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ARBITRATION DECISION

August 20, 2005

In the Matter of:

Ohio Department of Public Safety,)	
Division of State Highway Patrol)	
)	Case No. 15-00-040615-0059-04-01
and)	Holiday Pay
)	
Ohio State Troopers Association)	

APPEARANCES

For the Patrol:

Staff Lieutenant John R. Allard, Advocate
Krista M. Weida, Attorney

For the Union:

Herschel M. Sigall, Chief Legal Counsel
Elaine N. Silveira, Legal Counsel
Dennis M. Gorski, President

Arbitrator:

Nels E. Nelson

BACKGROUND

The events that led to the instant dispute were triggered by the death of former President Ronald Reagan on June 5, 2004. The day after Reagan's death President George W. Bush issued a proclamation declaring that June 11, 2004, would be a "National Day of Mourning." He also issued Executive Order 13343, which directed federal agencies to close on June 11, 2004, "as a mark of respect" for the former president. The executive order further stated that the "day shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971, and of 5 U.S.C. 5546 and 6103(b) and similar statutes insofar as they relate to the pay and leave of employees of the United States."

EO 11582 and the cited sections of the code deal with compensation and leave on holidays. The executive order lists a number of holidays and includes as a holiday "any other calendar day designated as a holiday by Federal Statute or Executive order." Both of the cited sections of the United States Code deal with compensation for holidays. They cover statutory or listed holidays and any other day declared a holiday by an executive order.

On June 10, 2004, Dennis Gorski, the president of the Ohio State Troopers Association, wrote to Steven Loeffler, the Director of the Office of Collective Bargaining, on behalf of the members of bargaining units #1 and #15. Gorski stated that President Bush "issued an EO declaring June 11, 2004 to be a holiday for purposes of pay and leave of employees of the United States." He asked Loeffler to acknowledge that the employer would honor the executive order and treat June 11, 2004, as a holiday.

When the employer refused Gorski's request, he filed a grievance on behalf of the members of the two bargaining units. He claimed that President Bush's executive order made June 11, 2004, a holiday and charged that the employer violated Article 44 of the collective bargaining agreement by not treating it as a holiday. Gorski asked that the members of the two bargaining units be granted holiday pay in accordance with the contract.

When the parties were unable to resolve the grievance, it was appealed to arbitration. The parties agreed to submit the case to the Arbitrator based on stipulated facts and briefs. The stipulations and the briefs were received by the Arbitrator on July 6, 2005. When the union received its copy of the employer's brief, it objected to certain exhibits attached to the brief. The employer responded to the union's objection on July 14, 2005. On July 19, 2005, the Arbitrator informed the parties that he would accept the exhibits attached to the employer's post-hearing brief and would allow them until August 5, 2005, to submit reply briefs. Once the reply briefs were received, the record was closed and this decision was prepared.

ISSUE

The issue as framed by the Arbitrator is:

Did the state violate the collective bargaining agreement by denying employees holiday pay for June 11, 2004?

RELEVANT CONTRACT PROVISIONS

Article 44 – Holidays

44.01 List of Days – Members of the bargaining unit will have the following holidays:

* * *

11. any day declared by the Governor of the State of Ohio or the President of the United States.

* * *

UNION POSITION

The union argues that the facts are clear and undisputed. It claims that President Bush issued an executive order declaring June 11, 2004, a holiday “by specifically referencing [Executive Order 11582], which declared what days a holiday would be.” (Union Brief, page 3) The union observes that Article 44 of the collective bargaining agreement states that a holiday is “any day declared by the President of the United States” and requires employees to be paid eight hours of holiday pay.

The union contends that the contract language needs no interpretation. It points out that page 470 of the fifth edition of Elkouri and Elkouri’s How Arbitration Works states “if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators.” The union notes that Article 44.01 clearly and unambiguously states that any day declared a holiday by the president is a holiday under the contract.

The union rejects the argument that the issue before the Arbitrator has already been arbitrated and, therefore, falls under the doctrine of stare decisis. It admits that it filed a grievance in 1994 when President Clinton issued EO 12910 on April 24, 1994, on the death of Richard Nixon where it argued that the members of units #1 and #15 were entitled to holiday pay. The union also acknowledges that the grievance was denied by Arbitrator Marvin J. Feldman.

The union asserts, however, that there is a significant difference between the executive orders issued by Presidents Bush and Clinton. It report that the key distinction is that the executive order issued by President Bush references Executive Order 11582 while the executive order promulgated by President Clinton does not include any reference to EO 11585.

The union contends that there is no question that President Bush's executive order falls within the scope of Article 44.01(11) of the contract. It observes that EO 11582 states that holidays include the listed days as well as "any other calendar days designated as a holiday by Federal statute or Executive Order." The union claims that June 11, 2004, was declared a holiday by the executive order issued by President Bush.

The union argues that the difference between the two executive orders means that Arbitrator Feldman's decision has "absolutely no relevance in the instant case." It states that the executive order issued by President Bush specifically included language concerning holidays whereas the executive order issued by President Clinton did not. The union asserts that the Arbitrator faces a "brand new issue."

The union maintains that state governments are not excluded from President Bush's executive order. It acknowledges that Section 2 of the executive order excludes a number of departments of the federal government from the order to close on June 11, 2004, which is contained in Section 1. The union emphasizes, however, that section 2 does not specifically reference state governments.

The union argues that Article 44 does not require the governor to declare a holiday in order for employees to be entitled to holiday pay. It points out that Section 44.01(11) states that bargaining unit holidays include "any day declared by the Governor

of the State of Ohio or the President of the United States.” (Emphasis added by the union) The union indicates that if the employer wanted to limit president-created holidays to those sanctioned by the governor, it could have done so.

The union contends that the intent of Article 44 is clear. It claims that the evident aim of the provision is to compensate members of units #1 and #15 with holiday pay for a calendar day designated as a holiday. The union states that “construing the agreement in broad terms to accomplish its aims finds that June 11, 2004 was a holiday within the collective bargaining agreement.” (Union Brief, page 7)

The union maintains that the June 7, 2004, email authored by Jillien Froment, the Office of Collective Bargaining’s General Counsel, which was attached to the employer’s post-hearing brief as Employer Exhibit #1, has no bearing on the issue at hand. It points out that the email references Article 26 of the contract, which governs work schedules. The union claims that since the email does not refer to Article 44, the holiday provision of the contract, it should be disregarded. It states that in any event, it only puts in writing the employer’s intent to violate the agreement.

The union argues that the other attachments to the employer’s post-hearing brief are also irrelevant. It indicates that the Proclamation issued by President Bush on June 6, 2004, which is attached to the employer’s brief as Employer Exhibit #2, is “a mere press release [and] does not fall within the hierarchy of laws of the United States.” (Union Reply Brief, page 1) The union claims that Employer Exhibits #3 - #6, Executive Orders 13068, 13109, 13281, and 13320, are irrelevant since only one was issued during the current contract period and since none of them concern an issue of such national consequence as the death of a former president. It maintains that Employer Exhibits #7 -

#9, which show that Article 44 has not changed from the 1994-97 contracts, are irrelevant and only show that it felt no need to change the clear and unambiguous language.

The union rejects the employer's claim that it is focusing its argument on 5 U.S.C. 5546 and 6103(b). It observes that these statutes relate to how federal employees are paid. The union asserts that "EO 11582 deals specifically with the governance of holidays and as Article 44 provides for a holiday to be any day declared as such by the President of the United States, it is wholly relevant and it is the focus of the Union's argument in this case." (Union Reply Brief, page 2)

The union claims that the employer's past practice argument is irrelevant and has no place in the case. It notes that Article 2 of the contract states that the "agreement is a final and complete agreement ... [and] may be amended only by written agreement between the Employer and the Union." The union reports that in the instant case there was no written agreement to incorporate a past practice in the contract.

The union concludes that June 11, 2004, was a holiday falling within the meaning of Article 44. It asks the Arbitrator to direct the employer to grant holiday pay to all members of bargaining units #1 and #15 in accordance with the contract.

EMPLOYER POSITION

The employer argues that President Bush did not make June 11, 2004, a national holiday. It points out that his proclamation stated that the day would be "a National Day of Mourning" rather than a holiday. The employer further notes that the proclamation "failed to authorize a respite from work for the American people and only mentioned that the President called upon the American people to assemble on that day in their respective

places of worship to pay homage to the memory of Ronald Reagan.” (Employer Brief, page 3)

The employer contends that EO 13343, which was issued by President Bush on the same day as the proclamation, did not make June 11, 2004, a holiday. It observes that federal offices were closed on that day “as a mark of respect” for the former president. The employer indicates that the executive order indicated that June 11, 2004, would fall within the scope of EO 11582 and 5 U.S.C. 5546 and 6103(b) for the purpose of pay and leave.

The employer rejects the union’s argument that a “National Day of Mourning” constitutes a holiday because President Bush used EO 11582 and 5 U.S.C. 5546 and 6103(b) to pay employees for time not worked. It reports that these procedures have been used on four occasions to pay employees when they did not work. The employer observes that they were used by President Clinton in Executive Orders 13068 and 13109 when he granted employees one day of leave on December 26, 1996, and one-half day of leave on December 24, 1998, and by President George Walker Bush in Executive Orders 13281 and 13320 when he granted employees one-half day of leave on December 26, 2002, and one day of leave on December 26, 2003.

The employer maintains that a past practice was established of not paying holiday compensation merely because the president uses EO 11582 and 5 U.S.C. 5546 and 6103(b) to grant pay to federal employees for time not worked. It points out that in the four cases cited above, it did not provide holiday pay to employees. The employer stresses that the union did not demand holiday under Article 44 in any of these instances.

The employer relies on the decision of Arbitrator Marvin J. Feldman in State of Ohio and Fraternal Order of Police, Ohio Labor Council, Inc., Units 1 and 15; Case Nos. 15-03-940510-036-04-01 and 15-03-940510-035-07-15; May 9, 1996. It reports that in that case, the FOP/OLCI, which formerly represented units #1 and #15, filed a grievance because the employer did not grant holiday pay when President Clinton proclaimed a National Day of Mourning following the death of Richard Nixon. The employer notes that the FOP contended that the National Day of Mourning was a holiday under Article 44.01 of the collective bargaining agreement. It indicates that Arbitrator Feldman disagreed and held that this provision applies only if the president declares a national holiday and that the fact that federal employees were paid for the National Day of Mourning did not make the day a holiday under Article 44.01.

The employer rejects the union's argument that the fact pattern in the dispute before Arbitrator Feldman is different from the instant case. It acknowledges that 5 U.S.C. 5546 is not mentioned in the executive order issued by President Clinton. The employer claims, however, that 5 U.S.C. 5546 and 5 U.S.C. 6103(b) are always considered together when granting pay to Federal employees." (Employer Brief, page 5)

The employer maintains that Arbitrator Feldman recognized another flaw in the FOP's case. It points out that he noted that there was no declaration of a holiday by either the governor or the president. The employer reports that Arbitrator Feldman stated:

... Neither the proclamation nor the Executive Order established a holiday. The proclamation creates a day of mourning and the Executive Order creates a method of payment. There is nothing more or nothing less.

The contract of collective bargaining clearly established that under Article 44 that a holiday is any day declared by the Governor of the State of Ohio or the

President of the United States. Certainly the Governor of the State of Ohio did not declare April 27 as a holiday because all state offices were open and working. The President of the United States did not declare April 27 to be a holiday, merely a day of mourning. With that language, it is difficult indeed to declare that President Nixon's internment day was a holiday. Simply put, a day of mourning is not a holiday. A holiday is a holiday when so declared. The clear and unambiguous language of the proclamation and Executive Order deny the creation of a holiday for that date and I so hold. (Pages 8-9)

The employer accuses the union of attempting to win a benefit through the grievance procedure that should have been brought to the bargaining table. It points out that in 1997 the Ohio State Troopers' Association was certified as the sole bargaining agent for units #1 and #15 but failed to propose any new language with respect to Article 44 during the 1997, 2000, or 2003 negotiations. The employer stresses that the language before the Arbitrator in the instant case is the same language that was interpreted by Arbitrator Feldman in 1996.

The employer contends that the language in Article 44 "transcends individual Unions." It points out that the language appears in the OCSEA, SEIU District 1199, and FOP/OLIC contracts. The employer indicates that the language has never been interpreted to make a National Day of Mourning a holiday. It acknowledges that there are holidays in Article 44 that started with a presidential proclamation but it insists that it has never recognized or compensated a National Day of Mourning as a holiday under any of its contracts.

The employer concludes that the union failed to meet its burden of proving a contract violation. It requests the Arbitrator to deny the grievance in its entirety.

ANALYSIS

The facts giving rise to the grievance are undisputed. On June 5, 2004, Ronald Reagan died. The next day President Bush issued a proclamation stating that June 11, 2004, would be a National Day of Mourning and promulgated an executive order indicating that federal offices would be closed on that day. He indicated in the executive order that, for purposes of pay, the day would fall within the scope of EO 11582 and 5 U.S.C. 5546 and 6103(b). The union requested holiday pay for June 11, 2004. When the employer refused the union's demand, it filed a grievance charging that the employer violated the collective bargaining agreement.

Article 44 of the agreement governs holidays. Section 44.01 lists ten holidays for which employees are entitled to leave and holiday pay. It also states that holidays include "any day declared by the Governor of the State of Ohio or the President of the United States." Thus, the crux of the dispute is whether President Bush declared June 11, 2004, a holiday.

The Arbitrator must reject the union's claim that the day was made a holiday. First, the proclamation issued by President Bush refers to a "National Day of Mourning" and does not use the word "holiday." While the union is correct that a proclamation is not the same as a statute or an executive order, it does indicate the intent of President Bush regarding the status of June 11, 2004.

Second, EO 13343, which was issued the same day as the proclamation, does not make June 11, 2004, a holiday. Its purpose is to close federal offices and to provide for the payment of employees who are given the day off. The executive order refers to "June 11, 2004" but does not attach any label to it.

The Arbitrator must discount the union's argument that President Bush's executive order makes June 11, 2004, a holiday by referring to EO 11582. EO 11582 defines "holiday" by listing nine holidays and by adding that a "holiday" includes "any other day designated as a holiday by Federal statute or Executive order" and it indicates when employees on different work schedules receive time off for a holiday. The reference to EO 11582 is for the purpose of scheduling leave and does not alter the fact that President Bush's proclamation declared June 11, 2004, to be a National Day of Mourning rather than a holiday.

The Arbitrator notes that President Bush's executive order also references 5 U.S.C. 5546 and 6103(b). Section 5546 governs pay for Sunday and holiday work. Paragraph b indicates that employees who perform work on a holiday are entitled to premium pay. Section 6103(b) deals with the scheduling of holidays for employees with different work weeks. Nothing in either provision of the code makes June 11, 2004, a holiday. They simply explain the scheduling of leave and the rate of pay for employees.

The Arbitrator's conclusion that the day in question was not a holiday is supported by the decision of Arbitrator Feldman in State of Ohio and Fraternal Order of Police, Ohio Labor Council, Inc., Units 1 and 15; Case Nos. 15-03-940510-036-04-01 and 15-03-940510-035-07-15; May 9, 1996; where the issue was the FOP/OLCI's demand for holiday pay when President Clinton closed federal offices following the death of Richard Nixon. Arbitrator Feldman held that President Clinton did not declare a holiday because his proclamation stated that the day in question was a National Day of Mourning rather than a holiday. He added that the reference in President Clinton's

executive order to 5 U.S.C. 6103(b) simply created the method of payment and did not make the National Day of Mourning a holiday.


The Arbitrator cannot accept the union's argument that Arbitrator Feldman's decision is irrelevant because there is a significant difference between President Bush's executive order and the executive order of President Clinton. He recognizes that the executive order issued by Present Bush refers to EO 11582 and 5 U.S.C. 5546 and 6103(b) while President Clinton's executive order references only 5 U.S.C. 5546. However, the cited executive order and the two sections of the code deal only with pay and leave for employees and do not create a holiday.

The Arbitrator believes that it is important to note that following Arbitrator Feldman's decision the union could have attempted to extend the reach of Section 44.01. It could have tried to negotiate language requiring the employer to give the employees a day off with pay whenever federal employees get time off with pay. However, in the three rounds of bargaining since the Feldman decision, the union made no attempt to amend Section 41.01.

Based on the above analysis, the Arbitrator must deny the union's grievance.

AWARD

The grievance is denied.


Nels E. Nelson
Arbitrator

August 20, 2005
Russell Township
Geauga County, Ohio