#1744

IN THE MATTER OF AN ARBITRATION
BETWEEN

THE OHIO STATE TROOPERS ASSOCIATION,
IUPA/AFL-CIO

THE UNION.

AND

CASE NO: 15-00-030807-0114-04-01
Arbitrator: Jerry B. Sellman
DECISION DATED: January 14, 2004
GRIEVANT: ARTHUR E. WOOD

OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE OHIO STATE HIGHWAY PATROL

THE EMPLOYER,

APPEARANCES:

FOR THE UNION:

Elaine N. Silveira - Assistant General Counsel, Ohio State Troopers Association IUPA/AFL-CIO, Representing the Grievant
Herschel M. Sigall, Esq. - General Counsel, Ohio State Troopers Association IUPA/AFL-CIO, Representing the Grievant
Dennis M. Gorski - Ohio State Troopers Association President
Trooper Arthur E. Wood - Trooper, Ohio State Highway Patrol, Grievant

FOR THE EMPLOYER:

Renee L. Byers, Esq. - Attorney with Office of Human Resources, Ohio State Highway Patrol, Representing the Employer

I. Nature of the Case:

Contractual Interpretation; time off with pay to attend arbitration hearing. This labor arbitration proceeding was conducted pursuant to the provisions of the Collective Bargaining Agreement (hereinafter referred to as the "Agreement") between the Ohio State Troopers Association Unit I (hereinafter referred to as the "Union") and the State of Ohio Department of Public Safety, Division of the Ohio State Highway Patrol (hereinafter referred to as the "Employer"). This proceeding concerns a grievance filed by Trooper Arthur E. Wood (hereinafter referred to as the "Grievant"). The Grievant challenges the Employer's decision denying his request to change his work schedule, which change would have enabled him to appear at an arbitration hearing in an "on-duty" status and be paid. The Employer maintains that it allows employees attending an arbitration proceeding time off with pay, but such entitlement does not extend to employees "off duty." The Union and the Employer mutually agreed that the grievance was properly before the Arbitrator and further agreed to waive an oral hearing and submit the case on briefs for a binding decision by the Arbitrator.

The issue in this proceeding is as follows:

> Did the Employer violate the provisions of the Collective Bargaining Agreement by denying the Grievant's request to change his day off in order to place him in an on-duty status on the day of his arbitration? If so, what shall the remedy be?

The applicable provisions in this proceeding are as follows:

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 20 - GRIEVANCE PROCEDURE

Section 20.01 - Purpose

> The Employer and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt impartial and fair processing of their grievances. The procedure whall be available to all bargaining unit employees and no reprisals shall be taken against an employee initiating or participating in the grievance procedure. The grievance procedure shall be the exclusive method of resolving both contractual and disciplinary grievances.

Section 20.08(2) - Witness

> The Employer agrees to allow witnesses time off with pay at the regular rate to attend the arbitration hearing.

II. SUMMARY OF THE TESTIMONY AND POSITION OF THE PARTIES:

The facts in this proceeding are not in dispute; it is the application of those facts to the parties' Collective Bargaining Agreement which is in dispute.

The Grievant, Arthur E. Wood, filed a grievance under the Collective Bargaining Agreement and the grievance was scheduled for arbitration on July 28, 2003 at the Office of Collective Bargaining in Columbus, Ohio before this Arbitrator. Trooper Wood was on scheduled time off on July 28, 2003. The Ohio State Troopers Association requested that Trooper Wood's schedule be changed so he could appear at the hearing in an on-duty status. The Employer denied this request. Subsequent to the hearing the Union filed the instant grievance alleging that the language in Article

20, Section 20.08(2) of the Collective Bargaining Agreement required the Employer to change a witness' scheduled time off in order to accommodate his/her presence at an arbitration hearing.

The position of the Union is that the clear and unambiguous language of the Collective Bargaining Agreement requires the Employer to pay an employee at his/her regular rate to attend an arbitration hearing as a witness. The language contained in Section 20.08 (2) does not state that an employee must be scheduled for work on the day of the arbitration in order to take advantage of the time off with pay provision. It contends that the the April 30, 2003 collective bargaining agreement negotiations between the Union and the Employer, at which time the Employer introduced a proposal to change Section 20.08(2), supports its position. The Employer introduced the following proposal:

> "The Employer agrees to allow witnesses, **who are scheduled to work the day of the arbitration,** time off with pay at the regular rate to attend the arbitration hearing."

The Union maintains that this additional language (in bold) would be needed to restrict the clear meaning of Article 20, which language currently does not restrict payment for time off at the arbitration hearing only to employees who were scheduled to work on the day of the arbitration. The Tentative Agreement signed by the Union and the Employer on June 13, 2003 did not contain this more restrictive proposal. As a result, it argues, there is no question that the Grievant was entitled to be paid for attending the arbitration proceeding.

The Union argues that since the language is clear and unambiguous, it is not open to varying interpretations. Furthermore, the parties' Agreement restricts an arbitrator's ability to add to, subtract from or modify any of the terms of the Agreement. In light of these principles, it argues that the Arbitrator must conclude that the language of Article 20 entitles the Grievant to compensation for attending the arbitration hearing. While the Employer states that its past practice and custom was

not to pay unscheduled employees, the Union argues that an examination of past practice should be either irrelevant or found to be in support of its position. First, past practice should only be utilized when interpreting ambiguous language and the language in question here is not ambiguous. Secondly, if the Arbitrator does look at the practice of the parties, he will find that while the practice and advice of the Office of Human Resources Management has never been to change a grievant's scheduled day off in order to put him/her in an on-duty status on the day of an arbitration, the Employer cannot say that a witness' or a grievant's scheduled day off has never been changed in order to place the employee on an on-duty status on the day of an arbitration.

It concludes by arguing that any decision contrary to its position would produce a chilling effect on the filing of grievances.

The Employer also argues that the language contained in Section 20.08(2) is unambiguous and the Arbitrator is compelled to apply the plain meaning of the words. The plain meaning of the language at issue places an affirmative duty on the Employer to allow on-duty employees to testify during their scheduled work hours, without any loss of pay. The obvious intent of this language is to prevent the Employer from requiring an on-duty employee to use permissive leave to testify at the arbitration. No reasonable interpretation of this concise language would require the Employer to place any witness who is off-duty into an on-duty status.

If the Arbitrator were to conclude that the language is ambiguous, then at the very least the Union's interpretation is nothing less than nonsensical and cannot be entertained. The Employer cannot give an employee "time off" unless they are actually working. If an employee already has scheduled time off, the employee could not be granted additional "time off" in order to attend the arbitration hearing. If it were the intent of the parties to incorporate language placing all employees

in an "on-duty" status on the day of an arbitration, the language would have included specific words to that effect.

It is a basic tenet of contract interpretation that once parties to an agreement incorporate specific language regarding a term in one part of the contract, they know how to be specific about the same term in other parts of the contract. If the same specific language regarding the term or concept is included in one section of the contract and not in a second section, it is not meant to apply in the second section. Following this tenet, the Employer argues that where the Employer intended to pay off duty employees, it included language to pay them. As an example, Section 27.05 of the Agreement contains language to compensate an off-duty employee who is placed on standby. The parties did not include any language referencing employees in an off-duty status in Section 20.08(2). Such language would have been included, if the Employer intended to compensate employees already off-duty.

The Employer further argues that any finding adopting the Union's interpretation would unduly burden it by requiring it to compensate employees it did not intend to compensate and increase it's scheduling and staffing demands. The subject benefits to be conferred upon the employees and the concomitant burdens to be shouldered by the Employer were not negotiated into the labor agreement and, therefore, are not be part of it.

The Employer admits that it did propose additional language to be included in Section 20.08(02) for the purpose of clarifying the existing language. While it believes the language to be unambiguous, grievances had been filed surrounding the language and management wanted to eradicate any future interpretation differences. The fact that the new language was not included in the new labor agreement is not proof that the language was needed to avoid paying off duty

employees.

If the Arbitrator were to conclude that an off-duty employee is entitled to compensation for attending an arbitration hearing, the rate of pay should be straight pay and no reimbursement should be given for travel expenses. Paying an employee time and one-half, plus travel expenses is punitive in nature and should be rejected by the arbitrator.

III. DISCUSSION AND OPINION:

Where the words contained in an agreement are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation; the clear meaning will ordinarily be applied. See, Elkouri & Elkouri, *How Arbitration Works* (5th Ed., 1999), at P. 470. The language contained in Article 20, Section 20.08(2) is clear relative to employees scheduled for work on the day of an arbitration. They are entitled to attend the hearing with pay. The issue presented by the Grievant involves an application of the Section to off-duty employees. The Arbitrator believes that the language contained in Section 20.08(2) is also clear relative to its application to off-duty employees; it does not include them.

Since the intent of the arbitration provisions in the Collective Bargaining Agreement is to provide a procedure available to all bargaining unit employees without any reprisal for participating in the process, it would appear to be logical to apply Section 20.08(2) to off-duty employees. Because an on-duty employee is entitled to be released from work, with pay, to be a witness at an arbitration, it would seem logical that a non-discriminatory application of the provision would apply to those already off-duty. Arbitrations are conducted during the day and not only would those employees working on the evening or night shifts be affected (they would be off-duty during the day), so would those employees on vacation or away from the workplace for other permissible

reasons. To reach such a conclusion, however, one would need to make the determination that the language of Section 20.08(2) was ambiguous and the intent of the parties, drawn from the essence of the Agreement as a whole, would support such an interpretation. Based on the clear language of the Section, such an interpretation would be misplaced. Even if the Arbitrator concluded that the provisions of the Section in question were ambiguous, the utilization of various rules of construction would result in the same finding: the Section does not apply to off-duty employees.

Just as a written instrument should not be construed alone from a single word or phrase, but construed in light of the instrument as a whole, the proper interpretation of sections or portions of an agreement cannot be isolated from the rest of the agreement. In this instance, the provisions of Section 20.08(2) must be examined in light of other relevant provisions in the Agreement to arrive at a proper interpretation. Section 20.08(2) does not set forth specific language stating that off-duty employees are to be included in the application of its provisions. Since specific language to that effect is not contained therein, one must examine similar language contained in other provisions of the Agreement. There are other sections of the Agreement that specifically address compensation for off-duty employees. The failure of the parties to do so in Section 20.08(2) results in a finding by the Arbitrator that the parties did not intend the provisions of Section 20.08(2) to apply to employees already off-duty.

If the Employer has agreed to allow witnesses time off to attend an arbitration, then they must be scheduled for work in order to be given time off. While the Union argues that employees attending an arbitration hearing as a witness are entitled to pay and the Employer must schedule the employee for work on the day of the Arbitration, there does not exist any language in the Agreement requiring the Employer to do so. Management has the exclusive right to manage the workforce,

which includes scheduling of the workforce. Where the Employer has intended to include compensation to off-duty employees, it has incorporated language to reflect that intent.

Section 27.05 of the Agreement is an example of where the parties have included language concerning compensation to be paid to employees not scheduled to work. The section addresses those times when employees must be placed on standby during their off-duty hours. Specifically it states:

> **27.05 Standby Pay**
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> Whenever an off-duty employee is placed on a standby basis by the Employer, he or she will be paid on-half of his/her regular rate of pay for all hours that he/she is actually on standby.

Another pertinent contractual provision is contained in Article 51 of the Agreement concerning Court Leave. Therein the Employer has agreed to allow an employee leave to appear before any court or official proceeding, if the action arises out of his/her employment and he/she is subpoenaed to appear. Employees are entitled to pay under these circumstances. Rather than leaving to question the issue of compensation for employees scheduled off-duty, it added specific language providing them compensation. Section 51.01 concerning Granting of Court Leave provides:

> **51.01 Granting of Court Leave**
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> The Superintendent shall grant court leave with full pay at the regular rate to any employee who:
>
> 1. Is summoned for jury duty by a court of competent jurisdiction, or
> 2. Is subpoenaed to appear, based on any action arising out of his/her employment, before any court or other official proceedings.

In addition to the above, the Agreement further provided the following in Section 51.02

concerning compensation:

> **51.02 Compensation**
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> A. Any compensation or reimbursement for jury duty, in excess of fifteen ($15.00) dollars per day, when such duty is performed during an employee's normal working hours, shall be remitted by a state employee to the payroll officer for transmittal to the Treasurer of State.
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> B. Employees shall notify their immediate supervisor when they are required to appear in court.
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> C. Employees appearing in court or other official proceedings based on any action arising out of their employment during their off duty hours shall be guaranteed a minimum of three (3) hours at one and one half times their regular rate or their actual hours worked, whichever is greater. The Employer shall not change an employee's schedule or scheduled shift in order to avoid payment for court time incurred during off duty hours without the consent of the employee involved. Payment shall be make in cash or compensatory lime at the discretion of the employee.
>
> D. Members of the bargaining unit who attend court after a mutually agreed to shift trade and during what should have been normal working hours, shall not receive court appearance pay.
>
> . . .

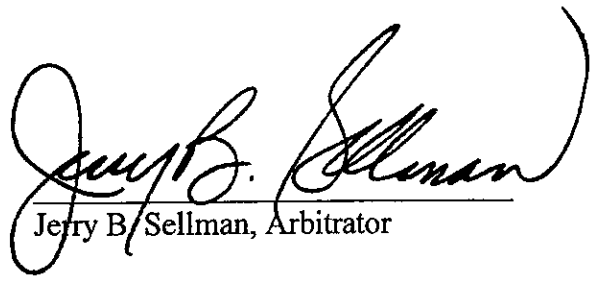
Based upon the two above contractual provisions, it can be determined that the Employer and Union were aware of circumstances where issues relating to compensation of off-duty employees were considered. Where the parties intended to provide compensation for off-duty employees, the circumstances under which they would be compensated and the amount of the compensation was set forth in specific contractual language. The Arbitrator must conclude that the omission of such language in Section 20.08(2) was purposeful and the provisions of the Section were meant to apply as the clear language dictates: only to employees currently working at the time of the arbitration.

While this result may seem unfair to those working on shifts other than the "day' shift, or off duty due to other reasons, the Arbitrator has no authority to add to, subtract from or modify the terms of the Agreement. Interpreting the language of Section 20.08(2), other than as set forth herein, would result in such action.

The Arbitrator considered the arguments presented by the parties concerning the proposal submitted by the Employer in the most current contract negotiations, wherein the Employer proposed to amend Section 20.08(2) by adding language indicating the provisions of the section were only to apply to on-duty employees. While the Union was astute to point out that the proposal must have been presented to restrict the application of the language in Section 20.08(2), the Arbitrator considers it to be more in the nature of clarification. The additional language was not necessary, but it would have been helpful in resolving disputes concerning the interpretation of the applicable provisions.

IV. AWARD

For all the reasons and conclusions set forth hereinabove, the Grievance is denied.



Jerry B. Sellman, Arbitrator