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## 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# 15-00-000828-0122-04-001  
(Allen Wheeler)

### APPEARANCES:

#### FOR THE STATE:

Renee Byers, Advocate  
Sgt. Charles J. Linek  
Andrew Shuman, OCB Representative  
Capt. Robert J. Young

#### FOR THE UNION:

Herschel M. Sigall, General Counsel  
Elaine N. Silveira,  
Allen Wheeler, Grievant  
Robert K Stitt, President  
Wayne McGlone, Staff Rep.  
Sgt. Aaron Walker, witness  
Tpr. Russ Cantrell, witness  
Jim Stumbo, witness  
Sgt. James Russell

An arbitration hearing was conducted March 26, 2002 at the Office of Collective Bargaining, Columbus, Ohio. The issue before the arbitrator in this case is:

**"Was the denial of Occupational Injury Leave (OIL) to Allen Wheeler in violation of Article 46 of the Collective Bargaining Agreement? If so, what shall the remedy be?"**

Article 46 states:

**ARTICLE 46 - OCCUPATIONAL INJURY LEAVE**

Occupational injury leave shall be governed by the Rules promulgated on this subject and the Ohio Revised Code 5503 as they exist on March 26, 1989. All employees in the bargaining unit shall be entitled to occupational injury leave.

**46.01 Maximum Hours of Occupational Injury Leave**

Each employee, in addition to nonl1al sick leave, is entitled to one thousand five hundred (1,500) hours of occupational injury leave at the regular rate per independent injury incurred in the line of duty, with the approval of the superintendent.

**46.02 Injuries**

Injuries incurred while on duty acting within the scope of his/her authority and job classification description shall entitle an employee coverage under this Article. An injury on duty which aggravates a previous injury will be considered an independent injury. O.I.L. is not available for injuries incurred during those times when an employee is in the act of arriving or departing from his/her assigned facility if not responding to an emergency or called in by a supervisor, when an employee is engaged in activities of an administrative or clerical nature, when an employee is on a meal or rest break, or when an employee is engaged in any personal business.

**46.03 Waiting Period**

Occupational injury leave may not be used within seven (7) days of the date of injury, or the date of a reactivation. Normal sick leave may be used during this time period. However, if an employee is immediately hospitalized overnight by a medical doctor due to a qualified on-duty injury, no loss of sick leave shall occur.

**46.04 Requests for Occupational Injury Leave**

The request for occupational injury leave will be submitted through established channels following the procedure as outlined by the Employer.

**46.05 Authority to Approve or Disapprove**

Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. shall not be unreasonably denied.

#### **46.06 Light Duty**

The Highway Patrol may, at its discretion, arrange for light duty for employees experiencing partial disability and on occupational injury leave, sick leave or disability leave.

; Such efforts will be made at the employee's assigned post, or to other divisional facilities as determined by the Employer. All living expenses incurred as the result of a light duty assignment, or another divisional facility in cases where the Employer cannot allow a daily commute to the employee's residence will be paid by the Employer. Any light duty employee who must begin work at some location other than his/her regular work

location or report-in location shall have any additional travel time counted as hours worked. Light duty may only be assigned up to a maximum of fifty (50) miles.

#### **46.07 Geographic Limitations**

No geographic limitation on the use of occupational injury leave shall be imposed if:

1. A doctor has certified that travel will not prolong the recovery period or cause additional injury prior to the travel
2. travel will not interfere with previously scheduled therapy or doctor's exams;
3. travel will not interfere with activity such as court dates;
4. the Employer has been given seven (7) days notice of the travel, and;
5. Notify the Employer of the location and phone number so the employee can be reached.

However, if the request for occupational injury leave follows a denied leave request for the same period of time, the Employer may require documentation of the occupational injury leave request and may impose geographic restrictions.

#### **46.08 Health Insurance**

Employees receiving Workers' Compensation who have health insurance shall continue to be eligible for health insurance at no cost to the employee not to exceed 24 months. Further, pending the certification of a Workers' Compensation award, the Employer shall continue group health insurance coverage at no cost to the employee, including the employee's share of such costs, for a period not to exceed 24 months. The Employer has the right to recover such payments if the Workers' Compensation claim is determined to be non-compensable.

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 a number of witnesses.

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.

Following receipt of the Brief of the Association, management objected that new evidence had been introduced in the brief.

A conference call followed between the parties in which it was mutually agreed that management would be given an opportunity to review the disputed material in the brief and respond to it. A time line was agreed upon and the supplemental management brief was received within that time period.

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.

**Background:**

Grievant Allen Wheeler, a twenty-year veteran of the Ohio Highway Patrol, was assigned to serve as an instructor at the OHP Academy.

One of his duties included firearms instruction.

The incident giving rise to this grievance occurred on June 21, 2000.

Grievant Wheeler was assigned to supervise firearms qualification at the firing range located on the grounds of Orient Correctional Institute.

He arrived before 8 a.m. and was preparing the range.

Targets and other supplies were stored in a trailer on site. While removing supplies from the trailer, Grievant Wheeler fell on the metal steps attached to the trailer.

He was treated and released.

He remained away from work until December of 2000.

On August 11, 2000 he made application for Occupational Injury Leave.

The Superintendent denied the application for Occupational Injury Leave

**Union Position:**

The union believes the denial of O.I.L. was improper. They state that the accident which was suffered by Grievant Wheeler was within the scope of his duties and meets all the criteria enumerated in Article 46 of the Collective Bargaining Agreement, and of the Statute which is incorporated by reference in the CBA.

The Association notes that originally management cited one of the reasons for denying the claim related to the untimely filing of the request. They argue that management abandoned these grounds at step 2 of the grievance process.

The Association also notes that Grievant Wheeler believed the OSP has filed the paperwork for him and due to the severity of his injuries; the immediate supervisor had a responsibility to initiate such paperwork.

In response to the second reason advanced for denial, the Union asserts that the work being performed was not administrative or clerical in nature. It was clearly within the scope of the duties of a Sergeant in the Highway Patrol and should be covered by Occupational Injury Leave.

The union argues that the employer has approved other similar requests for OIL but has chosen to treat Grievant Wheeler differently. To support that contention the union has included documentation of all O.I.L. requests in the recent past.

The remedy requested is that Grievant Wheeler be credited with 961 hours of OIL or otherwise be made whole.

**Employer's Position:**

The employer believes the denial of OIL to Sergeant Wheeler was correct. They note the statute and the contract clearly give the Superintendent authority to grant or deny OIL subject only to the limitation that approval shall not be "unreasonably denied."

The employer notes that nearly 90% of all OIL requests are approved and argue that such a rate speaks to the reasonableness of the process.

The employer believes that it is significant that Grievant Wheeler was *preparing* for class. In their view, this makes the work administrative in nature.

The employer argues that the duty has no inherent risks related to law enforcement and would be much the same as falling while carrying an overhead projector.

### **DISCUSSION:**

. Let us first turn to the issue of timeliness in the filing of the O.I.L. claim. This arbitrator is unsure of the position of the employer regarding this reason for denying the claim.

If timeliness were a serious assertion on behalf of management, this writer would expect to see the point argued in the post-hearing brief of the employer. Evidence of the consistent application of timelines should have been advanced.

A review of the cases submitted provided no clarity regarding the consistent application of a timeline.

In light of the absence of a timeliness argument in the post hearing brief and the failure to continue the assertion at the second step of the grievance procedure, I find that management abandoned this argument and thus have given it no consideration in reaching my conclusions regarding this matter.

We must examine Article 46.05 **“Authority to Approve or Disapprove**, Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. shall not be unreasonably denied.”

This language clearly requires that due deference must be afforded the decisions of the Superintendent. The end of the section clearly invites arbitral review to determine “unreasonably denied.”

The language of the 1989 code states: “... except that occupational injury leave is not available for injuries incurred during those times when the patrol officer is actually engaged in administrative and clerical duties at a patrol facility.....”

It would appear that the authors of this legislation meant to exclude persons working in the Patrol Post performing paperwork or necessary, but non-law enforcement tasks.

Those who authored the language were not able to envision the myriad of special circumstances that would need to be reviewed in the future.

The language goes on to give the Superintendent of the OHP the ability to “by rule define those administrative and clerical duties

and those situations where the occurrence of an injury does not entitle the patrol officer to occupational injury leave.”

In the absence of any duly promulgated rules, it falls to an arbitrator to review the case-by-case determinations of the Superintendent.

It is a difficult task to know where to draw the line. Some situations are clearly administrative or clerical in nature or not within the scope of the duties of a Highway Patrol Officer. Others, like the instant case, are much less clear.

There does seem to be more to this case than meets the eye. The union notes in its brief, in the summary section:

“For reasons unstated then or now, the Employer did not believe the validity of the event of the accident or the injury resultant from the accident. Contrary to its normal response to such an accident the Employer directed that an exhaustive investigation be launched into the Wheeler accident. For weeks the obvious facts of the accident were examined. Witnesses were interviewed as to the accident and as to whether the Sergeant exhibited “genuine” pain.”

Management may have had suspicions regarding this case, but since none were put on the record, this arbitrator must conclude that things are as they appear.

I fail to see the distinction drawn by management that preparation for the shooting exercises made it an administrative matter. If someone had fired a round, and then the grievant fell, carrying a target, would that have made the situation eligible for O.I.L.?

Management refers to the person carrying an overhead projector. A significant difference appears to this arbitrator. Any civilian might be carrying an overhead projector to instruct Highway Patrol Personnel, but only a sworn officer will be in charge of qualifying fellow officers on a shooting range.

Grievant Wheeler clearly met the requirements of the introductory section of Article 46.02 where it says: "Injuries incurred while on duty acting within the scope of his/her authority and job classification description shall entitle an employee to coverage under the act.

The only remaining question is whether the grievant is disqualified from coverage because he was performing an "administrative" duty.


Absent clearly promulgated rules, I find that the action of falling while carrying a target to the range was not administrative in nature, and therefore O.I.L. was unreasonably denied.

**AWARD:**

For the reasons herein stated, the grievance is granted. Grievant is to be credited with 961 hours of Occupational Injury Leave with the subsequent reinstatement of sick and vacation leaves.

This arbitrator will retain jurisdiction for the sole purpose of resolving any disputes that may arise regarding the implementation of this award.

Issued at London, Ohio this 3<sup>rd</sup>. day of June 2002.

  
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