

#1569 — *1* —
OCB
4-0991
ATTN: BAKER

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# 15-00-000224-0103-07-15
(John W. Mattox)**

Case submission limited to exhibits and briefs

FOR THE STATE:

Lt. Reginald Lumpkin, Advocate

FOR THE UNION:

Elaine N. Silveira, Assoc. Counsel

This matter was presented to the Arbitrator by briefs only, in lieu of a hearing. The briefs were submitted by the mutually agreed deadline..

The issue agreed to by the parties was:

"Did the Employer violate the Collective Bargaining Agreement by denying the Grievant's request for vacation leave on September 2, 3, and 4, 2000 and December 31, 2000? If so what shall the remedy be?"

The relevant section of the Collective Bargaining Agreement is 43.04

43.04 Vacation Leave:

Vacation 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) Subject to the above limitations, 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 vacation leave based upon seniority."

The parties mutually submitted eight documents along with individual submissions

The parties jointly stipulated that "this grievance properly before the arbitrator.

The Arbitrator reviewed and considered all submissions in rendering this decision.

Background:

Sergeant John W. Maddox is the most senior sergeant assigned to the Bucyrus Post of the Ohio Highway Patrol. He is the leader of the afternoon shift which operates from 3 –11 p.m. He is a member of the Unit 15 Bargaining Unit and covered by that Collective Bargaining Agreement.

Consistent with the window period enumerated in that agreement, Sergeant Maddox submitted a request for vacation leave to take place September 2, 3, and 4, 2000 and December 31, 2000. No other sergeant submitted a vacation request for any overlapping period.

The Employer denied that request due to "operational need."

Union Position:

The Union asserts that Sergeant Maddox should have had his vacation request approved. He was the most senior sergeant at the Bucyrus post. No other sergeant had requested overtime.

The Union believes management refused the overtime request because Sergeant Maddox had already taken 240 hours of vacation leave. If this is the case, they argue the amount of vacation taken should have no bearing on this request.

The Union points out the Employer's policy which clarifies how requests from sergeants should be handled. It states: *"At the post level, only one sergeant may be on vacation or compensatory time leave. In the event a day shift sergeant and post commander have simultaneous leave requests, only one supervisor shall be off at one time."*

The union notes that in a previous arbitration, Arbitrator Ruben ruled "[a]lthough 'operational necessity' is not further defined, the Department has interpreted this standard as synonymous with minimum shift manning required to meet the Post's coverage obligations." The union argues that clearly the Post would have met

minimum staffing requirements even if Sergeant Maddox had been on vacation.

The Union quotes again from the Ruben decision in addressing the issue of "mutually agreeing to vacation time." The arbitrator said the provision "did not give the Department carte blanche to refuse vacation requests for any reason or for no reason at all. Implied in the Contract is the obligation to deal fairly and in good faith in the implementation of its provisions so as not to deprive the other party of the benefit of the bargain it struck."

The Union argues that Patrol policy also provides for coverage when a sergeant is gone. In OSP policy 9-203.15-01 it states in pertinent part: "an adjacent post with an on-duty supervisor will be notified by computer message or telephone to assume responsibility of a situation should one occur."

Finally the Union notes that the employer attempted to deal with the situation after the grievance was filed by revising policy 9-203.15-01 on March 30, 2001. Added was a "Special Provision" which stated: "During the Memorial Day, Independence Day and Labor Day holiday reporting periods, posts will make every effort to maintain 24-

hour supervisory coverage." The Union points to the non-required nature of the language.

Management Position:

Management believes the language of 43.04 which states "Vacations shall be taken only at times mutually agreed to by the Employer and the employee" gives them the clear right to deny the vacation request in question.

For good business reasons the Employer desires to have supervisory coverage on all shifts during the high traffic holiday periods covered by this grievance.

Management contends it has been a past practice to have 100% supervisory coverage on the major holidays, at the Bucyrus Post.

To buttress its argument, the Employer referred to OSP Policy 507-08 for guidelines regarding approval or denial of leave requests.

Number 1 in that policy states:

"Leave shall be taken only at times mutually agreed to by the employer and employee. The employer reserves the right to deny all leave requests based on legitimate operational need."

Number 2 goes on to say:

"Such conditions as traffic volume, crash experience, special details, holiday periods, illness and other existing problems shall be given proper consideration in determining the result of the leave request. Post commanders may consider personnel loss as the result of projected events and details (such as the annual Ohio State Fair detail) in restricting permissive leaves (vacation, compensatory make-up time, and non-emergency personal leave) at the post during this time."

The Employer states that a Sergeant was needed on the dates requested due, in part, to the relative inexperience of the Troopers assigned to the afternoon shift and the anticipated higher traffic expectations on the holiday weekends.

The employer notes that vacation has been liberally approved for the grievant as evidenced by the fact he used 240 hours in the past year.

Finally, the Employer asserts that Article 4 (Management Rights) of the Contract gives management the right to "determine the adequacy of the work force."

Discussion and Opinion:

The Bucyrus post of the Highway Patrol has responsibility for Crawford and Wyandotte Counties. They patrol the direct route between Columbus and Cedar Point. The roads in that area are used by persons going to and from many attractions in the Lake Erie region.

There is no doubt in this arbitrators mind that the area would be busy on Memorial Day weekend.

New Years Eve is a holiday that demands an increased Police presence and in spite of the best efforts of everyone involved it remains a very unsafe time to be on the roads.

Therefore, having acknowledged the significant challenge that faces the Ohio Highway Patrol in deploying scarce resources in the best way to serve the citizens of Ohio, the task remains to determine if the Collective Bargaining Agreement has been violated in the rendering of this one specific management decision.

If the first phrase of Article 43.04 where it says "*vacation leave shall be taken only at times mutually agreed to by the Employer and the employee*", stood alone, I would agree with the Employer. It does not stand alone.

If Section A which states: *"Subject to the above limitations employees who submit vacations requests no more than (30) day and no less and twenty (20) days prior to the first day of the permanent shift dates referred to in Section 26.01 shall be granted vacation leave based upon seniority"* stood alone, I would agree with the Union. It does not stand alone either.

Arbitrator Ruben, in a decision cited by both parties, offers helpful insight in viewing this language when he writes: "In the present context this obligation requires the department to act reasonably rather than arbitrarily, and uniformly rather than discriminatorily."

The evidence presented would indicate the Ohio Highway Patrol has not been consistent in requiring 100% supervisory coverage on the Holidays in question.

The revision to OSP Policy which clarifies such situations, is helpful when it states: "During the Memorial Day, Independence Day and Labor Day holiday reporting periods, posts will make every effort to maintain 24-hour supervisory coverage". The problem is this policy statement was not promulgated until after the date of this grievance.

Certainly seniority is a status sought after by most employees but seniority achieves only the rights and privileges afforded by the Collective Bargaining Contract or the law.

The distinguished arbitrator and Ohio Supreme Court Justice, Rankin M. Gibson, (now deceased) stated this fact in a decision rendered in a Chillicothe Telephone Company case.

Even prior to the advent of collective bargaining, employers generally gave preference to their older employees as a matter of equity, so long as they could do the required work. However, seniority exists as a "right" only to the extent made so by contract or by statute.¹

In this case seniority is clearly given serious weight. There is no question Sergeant Madcox would be given first consideration for vacation approval before any other sergeant.

The question is whether the wording of Article 43.04, section (A) requires management to always approve vacation unless if the employer is "restrict(ing) the number of concurrent vacation leave requests at a work location based on work shift."

Section (A) says: "shall be granted vacation leave based on seniority." (*emphasis added*)

¹ In re CHILLICOTHE TELEPHONE COMPANY [Chillicothe, Ohio] and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 578, Gibson, Rankin M., 1984, 84 LA 1

A logical reading of the two conflicting sections is that vacation shall be approved unless management has, through policy, clarified the conditions under which mutual agreement will not be granted.

There is no question Sergeant Maddox properly and timely submitted his request.

Management refused to approve it. Was that action arbitrary, capricious or discriminatory?

The employer has further defined how it will administer the discretionary parts of the Collective Bargaining agreement by promulgating policies to assure uniformity and fairness. An examination of these policies in effect at the time of the instant situation assists in answering the key question.

OSP Policy 9-203-15-J1 (revised 7/28/93) (Joint Exhibit 5) states in section "C" "AREA SUPERVISORY COVERAGE – When a post has a shift or portion of the work day without a supervisor on duty, an adjacent post with an on-duty supervisor will be notified by computer message or telephone to assure responsibility of a situation should one occur."

This policy clearly anticipates periods when a sergeant will not be available.

Nothing in this policy suggests that there was a "blackout" of vacation usage on specific holidays.

Subsequent to the filing of the instant grievance, the Patrol amended the POST SUPERVISORS WORK SCHEDULE policy. (Joint Exhibit 6). A "Special Provisions" section was added which reads: "During the Memorial Day, Independence Day and Labor Day holiday reporting periods, posts will make every effort to maintain 24-hour supervisory coverage.

One final policy needs to be reviewed. OSP Policy 507.08 LEAVE REQUESTS. Section (A) (2) states:

"Such conditions as traffic volume, crash experience, special details, holiday periods, illness and other existing problems shall be given consideration in determining the result of the leave request. Post commanders may consider personnel loss as the result of projected events and details (such as the annual Ohio State Fair detail) in restricting permissive leaves (vacation, compensatory make-up time and non-emergency personal leave) at the lost during this time."

While this policy provides latitude and flexibility to post commanders, in the opinion of this arbitrator, such restrictions applied to specific holidays, require some type of prior notice to employees.

In conclusion, the Ohio State Patrol can either declare certain holidays to be blacked out, as they have attempted to do in their revision to OSP Policy 9-203-15-01 (revised 3/30/01) or they can

vest post commanders with the authority to examine situations consistent with the criteria enumerated in OSP Policy 507-08, but such vesting requires commanders to let bargaining unit employees know that such "restricting" will take place.

Such prior action would assure that vacation approvals and rejections will be uniform and fair.

If the employer relies on such conditions as "traffic volume, crash experience, etc., the burden shifts to the employer to demonstrate the validity and uniformity of such factors utilized.

In the instant case, this justification was not provided to the satisfaction of this arbitrator.

In summary, I find the language of 43.04 to be ambiguous. Elkouri and Elkouri, How Arbitration Works, indicates that an agreement is ambiguous if "plausible contentions may be made for conflicting interpretations thereof."² Arbitrator Rhonda Rivera, in a Department of Natural Resources Case, stated that ambiguity exists ". If the Arbitrator concludes that two reasonable meanings are possible."³

² Elkouri & Elkouri, HOW ARBITRATION WORKS, Fifth Edition, Voltz, Martin M., Goggin, Edward P., BNA Books, Washington D.C. 1997.

³ OHIO DEPARTMENT OF NATURAL RESOURCES and FRATERNAL ORDER OF POLICE OF OHIO, INC., OHIO LABOR COUNCIL INC, 90 LA 1049, March 18, 1988, Rivera, Rhonda R.

Because the contract language is unclear, the arbitrator must examine the interpretative policies that the Ohio State Patrol has issued to guide its agents in the administration of the agreement.

Based upon the fact the Ohio State Highway Patrol revised its Policy to specifically name one of the holidays in question, immediately after the filing of the grievance, I have to believe they realized that their current policy did not preclude the taking of vacation on the holiday(s) requested.

In his answer to the grievance, Captain Phillips states: "The Commander of Field Operations has directed post commanders to schedule 100% supervisory coverage during summer holidays..." No evidence was presented to this arbitrator that such a directive exists.

Or, if this verbal directive was given, it flies in the face of OSP Policy 507 - 08.

For the reasons stated herein, I find that the employer did deny the vacation request of Sergeant Maddox in an arbitrary manner and thus in violation of the Collective Bargaining Agreement.

Decision and Award:

The Grievance is granted.

Sergeant Maddox is to be compensated at the rate of 1 ½ times his regular rate of pay for hours worked on September 2, 3 and December 31, 2000 and at 2 ½ times his regular rate of pay for hours worked on September 4, 2000 (Labor Day). Such compensation shall be subject to all appropriate deductions.

This Award is issued at London, Ohio this 24th. Day of April,
2002

N. Eugene Brundige
N. Eugene Brundige, Arbitrator

NOTE: The original grievance cited violations of Articles 7 and 21 of the Collective Bargaining Contract. The Parties did not argue either of these articles and thus I find no violation of either Article 7 and 21
