#1587

IN THE MATTER OF ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 15
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

GRIEVANT Patrick McDonald

Case No. 15-00-20010129-0010-07-15

UMPIRE'S DECISION AND AWARD

Appearances:

For the Employee Organization:
Elaine Silveira
Herschel M. Sigall
Robert Stitt

For the Employer:
Andrew Shuman

Sandra Mendel Furman, J.D.
One Easton Oval Suite 500
Columbus, Oh 43219
(614) 416-5611

INTRODUCTION

This matter was heard before the undersigned on April 29, 2002 in Columbus, Ohio at the Office of Collective Bargaining. Grievant McDonald appeared as the union witness. Also present were OSTA President Robert Stitt, General Counsel Herschel Sigall and Staff Representative Wayne McGlone. Elaine Silveira represented Grievant at the hearing. Silveira presented closing arguments, assisted by Stitt, Sigall, and McGlone.

The State's witness was Captain Rob Young. Also present were Renee Byers from central office of the Patrol and Beth Lewis from the Office of Collective Bargaining. Andrew Shuman represented the Patrol and presented closing argument.

The contract, grievance trail, paperwork related to McDonald's O.I.L. applications, departmental bargaining unit OIL applications from 1999 through January 11, 2002, and OSP policy 507.10 were introduced and accepted as Joint Exhibits 1-5. The Union introduced an exhibit setting forth all of the Grievant's leave related paperwork for this injury; this was admitted as Union Ex. 1. Stipulations of fact were presented; these will be referenced in the decision.

There were no procedural arguments presented. Each side was given the opportunity to call witnesses and cross-examine witnesses, and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were postmarked on May 29, 2002. The hearing was closed upon receipt of the closing arguments.

ISSUE:

Did the State violate the collective bargaining agreement by denying the Grievant's application for occupational injury leave ("O.I.L.")? If so, what shall the remedy be?

APPLICABLE CONTRACT SECTIONS:

Article 46, Article 2, Article 20

STATEMENT OF FACTS:

Grievant is employed as a Sergeant at the Gallipolis post. On September 5, 2000, he injured his left knee while exiting his patrol car to deliver affidavits to the Gallipolis Municipal Court and the Gallia County Juvenile Court. Grievant applied for workers

compensation benefits and received compensation for "medical only." No lost time benefits were paid under workers compensation. Per R.C. section 5503.08, O.I.L. benefits are in lieu of workers compensation benefits. Other than medical examinations for his injury, Sgt McDonald did not miss any work due to his injury from September 5, 2000 to December 21, 2000. Grievant used his available sick leave to attend medical appointments. On December 21, 2000, McDonald had surgery on his injured knee. He returned to work on January 14, 2001 under a Transitional Work Agreement. Grievant returned to full duty on February 15, 2001.

The grievance seeks relief in the form of payment of O.I.L. benefits for the period of time Grievant used sick leave.

EMPLOYER POSITION

The Employer states that the delivery of affidavits to court is an administrative or clerical duty. As such, it is not compensable under the language of Article 46.02. OSP policy 507.10 further supports the denial. Exiting a state vehicle and delivering documents is an action that may be performed by any state employee; thus an injury incurred while in uniform does not transform that act into an O.I.L. type injury. The Umpire may not consider the R.C. in rendering her decision, as the contract prevails. The BWC denial of lost time benefits confirms the reasonableness of the Superintendant's denial.

UNION POSITION

The Union argues that Grievant is entitled to O.I.L. benefits for the period in question through the language of R.C. section 5503.08, which is incorporated into Article 46 of the collective bargaining agreement.

DECISION AND AWARD

The relevant contract language states:

ARTICLE 2

Fringe benefits and other rights granted by the Ohio Revised Code, which are not specifically provided for or abridged by this Agreement, shall be determined by those applicable statutes, regulations, rules, or directives.

ARTICLE 46

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.

46.02

Injuries incurred while on duty acting within the scope of his/her authority and job classification/description shall entitle and employee coverage under this Article ...O.I.L. is not available for injuries incurred during those times... when an employee is engaged in activities of an administrative and clerical nature...

46.05

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

ARTICLE 20.08 5.

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.

20.05 8.

...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 any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues.

Since the parties are in agreement that the act of filing affidavits is an administrative or clerical function[1], the inquiry then turns to whether the statutory entitlement prevails over contract section 46.02.

R.C. section 5503.08 provides in relevant part for O.I.L. for occupational injury leave for

each state highway patrol officer. ...except that OIL is not available for injuries incurred during those times when the patrol officer is actually engaged in administrative or clerical duties *at a patrol facility*....The Superintendent of the state highway patrol shall, by rule, define those administrative or clerical duties and those situations where the occurrence of an injury does not entitle the patrol officer to occupational injury leave. (emphasis added)

There are immediate and obvious differences in the contractual and statutory entitlements to O.I.L. As a preliminary matter, the Umpire finds that the "Rules" language referred to in Article 46 relates to administrative rules –the O.A.C. At most other parts of the contract when the word rules appears, it is capitalized and refers to the Ohio Administrative Code specifically. Otherwise, the word rules relate to work rules, and the word is not capitalized. Therefore, the

[1] See Union brief: "one cannot reasonable (sic) say that paperwork is not administrative.

OSP policy 507.10 is not a "Rule" within the meaning of Article 46.[2] There are no O.A.C. rules promulgated on the O.I.L. benefit. But the inquiry does not end here.

It is the Umpire's conclusion that the parties bargained the language in Article 46 with full knowledge that the statute provided a level of benefits different than the contract. The differences are several: the statute applies only to Patrol officers; the contract coverage relates to the entire bargaining unit; the statute uses phraseology "actually engaged in, the contract does not"; the statute refers to a rest period, the contract refers to rest breaks. The contract defines as an independent injury that which aggravates a previous injury; the statute does not so define an independent injury. The contract excludes O.I.L. benefits for those times when an employee is arriving or departing from the assigned patrol facility if not responding to an emergency or called in by a supervisor. No such exclusion appears in the statute. Most significantly for the present dispute, the statute is broader in its grant of benefits in that it excludes payment when an officer is "actually engaged in administrative or clerical duties at a patrol facility". The contract states that no payment is available for administrative or clerical tasks without reference to geographical site.

It is clear that when the parties intended to specifically be bound by statutory language, they set forth the statutory references with detail, and indicated specifically where the contract and statute parted ways. For example, in Article 47, the parties referenced the O.A.C. and then included certain modifications and clarifications. Article 35 makes a similar reference. Medical Examinations in Article 39 requires adherence to the O.A.C. as in effect on the date of the agreement. In Article 56, the intent to follow the statute is clear and unambiguous, as it is in Article 58. These sections are in contrast to Article 46. Although the statute is referenced, there is no language evidencing intent to have the statute supersede the contract or be read in its stead. To so conclude would make much of Article 46 surplusage; why detail when O.I.L. may or may not be received when the statute already lists the circumstances? Stated differently, since the parties' contract extends the O.I.L. benefits to the entire unit, the parties had to have had in mind the fact that the statute had no coverage for any classification other than officers. Logically, the other differences cited above between the statute and contract were a product of bargaining, not sloppy draftsmanship. Therefore it is the opinion of this Umpire that a unit employee who is

[2] The Umpire notes that the OSP policy cited does not attempt to define what is considered an administrative or clerical task. Witness Young pointed out the impracticability of such a list.

engaged in administrative or clerical tasks, may properly be denied O.I.L. regardless of where s/he is performing the activities. There is no per se entitlement to O.I.L. while not at the patrol facility.

The contract **does** require that the Superintendent act reasonably in his denial of O.I.L. (The Union did not directly argue that the Superintendent was unreasonable, as it places its emphasis on the statutory entitlement.) The Umpire may examine the reasonableness of the Superintendent's denial in this case. In this task, the Umpire reviewed the 54 O.I.L. applications presented at the hearing.

The Union argued that on two earlier occasions, the Employer paid O.I.L. while a trooper was engaged in activities where paperwork was involved. In one, Trooper Johnson was completing a crash investigation report and fell down the stairs at the private residence. Joint Ex. 4-31. He was there by virtue of his status as a trooper, and he was engaged in one of the primary job functions of a trooper. That situation does not have the same quality or nature in contrast to McDonald's act of exiting a car to go up courthouse steps to deliver affidavits. Injury while exiting a patrol car under safe and routine conditions was deemed properly compensable by the workers compensation process. There is no dispute that he was performing a duty within his scope of responsibility. But workers compensation entitlement is a separate level of analysis with separate standards than O.I.L..

In the second example cited by the Union, Trooper Bionci was granted leave due an injury received while he was exiting an ambulance at a crash site on the turnpike. The second example is easily distinguishable: the Trooper was in the midst of performing a duty unique to a law enforcement officer: taking a report at an accident scene. He was in media res; the taking of the report was likely only part of his involvement at the scene. See Joint Ex. 4-4.

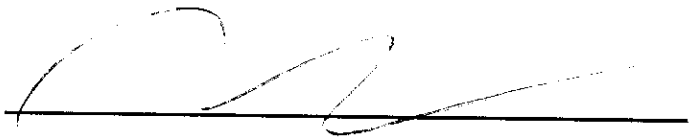
Reviewing the remainder of the O.I.L. applications, the Umpire noted several other instances of denial. Some denials were related to a question of proper reporting, timeliness of the application or whether a re-injury was involved. But in other examples of denied O.I.L. requests, the Superintendent stated that the tasks were administrative or clerical in nature. See, e.g. Joint Ex.4-44; 4-45; 4-46. Apparently, these went unchallenged by the Union, as no grievances or umpire awards were presented as to those matters. The only award presented was included in the Employer's step two answer to the instant grievance. In that matter, umpire Ray denied a request for O.I.L. for a trooper who slipped in the Patrol garage while filling out a gas usage report.

Although Ray did not reach the issue of contract language controlling over statutory language, he found the injury not covered by O.I.L. at least in part because it was clerical in nature. He also states at p. 7: "...there is no indication that the Union succeeded in getting coverage for all injuries incurred on duty. The exclusions are part of the contract." This Umpire agrees with that conclusion.

In conclusion, the concept of O.I.L. is a benefit different than hazard duty pay, which is a per se type of entitlement. It does not strike the Umpire as unreasonable to deny McDonald O.I.L. for this injury incurred in the manner stipulated by the parties. Without sufficient evidence that the Superintendent was unreasonable in his denial of McDonald's O.I.L. request, the grievance lacks merit. [3]

AWARD

The grievance is denied.



Sandra Mendel Furman, Umpire

Issued in Columbus, Ohio on June 27, 2002

[3] There was no allegation of an improper animus against Grievant.