen (14) days of his conversation with Trooper Burnem. Anything pertaining to matters prior to December 23, 1999 are outside the scope of the grievance. This time period serves as the appropriate threshold date for evaluation and remedy purposes.

The Union's Position

The Union never addressed the arbitrability issue, but rather, it dealt with a related matter when discussing potential remedies. The Union emphasized that overtime opportunities are equalized at the end of the calendar year. As such, the Employer's determination, during this time period, caused the disputed filing. Any attempted previous filing would not have been ripe for adjudication.

THE ARBITRATOR'S OPINION AND AWARD REGARDING ARBITRABILITY

From the evidence and testimony introduced at the hearing, including pertinent contract provisions, it is this Arbitrator's opinion that the matter is arbitrable. This finding in no way serves as a precursor on the merits of the dispute or any potential remedy. The Employer failed to supply: the proper level of proof, properly raise the arbitrability dispute and violated an agreed to contractually specified provision.

Section 20.08 – Arbitration, 8. Issues provides for joint submission of "issue or issues to be placed before the umpire." When such a submission exists, this provision limits the Arbitrator's decision "to the issue or issues presented."

Here, the parties provided a stipulated issue dealing with an interpretation dealing with Section 27.03. The Statement of the Issue did not specify any jointly submitted issue regarding procedural arbitrability. On a contractual basis, the Employer violated Section 20.08 when it raised and articulated an arbitrability concern for the first time in its brief.

Nor did the Employer attempt to independently articulate the arbitrability issue at the arbitration hearing. The Employer's brief contained a procedural argument, as did the Step 2 response. These features of the case are not viewed as formal parts of the record, but mere argument. The Employer did not properly submit proofs in support of its allegations. In the past, this necessary standard has been met as a consequence of mutual agreement. The parties have provided a narrative accompanied by other facets of the record. But, on those occasions, the parties advised the Arbitrator that the matter was ripe. There was no surprise and the parties were well prepared.

Here, the Union was totally unaware of the Employer's intentions. The Union's brief does not even address the procedural arbitrability claim. It merely tangentially addresses the matter when discussing remedy outcomes.

The described circumstances are perilous if allowed to continue. Such a strategy, whether intentional or not, places the Union at a tremendous disadvantage. A proper defense becomes virtually impossible when "surprises" such as this arise.

THE ARBITRABILITY AWARD

The grievance is arbitrable. The grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Union's Position

It is the Union's position that the Employer violated Section 27.03, as well as policies dealing with overtime notification and equalization. By failing to comply with articulated policies, the Employer failed to engage in "good faith" attempts to equalize overtime opportunities.

Policy 500.20.01 (A) (3) defines opportunity for working voluntary overtime, and the method used for equalizing voluntary overtime. Voluntary overtime is to "be equalized based on opportunity, not number of hours worked." Here, for a number of reasons, the Grievant was never advised that overtime was available, causing numerous missed opportunities to work voluntary overtime.

The Employer violated several notice related policies. Policy 500.20.01 (B) requires overtime rosters to be posted "at each facility." The record clearly indicates the CDL facility is viewed as a separate and distinct facility, and not a formal portion of the District 9 Headquarters structure. A roster, therefore, should have been posted in

accordance with Policy 500.20.01 (B) (1). This requirement should have been complied with even though voluntary overtime is distributed and equalized in accordance with the Jackson Post's roster. The posting of a separate and distinct roster has never been in dispute.

The discussed notice defect is further underscored by a special provision contained in Policy 29C, which deals with Scheduled Overtime Opportunity Sign-Up Sheet. Policy 29C, Section V – Special Provisions discusses the intent of the overtime sign-up sheet. It states:

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> The intent of this form is to provide notification to employees of overtime/ extra duty work opportunities and to provide management with an effective method of determining those employees who are interested in working. Open communications will assist in meeting these goals.

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Clearly, in 1999, by failing to properly post the sign-up sheet, the Employer neglected its notification responsibilities, which violated its open communication goal.

The Grievant's actions underscore his willingness to work overtime. Once the Employer began to send overtime-related teletypes to the CDL facility in 2000, the Grievant worked sixty-six hours of desk overtime.

Even though he became aware of overtime opportunities during mid-1999, he did not intentionally avoid placing the Employer on notice regarding the improprieties. He knew all voluntary overtime was equalized at the end of the year, and hoped the matter would then be resolved.

The above-mentioned defects caused a remedy request of 180.5 hours of the desk overtime worked by Trooper Burnem during 1999. Federal overtime in the amount

of 24 hours was also requested, which represents the hours not offered over the Memorial Day and Labor Day holidays. In the alternative, the Grievant requested 66 hours of overtime. This amount represents the amount of overtime worked by the Grievant in 2000, once he was notified about available overtime opportunities.

The Employer's Position

The Employer opined it did not violate Section 27.03. This provision requires good faith equalization attempts at any one installation. Here, the installation in question is the Jackson Post where voluntary overtime is posted, made available and equalized.

Policy HP-29C discusses the Employer's posting obligations. It states in pertinent part:

> The form will be placed in Read and Sign, or posted at some other previously indicated location so that all affected employees should be aware of notification.

Here, the previously indicated location for desk overtime is the dispatch area of the Jackson Post, while federal overtime is posted in the Troopers' room at the Jackson Post. Nothing in the Agreement (Joint Exhibit 1) nor the referenced policies place an obligation on the Employer to post voluntary overtime opportunities at the CDL facility.

The Grievant, not the Employer, failed to comply with well-known policies. Policy 500.20.01 (E) states:

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> The responsibility for communicating a desire to work overtime rests with the Employee.

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The Grievant acknowledged that he read and understood the policy. And yet, with apparent ample opportunity to raise certain questions regarding his overtime opportunities, he failed to seek any clarification of the situation. Trooper Burnem placed him on notice during mid 1999, yet he failed to act. He never asked nor approached his Sergeants, regarding the same possibilities. When periodically fueling his patrol vehicle, he never stopped by the Post to determine his overtime status.

Other reasonable inferences can be drawn regarding notice of overtime availability. The Grievant knew where the overtime was posted. He was assigned and worked out of the Jackson Post for the period 1995-1997. The postings in question were posted in the same location during 1999. Also, a twenty-year veteran of the Patrol should be clearly aware that federal overtime opportunities are offered for the three summer opportunities.

Even if the Grievant's unit number was not listed on the HP-29C, he was still eligible. He merely had to write his unit number and indicate he wanted to work. Failure to designate unit numbers did not violate this particular policy. It is the employees' responsibility, under Caption E to sign up if he/she desires to work overtime, while it is the Employer's responsibility, under Section II, to complete captions A through D.

The proposed argument concerning unit listing seems misplaced in this instance. The Grievant, himself, said it really did not matter whether his name was not on every posting. He never stopped to look at them. His compliance with the Health and Physical Fitness Program caused continuous opportunity to work overtime. The Grievant merely failed to effectuate those opportunities that became available.

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 and relevant policies, it is this Arbitrator's opinion that Section 27.03, and relevant policies were not violated. The record clearly supports the view the Grievant knew or should have known where the overtime postings were located. His failure to acknowledge or designate his willingness to work overtime caused the missed opportunities. The Employer's actions in no way violated the previously mentioned provision, nor any other rights accorded in relevant policies, including the overtime equalization policy. This ruling applies equally to the voluntary overtime and the federal overtime matters in dispute.

The posting of the HP-29C sign-up sheets at the Jackson Post comport with Section 27.03 and HP-29C, Section II. Section 27.03 refers to "one installation" while HP-29C, Section II notes the form will be "posted at some other previously indicated location so that all affected employees should be aware of the notification." These provisions provide the Employer a great deal of latitude in terms of where it posts overtime rosters; especially if the record supports expressed or implied notice regarding a "previously indicated location." Here, the "previously indicated location" is the Jackson Post. Nothing in the record indicates that the parties intended any other interpretation of the "one installation" phrase.

The record does, however, establish that the location presently in use at the Jackson Post has been the same over a considerable period of time. As such, it has become the "other previously indicated location" designated by the Employer, and recognized as such by all affected bargaining unit members, but the Grievant. Other

similarly configured situations, that is, those where a post is connected to a district headquarters with an outlier CDL facility, post overtime opportunities at the relevant post. The Union was unable to recant testimony regarding this matter. This procedure, moreover, makes sense since individuals similarly situated to the Grievant are carried on the posts' rosters for the purpose of equalizing overtime.

The Grievant's history regarding his previous overtime record does not raise any sufficient suspicion. His assignment at the Jackson Post prior to his assignment to the CDL facility is, however, telling whether he took advantage of overtime opportunities during this time frame is not relevant, but I find it hard to believe he was unaware of the procedure nor responsibilities placed on bargaining unit members. Trooper Burnem was identically situated to the Grievant and took ample advantage of available overtime opportunities even though he was housed at the CDL facility. The Arbitrator can only conclude the Grievant, during the time in question, did not desire to work the available overtime. As such, there was no need to exercise any equalization protocol. The voluntary overtime was available, he was eligible to work voluntary overtime, and had an opportunity to indicate his desired preference. His failure to make an indication of interest in working overtime was properly considered as declining the available overtime for the purpose of equalizing overtime.

Policy 500.20.01 (E) deals with notification of availability to work overtime. It states:

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> ...the responsibility for communicating a desire to work overtime rests with the employee.

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At the hearing, the Grievant acknowledged that he read and initialed the policy. If any ambiguity existed, he was placed on notice he was responsible for communicating any interest. The Grievant never engaged in any action that indicated a desire to take advantage of available overtime opportunities.

The Grievant's refusal to indicate an interest renders the listing claim as immaterial to the present determination. It becomes difficult to offer this defect as a plausible argument when the Grievant failed to indicate an interest, and failed to question his alleged situation with any superiors. His listing on the roster might have proved to be an important consideration if somehow he wished to indicate a preference to work overtime, and his rights had somehow been denied.

As previously noted, the previous findings dealing with the voluntary overtime and related equalization issue also apply to the federal overtime dispute. As such, there is no need to analyze that portion of the dispute.

AWARD

The grievance is denied.

7/5/01

Moreland Hills, Ohio

Dr. David M. Pincus
Arbitrator