

# **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# 15-00-000118-0011-07-15  
(Sergeant John Thompson)**

## **APPEARANCES:**

### **FOR THE STATE:**

**Charles J. Linek, Advocate  
Robert J. Young, Human Resources  
Neni Valentine, OCB Representative**

### **FOR THE UNION:**

**Herschel M. Sigall, General Counsel  
Elaine N. Silveira,  
John L. Thompson, Grievant  
Robert K Stitt, President**

An arbitration hearing was conducted June 19 , 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 27.03 of the labor agreement? If so, what shall the remedy be?”**

Section 27.03 states:

#### **27.03 Overtime Assignments**

It is understood and agreed that determining the need for overtime, scheduling overtime, and requiring overtime are solely the rights of the Employer.

The Employer will not change a members schedule or scheduled shift starting time to avoid the payment of overtime without the members's consent. Mandatory overtime assigned by the Employer shall be assigned to the most junior employee at the facility. In the event of multiple overtime assignments, reverse seniority shall be used.

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

In addition the parties jointly provided the arbitrator with the documents comprising the grievance trail. It was noted the arbitrator has a copy of the appropriate Collective Bargaining Agreement

Testimony was offered by two witnesses. In addition management provided one document: 1. A copy of a grievance filed by Virgil J. Wright Jr., dated 1-2-97. The union offered three documents: 1. An Inter-Office Communication dated September 14, 1998 from Major M.R. Everhart, 2. A Voluntary Overtime Roster Worksheet dated 1999, and 3. A Voluntary Overtime Roster Worksheet dated 2000.

Management objected to the admission of the 2000 Roster. The document was received for informational purposes without ruling on the relevance of it to the instant proceeding.

Both parties were given full opportunity to examine and cross-examine witnesses, pose arguments and present their respective cases. The competing opinions and arguments were well articulated

and fully explored. Closing briefs were received within the time period agreed to by the parties.

All testimony and materials were reviewed and considered by the arbitrator in reaching this decision.

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 union explained how overtime arose for members of the bargaining unit. It was noted that overtime arises when a bargaining unit member must continue an assignment or task or when the member must attend court. These types of overtime are not at issue in this case.

Likewise bargaining unit members work special duty. These assignments are also not at issue.

The types of overtime that are involved include desk overtime, alcohol overtime and speed overtime. Prior to 1998 both Sergeants and Troopers would "sit desk" or fill in on an overtime basis when a dispatcher was not available.

In early 1998 management declined to allow sergeants to work desk overtime anymore. Sergeant Virgil Wright filed a grievance. The grievance was settled between the Union and Management. The settlement states in pertinent part: *"There will be one overtime roster at each patrol post. Scheduled desk overtime will be counted as opportunities for troopers. Sergeants will not be permitted to work scheduled desk overtime, however they will be eligible for other scheduled overtime opportunities."*

After the settlement of the Wright grievance a memorandum was issued to all commanders by Major M. R. Everhart establishing a single roster at each post for tracking overtime.

The union called the grievant who explained the three types of overtime that were available to sergeants prior to 1998. The grievant stated his understanding of the settlement of the Wright grievance. Sergeant Thompson believed that the employer wanted to prohibit sergeants from working desk overtime because it was more expensive to pay sergeants than it would be to pay troopers. The grievant also believed that the employer would use alcohol and speed overtime to "make up" any lost desk overtime opportunities for sergeants.

Sergeant Thompson explained that he did not file a grievance in 1998 because of the statement in the memo that the employer would not be "catching up" overtime in 1998. His grievance is based upon a review of the entire year of 1999.

Grievant Thompson stated that he had been offered twenty two overtime opportunities and a similarly situated trooper was offered twenty eight overtime opportunities. Thompson did raise the issue with his commander within the calendar year but waited to file this grievance after the year was concluded.

On cross examination Sergeant Thompson testified that he was a member of bargaining unit 15, that he was equalized among the sergeants at the Bucyrus post and that he declined fourteen of the twenty two opportunities he was offered.

The grievant noted that extra duty overtime is kept in one book and is equalized between sergeants and troopers.

**Employer's Position:**

The employer raised a procedural objection stating that the union was attempting to grieve a situation that lay outside the bargaining unit.

Management contends that a duty to equalize overtime cannot exist across bargaining units.

Management called Captain Young who testified regarding the Sergeant Wright grievance. He stated that this grievance was much the same as the one filed by Sergeant Thompson.

Captain Young testified that the settlement agreement did not accord additional enforcement overtime to Sergeants. It is the opinion of Captain Young that the single roster has no impact on the number of opportunities being offered to sergeants.

He explained that each opportunity could vary greatly in the number of hours actually worked.

On cross-examination Captain Young testified that prior to 1998 Sergeants who were offered desk overtime were charged whether they worked or declined the opportunity.

The employer reminds the arbitrator of the limitations placed on the arbitrator in Article 20.08 (5): *"Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration."*

*The umpire shall 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.”*

### **DISCUSSION:**

Let me turn first to the procedural objection offered by management. There is no way to deal with this procedural objection without consideration of the merits. When there is a disagreement raised regarding a contractual provision or a settlement agreement, the proper way to resolved it is through the grievance procedure. Arbitrators tend to be very liberal in permitting grievances to progress that are marginally covered by the Collective Bargaining Agreement. The proper way to resolved this matter is a decision on the merits rather than a strictly interpreted procedural review.

The noted authority *How Arbitration Works,*<sup>1</sup> states at page 308:

“Several arbitrators have emphasized that when parties go to an arbitrator on the question of substantive arbitrability, the arbitrator (1) should exercise individual judgment on the question, (2) should not be restricted to the criteria established for the courts by the



*Trilogy*, and (3) should not decide the issue slavishly on the basis of how a court might decide it. Some other arbitrators, in holding that doubts concerning arbitrability should be resolved in the affirmative, appear to have their eye on the basic *Trilogy* standard of presumptive arbitrability.

**The procedural objection is over-ruled.**

The positions of the parties are easy to understand in this matter. For financial reasons the employer decided to change the way it had awarded desk overtime. It was more cost effective to have Troopers do the desk overtime than to have Sergeants do the same work.

The failure of the employer to award desk overtime led to the grievance filed by Sergeant Wright.

The parties came together in good faith to resolve the matter and a written settlement agreement resulted. The grievant believed that the act of creating a single roster was a commitment to “make up” any lost overtime by offering Sergeants a larger share of the AOT and the SOT or what we will refer to as enforcement overtime.

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<sup>1</sup> Elkouri & Elkouri, *HOW ARBITRATION WORKS*, fifth edition, Voltz, Marlin M. and Goggin, Edward P., ABA Section of Labor and Employment Law, The Bureau of National Affairs, Inc. Washington, D.C.

Certainly the Inter Office Communication distributed by Major Everhart could be construed to permit equalizing between Troopers and Sergeants. The next to the last line which states: "*We will not be 'catching up' employees as far as opportunities go*" is confusing at best.

Management understood the settlement a different way. The act of creating a single roster was an administrative convenience and had no greater meaning. Likewise the acknowledgment in the settlement agreement that desk overtime was work for Troopers precluded any responsibility to equalize beyond equalization between Sergeants.

As an arbitrator I must look at the documents and determine what is written. I do not have the ability to determine what the parties meant by their written words unless there is bi-lateral agreement regarding that intent.

One cannot determine if the language in Article 27.03 has been violated without turning to the Settlement Agreement.

Captain Young is the only person offering testimony regarding the agreement therefore I must depend heavily on his memory of its origin. In essence he testified that the Settlement Agreement is clear

as written. I would gather from his unrefuted testimony that there were no side agreements regarding giving sergeants more overtime of a different type to “catch up” for what they would lose by no longer working desk overtime.

If I read the plain wording of the Collective Bargaining Agreement and the Settlement Agreement, I must conclude that in the execution of the Settlement Agreement, any question as to whether desk overtime was bargaining unit work for sergeants was resolved with the execution of that agreement. Desk overtime now belongs specifically to Dispatchers and, in their absence to Troopers.

Likewise, enforcement overtime (AOT and SOT) belongs to Troopers and Sergeants. To limit the amount of enforcement overtime offered to Troopers in order to divert more to Sergeants would appear to be unfair to Troopers.

There is no provision in the Collective Bargaining Agreement that requires equalization across bargaining units and there is nothing in the settlement agreement which modifies the language of the agreement.

**AWARD:**

The procedural objection regarding arbitrability is denied.

For the reasons herein stated, the grievance is denied.

It is so ordered at London, Ohio this 25<sup>th</sup> day of July 2001.

  
Umpire