

#1588

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

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, IUPA/AFL-CIO

GRIEVANTS: DAVID SHOCKEY & ROBERT LINDENBORN
GRIEVANT NO.: 15-00-20011004-0120-04-01

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
JULY 1, 2002

APPEARANCES

For the Employer

Larry J. Banaszak
Russell N. Johnson
Kevin Teaford
Beth Lewis
Charles J. Linek

Staff Lieutenant
Staff Lieutenant
Staff Lieutenant
Office of Collective Bargaining
Advocate

For the Union

Darrell Thomas
Aaron Walker
Robert Lindenborn
David Shockey
Elaine N. Silveira
Bob Stitt
Herschel Sigall

Trooper
Sergeant
Grievant
Grievant
Staff Attorney
President
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

Ohio State Troopers Association, Inc. (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, 2002, 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 26.05

At any time when the starting times of shifts worked by a member are less than twenty (20) hours apart, the members will receive one and one-half (1½) times his/her hourly rate, including premium pay for the second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double-back for pay purposes under this Article.

Article 37.02

In addition to the basic training provided at the Academy, advanced, specialized for individual training may be provided as needed. The reasons for training may include, but are not limited to, the overall improvement of skill and efficiency; changes in laws or duties and responsibilities, changes in equipment or technologies; and to qualify for positions of greater responsibilities.

The workday for all training programs shall be from 8:00 a.m. to 5:00 p.m., unless otherwise specified, with one (1) hour for lunch and time for breaks as the program

allows. Employees assigned to attend training programs will adapt to the schedule of the program.

Employees are required to participate in official duties or classes that extend beyond an eight (8) hour workday may be compensated according to the overtime provisions of this contract.

Staying or sleeping overnight at a particular location during a training program shall not give rise to the accumulation of overtime.

Travel time to and from training programs shall be considered as on duty hours and compensated appropriately.

STIPULATION

The parties agreed that the prior arbitration decisions of Arbitrators' Dworkin and Brookins (Joint Exhibits 3, 4 and 5) should control the analysis involving the present dispute. Of specific importance here are the distinctions surrounding a "test" and a "training" exercise articulated by the previously mentioned arbitrators. These standards will be applied in the analysis, which follows below.

STIPULATED ISSUE

Did the Employer violate Section 26.05 of the labor agreement by denying double-back pay when the GrievantS attended training?
If so, what shall the remedy be?

CASE HISTORY

The present dispute involves two similarly situated Troopers who worked at the Easton post in District Five. The incident took place during September of 2001.

Grievant Robert Lindenborn worked the 3:00 p.m. to 11:00 p.m. shift on September 12, 2001. Once his shift was completed, he was required to attend Civil Disturbance

training on September 13, 2001. Grievant David Shockey worked the 3:00 p.m. to 7:00 p.m. shift on September 17, 2001. After the completion of his shift, he was required to attend the same training session on September 18, 2001.

On September 20, 2001, both Grievants formally grieved the denial of double-back pay for the training days in question. The matters were processed in accordance with the grievance procedure, but the grievances were never settled. Neither side raised substantive nor procedural arbitrability concerns. As such, the grievances are properly before the Arbitrator.

**PRIOR STANDARDS ESTABLISHED BY
ARBITRATORS DWORKIN AND BROOKINS**

As previously noted, this Arbitrator's present analysis is confined, via stipulation, to standards previously articulated and utilized by the above-mentioned arbitrators. The present matter, as well as the prior matters considered by Arbitrators Dworkin and Brookins, involves the interplay between Sections 26.05 and 37.02 of the Agreement (Joint Exhibit 1). Arbitrator Dworkin found that Section 37.02 exempted training shifts from the provisions for "double-back" pay in Section 26.05. Arbitrator Dworkin, moreover, concluded Section 37.02 exempts scheduled training sessions from the premium pay provisions contained in Section 26.05.

Arbitrators Dworkin and Brookins also defined and distinguished training from testing activities. Training contemplates providing an individual with knowledge and information that serve to elevate his/her level of skill and proficiency in a particular subject matter area. Testing, however, contemplates an examination to determine or prove an individual's level of knowledge, ability, aptitude or qualifications in a particular area of endeavor. Arbitrator Brookins' analysis differed from Arbitrator Dworkin's in a

particular way. He noted that measuring proficiency may involve skills training in areas “probably already possessed.” Thus, he viewed training in possessed skills as a test.

When assessing the nature of the activity, another standard was articulated by the Arbitrators. An Arbitrator is to analyze the “essential purpose” of the activity to determine its basic nature. This task is especially essential when confronting hybrid sessions, which may involve some training and testing components.

THE MERITS OF THE CASE

The Union opines the Employer violated Section 26.05 when it failed to pay double-back pay for the sessions in question. In the Union’s view, the Civil Disturbance Training constitutes a demonstration of proficiency learned at an earlier date. The essence of the disputed activities did not constitute “training” in the form articulated by the antecedent arbitration decisions.

The Union argues that the Employer merely recast its Civil Disturbance Training to preclude the application of Section 26.05. Prior to the present dispute, and in alleged compliance with the Brookins’ decision, the Employer transferred the firearms qualifications segment of the Civil Disturbance training to in-service training at the Academy. As a substitute for the firearms qualification session, the Employer imposed a “Shoot, Move and Cover” program, which had previously been conducted during prior in-service training at the Academy.

“Shoot, Move and Cover” sessions merely serve as another weapons proficiency program. These sessions require Troopers to shoot shotguns and service handguns while on the move. Performance is monitored by Range Officers who provide advice on how to improve performance. Scoring performance, however, is not documented.

Another portion of the exercise is called the “Red Handle” drill. This segment, unlike “Shoot, Move and Cover,” was part of prior Civil Disturbance training protocols. A traffic scenario is used to determine when not to fire, defensive strategies and reloading under fire. Here, participants are monitored, and performance is formally recorded by Range Officers. They determine whether performance has been satisfactorily completed.

In terms of classroom instruction, the amount of time allotted has been reduced. Prior to the designated change, at least two hours were assigned for classroom instruction. Under the new training paradigm, classroom learning was only scheduled for twenty to thirty minutes. The “Shoot, Move and Cover” assignment appeared to take more time than the previously assigned firearms certification, causing the reduction in educational training.

Other programming remained basically intact. These subject areas included: equipment checking, formation marching, weapons cleaning, range safety when firing weapons, and handcuff techniques.

The “Shoot, Move and Cover” drill is a weapons proficiency exercise, which reviewed skills the Troopers already possessed. These skills were originally taught to Cadets while at the training Academy, and further reinforced at in-service training held at the Academy.

Other than brief updates dealing with legal developments, the remaining training exercises were mere reviews of previously learned skills. As such, these skills were already in the possession of the Troopers, and therefore, should not be viewed as “training” as defined in the antecedent arbitration decisions.

The Employer's Position

The Union failed to meet its burden regarding the Section 26.05 violation. It did not provide convincing proof that the Grievants participated in "tests" and not training. Analyses of various training sessions' contents adequately supports the view that training rather than testing transpired on the dates in question.

The presently disputed sessions need to be analyzed in light of what took place prior to the curriculum change. Arbitrator Brookins evaluated the curriculum when it contained weapons qualification sessions. These identical weapons qualification drills are presently being conducted during in-service training at the Academy as re-qualification exercises. The exercise, itself, requires Troopers to shoot a specified course. Range Officers score the targets and Troopers either qualify or fail. They do not provide the examinee with any feedback during the course of the exercise. There are negative consequences attached to any score resulting in failure. When failure takes place, discipline is imposed with an entry made in a Trooper's department record.

Survival Shooting Techniques is a primary exercise at the current Civil Disturbance Training exercise. A number of drills are involved, and targets are evaluated after the first ten (10) rounds. Range Officers evaluate the targets and offer technique suggestions, which may improve performance. These records are not scored or documented for future use.

Survival shooting techniques also include a Transitional Drill segment. Here, Troopers use both shotgun and a handgun, and shoot at targets from various positions, either standing or kneeling. Range Officers, again, do not formally score the session, but provide constructive criticism. Once the drill is completed, the Trooper may be

asked to perform the drill again to increase the level of skill and proficiency. If the drill is repeated, discipline is not imposed.

The "Red Handled Gun" exercise or the Defensive Combat Course serves as a real gunfight scenario. Troopers encounter gunfire while dealing with a probable cause stop involving a possible violator and his/her vehicle. Range Officers critique Troopers on a number of critical dimensions: Approach, position, verbal communication, reaction, return fire, retreat, taking cover, reload, call for help and physical condition. Range Officers take notes on a form, in the comments section, during the exercise. Notations indicate the nature of the Trooper's performance per the previously described dimensions. These notations are used to provide feedback concerning realized performance. Troopers may be asked to repeat the drill without any disciplinary consequences.

The use of a checklist to document performance does not define the activity assessed as a proficiency test. Staff Lieutenant Banaszak testified that a variety of other training activities require documentation. Noted comments are merely used to provide feedback without any attached consequences.

None of the questioned training activities are re-qualification programs required by the Ohio Peace Officers Training Council (OPOTC). The weapons re-qualification, which is required, is presently conducted at in-service at the Academy.

Clearly, the various Civil Disturbance Training sessions in contention were engaged to enhance Trooper proficiency and skill level. Previously conducted training at the Academy, should still be viewed as training if conducted again in another setting.

THE ARBITRATOR'S OPINION AND AWARD

This Arbitrator has been placed in a unique situation by the parties. He has been asked, via a stipulation, to apply other arbitrators' standards, and related interpretations, to a pending dispute. Although I hold both arbitrators in extremely high regard, I find this approach doable, yet a bit perplexing. The antecedent arbitration rulings are well written and clearly articulated. Yet, the Arbitrator can honestly say that an independent evaluation on his part could have led to a different interpretation resulting in varying outcomes. Having expressed my reservations, however, the Arbitrator is committed to fulfilling the parties' expectations and desires as evidenced in the agreed to stipulation. Hopefully, the parties will address the language in dispute during the course of the upcoming negotiation cycle.

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions and submitted antecedent arbitration opinion and awards, it is this Arbitrator's opinion that the activities in question do constitute training, and therefore, are not subject to the double-back pay provisions of the Agreement.

Arbitrator Dworkin's distinction between a "training operation, or session," and an activity in which an individuals proficiency or skill is tested is quite applicable to the circumstances under review, and is accepted by the Arbitrator as "the appropriate standard." When a Trooper is trained, he/she is being provided with knowledge and information that elevates his/her level of skill and proficiency. Training, moreover, contemplates making someone proficient with specialized instruction or practice, sometimes with a regimen.

The “term” test, however, has other connotations. When Troopers are tested, the Employer is examining a specific subject matter area, to ascertain whether a pre-established performance level has been attained. This evaluation, whether weapons related or otherwise, normally involves no instruction or feedback, with some form of consequence attached depending on the evaluated performance. Testing, more specifically, or a test used during a testing opportunity, contemplates an examination of an individual so as to prove or ascertain the level of achievement against a pre-established standard.

Arbitrator Dworkin’s standards differ somewhat from those applied by Arbitrator Brookins. Arbitrator Brookins’ definition of a test focused on the measurement of proficiency, and sessions, which taught skills “which Troopers probably already possess.” This narrow view of a “test” is proposed by the Union as the key distinguishing feature of a test versus a training activity. It is a distinction, however, not supported by Arbitrator Dworkin’s specific articulation and general principles involving testing and evaluation. As such, the evaluation which follows, comports with Arbitrator Dworkin’s antecedent arbitration decisions.

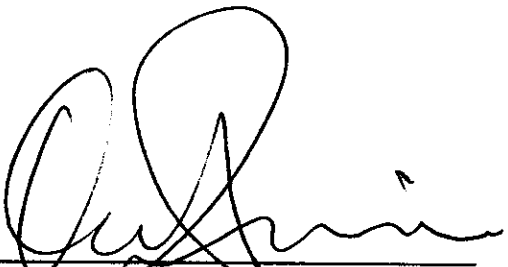
Mere repetition of certain activities taught during prior in-service training at the Academy, or some other location, does not cause an activity to be viewed as a test. As noted above, training includes specialized instruction or practice. Nothing in the Agreement (Joint Exhibit 1) precludes the Employer from requiring extensive practice. Sessions reviewing already possessed skills, do not, by themselves, elevate a session to a testing situation; especially when other key features, which characterize tests are lacking.

Proper instruction, especially when reviewing potentially hazardous and complex real world scenarios, requires specific identification of troublesome strategies or performance. Otherwise, purposeful feedback would be lacking, jeopardizing proper performance during emergency situations.

ARBITRATOR'S AWARD

On the basis of the evidence adduced before the Arbitrator with reference to the subject matters in dispute, and stipulations of the parties, the Arbitrator denies both grievances. The time spent at Civil Disturbance Training does not constitute testing, but rather comports with standards used typically to identify training sessions. These sessions, therefore, are not subject to the double-back provision of Article 26.05.

AWARD SIGNED, ISSUED AND DATED
AT MORELAND HILLS, OHIO,
CUYAHOGA COUNTY THIS
1ST DAY OF JULY 2002



Dr. David M. Pincus
Arbitrator