

OPINION AND AWARD

In the Matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The Ohio Department of Natural Resources
& The Office of Collective Bargaining

Regarding

Grievance Number 25-17(09-21-05)-03-05-02
(David Dobbins et. al.)

Date of Hearing: September 21, 2006

Date of Award: October 21 , 2006

APPEARANCES:

FOR THE STATE:

Brad Nielsen, Labor Relations Officer
Buffy Andrews, Labor Relations Spec.
Bill McGarity, Deputy Chief, Watercraft
Michael Quinn, Acting Chief
Erica Berencsi, OCB
Abblie Workman, OCB Intern

FOR THE FOP/OLC:

Paul Cox, Chief Counsel
David Dobbins, Grievant
Sally Hess, Grievant
Renee Engelbach, Paralegal
Joel Barden, Staff Representative

An arbitration hearing was conducted on September 21, 2006, at the offices of the Fraternal Order of Police, Columbus, Ohio.

At the commencement of the hearing the Department of Natural Resources offered a procedural objection stating that there was no record that there had ever been a demand for arbitration made by the FOP.

After initial arguments the Arbitrator invited the parties to present evidence and further argument on the threshold issue.

The Department requested the hearing be delayed to allow Alicyn Carroll, Office of Collective Bargaining Staff, to arrive and testify.

After a period of time the Department asked that the hearing proceed on the merits and reserved its right to argue the procedural objection later in the day.¹

Prior to the hearing the Arbitrator, upon a request of the FOP, issued a subpoena for various documents relating to this grievance. In addition to the documents acquired by subpoena, the parties jointly submitted the collective bargaining agreement, the grievance trail and numerous other documents.

The issue before the Arbitrator can be stated as, ***“Did the Department of Natural Resources violate Article 22 of the Collective Bargaining Agreement when it assigned Watercraft Officers to Hurricane Katrina Relief? If so, what shall the remedy be?”***

BACKGROUND:

¹ At the conclusion of the respective presentations of the parties, the Employer withdrew its procedural objection. The parties then agreed that the matter was properly before the Arbitrator for determination.

This situation arose in response to a request received by the State of Ohio for assistance in the aftermath of Hurricane Katrina. The Department of Natural Resources was notified that assistance had been requested by the federal government to assist in the Gulf Coast region.

The request was conveyed on September 2, 2005. The initial request was for ten (10) Watercraft Officers and five (5) vehicle units.² At that time it was believed that the Parks Division of the Department would also be sending a team.

On Saturday September 3, 2005, Chief Quinn³ was notified that the plans had changed in that the Parks Division was not going to send a team and the Watercraft Division needed a team of twenty (20) officers and ten (10) vehicle units. The team was to be deployed the following day, Sunday, September 4, 2005.

The Employer surveyed the Watercraft Officers at the ten (10) area offices to solicit volunteers who would be willing to serve on this search and rescue team.

Seventeen (17) FOP officers were selected along with three (3) exempt supervisors and those twenty (20) persons departed for Mississippi on Sunday. All seventeen (17) FOP officers were in the Gulf Region for four days and all worked in excess of forty (40) hours and earned overtime compensation.

Three identical grievances were filed regarding this matter and all were designated as class action grievances on behalf of those persons who had

² Truck and Boat

volunteered and who were more senior than one or more of the persons selected.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 22 - HOURS OF WORK AND OVERTIME

22.01 Work Week and Work Day

The normal work week for all full-time permanent employees shall be forty (40) hours. The work week shall commence at 0:00 hours on Sunday and end at 23:59 hours on Saturday. The normal work day shall be eight (8) consecutive hours, or ten (10) consecutive hours for those scheduled to work four (4) days a week.

The normal work week for Wildlife Officers and Liquor Control Investigators shall consist of five (5) eight (8) hour days.

Routine work normally performed by Wildlife Officers within an eight (8) hour day may include but not be limited to: enforcement, public relations, phone calls, etc.

22.02 Posting of Work Schedules

It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time. Work schedules will be posted for a work period of four (4) weeks or greater and shall be posted for a minimum of four (4) weeks in advance. Work schedules shall not be established solely to avoid overtime but for efficient operations. After the schedule has been posted it will remain in effect for the duration of the posted period and may be changed only with four (4) weeks notice of a date or in emergency situations. Less than full time (LTFT) employee schedules may be modified with two (2) weeks notice to facilitate time off for other officers and/or provide coverage for the advanced scheduled absence of an officer and/or in the case of an emergency. LTFT employees' scheduled hours cannot exceed forty (40) hours in any week. For the purposes of this Article, LTFT means part-time permanent in the Departments of Mental Health and Mental Retardation/Developmental Disabilities. For purposes of administration of this Article, training opportunities and employee leave notices shall not in themselves constitute emergencies. Records regarding work schedules shall be retained for twelve (12) months in each facility. Within a classification, requests for days off will be determined by classification seniority. Shift assignments will be established by classification seniority within that classification, except that all bargaining unit members classified as Police Officer 1 and 2 shall use bargaining unit seniority within the respective agency. Employees at work facilities without work schedules shall be notified of special assignments two (2) weeks in advance whenever possible except for unforeseen or mitigating circumstances including emergency situations.

The Employer will attempt to schedule employees so as to have two (2) consecutive days off.

The parties understand that employee cooperation will enhance the implementation of this section.

The FOP/OLC staff representative and management may agree to waive or modify any part of this Article...

22.08 Overtime Assignment

Unscheduled overtime will be offered to employees on duty starting with the most senior qualified employee, except when the nature of the enforcement duties being performed need to be completed by the incumbent. If the overtime assignment is not filled by the above, it will be offered to

³ Chief Quinn was serving as Assistant Chief at the time this incident occurred.

the most senior qualified employee available who is assigned to that work location. If the overtime assignment cannot be filled by either of the above, the least senior qualified employee on duty will be required to work. If the least senior employee is unavailable, then the next least senior employee(s) shall be required to perform the overtime assignment(s). Scheduled events and overtime to be worked at other facilities will follow the selection procedure outlined above with seniority being determined in the defined area (i.e., facility, park, and region, state) from which the member is to be selected. In departments or divisions in which services and/or facilities are regionalized or in which regionalization is proposed or being implemented, regionalization shall be a viable topic for labor/management committees. Committees may discuss and make recommendations to the appropriate parties regarding scheduling and overtime in the regions. Wildlife Officers' scheduling of overtime will be governed by the directive currently in effect, except that changes may be made to such directive as deemed necessary by the Chief. If such changes affect the terms and conditions of employment, they will be negotiated in good faith with the FOP/OLC. Good faith attempts will be made to equalize scheduled overtime at any one facility. Scheduled overtime is defined as any overtime of which the Employer has forty-eight (48) hours advance notice.

POSITION OF THE FOP:

The contract clause being grieved by the FOP (22.08) is very clear. The question before the Arbitrator is which contract provision governs.

The Employer has not disputed that overtime was worked.

The FOP notes that the question before the Arbitrator is can the Employer submit a credible claim that it did not know whether overtime would be worked.

The FOP notes that there is no disagreement that a one way trip to the Gulf Region is fourteen (14) hours in duration.

If the Employer believed that overtime would occur then Article 22.08 must govern the assignment.

The FOP notes that the original answer to the grievance is based on lack of proof that overtime was worked. Only after the delivery of the materials required in the subpoena for records, did the Employer abandon that defense.

The FOP requests that the grievance be granted and that the persons covered by the grievances be compensated at the overtime rate for hours they were denied by their non selection.

POSITION OF THE EMPLOYER

The Department of Natural Resources argues that there was not a contractual violation. It responded to a national emergency quickly while taking into account the needs of the boaters in Ohio as well as the people in need of rescue in the Gulf Region.

It believes Article 22.02 is the governing contractual provision in that it merely changed the schedule of employees in an emergency situation.

The Employer notes that the provisions of Article 22.08 were properly applied to the group of employees assigned to the Gulf Region in that all were afforded an equal amount of overtime.

The Employer notes that the Division did not deem the situation as an overtime opportunity.

It also notes that the Employer was preparing a second response team in case it was requested. Persons not assigned to the first group would have had an opportunity to be assigned to the second.

(Then) Assistant Chief Quinn then testified that he considered seniority when assigning officers but also attempted to balance the officers remaining in Ohio between junior and experienced officers. He noted the occurrence of a busy Labor Day weekend at the same time the volunteers were deployed to the Gulf Coast.

The Employer argues that it had a management right to assign persons consistent with Article 22.02 of the contract and thus the grievances should be denied.

DISCUSSION:

The facts in this matter are not in dispute. Soon after Hurricane Katrina struck, the federal government issued a call for assistance. The State of Ohio agreed to send personnel to help with search and rescue.

The turnaround time was very brief. Notification was received on Friday and the teams were to depart on Sunday.

Assistant Chief Quinn began to seek volunteers to staff the effort. The needs of the State of Ohio were considered along with the skills that would be needed to most effectively assist in the Gulf Region. It was decided that only officers who had search and rescue training would be appropriate. Likewise, the one paramedic within the group of employees would be of great assistance.

The decision was made that any persons who volunteered with added restrictions or qualifications would not be considered due to the short time period for finalizing the group.

The evidence indicates that the State sent employees south with the expectation that their travel would take fourteen (14) hours each way and the deployment could last for up to two weeks.

When the Parks Division of the Department of Natural Resources thought it would also be sending a team, it called the FOP and consulted on how to accomplish the goal without violating the Collective Bargaining Agreement.

I do not totally agree with FOP Advocate Mr. Cox that the question the Arbitrator must answer is which section of the Collective Bargaining Agreement governs in this situation.

Both sections must be complied with. There is no question that the Department of Natural Resources can change schedules in response to an emergency. An emergency was clearly established in this situation.

The more relevant question for this Arbitrator is whether the right to change schedules excuses the Employer from the requirement to offer overtime to all eligible employees if it is anticipated, even though the overtime will occur as the result of an emergency situation.

If the Employer could convince the Arbitrator that it planned to send employees on this assignment with the expectation that they would remain within forty (40) hours of work per week, or if the Employer had directed its on-site supervisors to refuse to assign or approve overtime then the provisions of Article 22.08 would not apply.

The record shows that overtime was approved thus the conclusion to be

drawn is that no such restriction was placed

SUPPLEMENTAL OPINION AND AWARD

In the Matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The Ohio Department of Natural Resources
& The Office of Collective Bargaining

Regarding

Grievance Number 25-17(09-21-05)-03-05-02
(David Dobbins et. al.)

January 5, 2007

APPEARANCES:

FOR THE STATE:

Brad Nielsen, Labor Relations Officer
Michael Duco, OCB

FOR THE FOP/OLC:

Joel Barden, Staff Representative

This Arbitrator issued a decision and award in the above referenced case on October 21, 2006. The Decision in that case was:

"DECISION AND AWARD:

The grievances are granted and the remedy requested is ordered. Those Officers who volunteered without restrictions or conditions, who were more senior than other Officers selected shall be compensated for an amount of overtime equal to that earned by the less senior Officers who were selected and deployed.

The Arbitrator will retain jurisdiction to resolve any disputes that may arise regarding the implementation of this award."

Pursuant to the retention of jurisdiction clause, the parties asked the Arbitrator to consider the question of remedy only. The difference of opinion related to which individuals should receive the remedy awarded.

A joint conference call was conducted January 5, 2007 wherein the parties argued their respective positions and asked the Arbitrator to issue a supplemental Award on this limited issue.

In addition the parties jointly submitted a brief outlining their respective views and positions in writing.

The Union believes the persons to be compensated should be *"the more senior Watercraft Officer's from each of the Field Offices than the less senior Officer's sent from each respective office from which members were selected."*

The Employer believes *"the appropriate parties to the action are the more senior Officer's based upon statewide availability and classification."*

A review of section 22.08 reveals the controlling language: *"Scheduled events and overtime to be worked at other facilities will follow the selection procedure outlined above with seniority being determined in the defined area (i.e., facility, park, and region, state) from which the member is to be selected. In departments or divisions in which services and/or facilities are regionalized or in which regionalization is proposed or being implemented,"*

The record in the original grievance is unclear regarding exactly which universe was being used to draw employees to work this special assignment. At some point it appears the draw was statewide and others it appears to be by Office.

When forced to choose between the two views espoused by the parties, I must select the one presented by the Union. The evidence presented in the previous hearing notes that the main interest of the Employer was to assure that each office was staffed with a mix of seasoned and newer employees.

This leads me to conclude that "Offices" really were the universe to be utilized.

Clearly the language of 22.08 reserves to the Employer the right to determine the universe, and then once determined, the application of seniority needs to be made pursuant to the Contract.

As noted in the original award the language also provides a vehicle whereby the Union and the Employer can agree to alternative methods of responding to such circumstances. The Advocates reported during the telephonic hearing that they are making progress in reaching such an agreement.

Without the benefit of a full record in this supplemental matter, and due to the lack of clarity about the universe used by management to make the selections, it is difficult to make the determination alluded to above.

But because the parties were unable to reach an agreement on their own, and because they requested this Arbitrator to make that determination, I will do so with the caveat that this supplemental should not be considered as precedent setting.

While the parties may find some precedential value in the original award, this Remedy Award should not be viewed as precedent setting.

NON PRECEDENT SETTING REMEDY AWARD

The appropriate parties to this Grievance are the more senior Watercraft Officer's who volunteered without restrictions or conditions from each of the Field Offices in which less senior Officer's were selected.

Issued at London, Ohio this 8th day of January, 2007.


N. Eugene Brundige, Arbitrator

David Dobbins, et. al 25-17 (09-21-05) 03-05-02

ARBITRATOR BRUNDIGE DECISION AND AWARD:

The grievances are granted and the remedy requested is ordered. Those Officers who volunteered without restrictions or conditions, who were more senior than other Officers selected shall be compensated for an amount of overtime equal to that earned by the less senior Officers who were selected and deployed.

The Arbitrator will retain jurisdiction to resolve any disputes that may arise regarding the implementation of this award.

Union Position

The Union contends the appropriate parties to this Grievance are the more senior Watercraft Officer's from each of the Field Offices than the less senior Officer's sent from each respective Office from which members were selected.

Example: Cambridge Field Office (in order of seniority)

- 1) Specialist Cathy Janosko-**Responded**
- 2) Specialist David Dobbins-**Able to respond, not selected for deployment**
- 3) Specialist Mark Kleis- **Able to respond, not selected for deployment**
- 4) Officer Plumly-**Responded**
- 5) Officer Jason Hobart-**Responded**
- 6) Officer Christian Zlocki- **Able to respond, not selected for deployment**

Thus, since Officer Plumly & Hobart responded from the Cambridge Field Office and Specialist Dobbins & Kleis are more senior, Specialist Dobbins & Kleis are the appropriate parties to the grievance.

Management Position

The appropriate parties to the action are the more senior Officer's based upon statewide availability and classification. Management sent eleven (11) Watercraft Officers, five (5) Watercraft Specialists and one (1) Watercraft Investigator.

Example: Watercraft Officers in order of seniority and their response as to availability for overtime assignment.

Watercraft Officers	#	Name	Response
11 Officers Responded	1	Jeffrey Baker	Responded
	2	Lawrence Rieck	Yes
		Blaine Downing	No
		Stephen Massello	No
	3	David Goodwin	Responded
	4	Patrick Brown	Responded
	5	David Bresko	Yes
	6	Margaret Brown	Yes
	7	Andrew Hollenback	Responded
	8	Chad German	Yes
		Brett Trump	No
		Jennifer Brown	No
		Richard Lowry	No
	9	Jason Latchic	Responded
	10	Greg Jason Plumly	Responded
	11	Travis Hobart	Responded

Thus, in our example, the most senior Officers on a statewide basis are the appropriate parties to the action. Therefore, Officers Rieck, Bresko, Brown & German were available for the deployment but skipped for less senior employees to get to the eleven (11) Watercraft Officers sent to respond to the emergency.

Joel's Version

#	Name	Seniority	last digits SS#	Ranking
1	Investigator Randal Battista			
2	Specialist Joe Yingling			
3	Specialist Sally Hess			
4	Specialist Jason Albanese	06/19/00	4780	4 less senior than Management employees
5	Specialist Mark Klies	06/05/00		
6	Specialist David Dobbins	03/05/95		
7	Officer Ken Stapleton	07/01/02		less senior than Management employees

Management Version

#	Name	Seniority		
1	Investigator Randal Battista			
2	Specialist Joe Yingling			
3	Specialist Sally Hess			
4	Specialist John Johnston	12/03/79		
5	Officer Lawrence Rieck	06/04/00	848	3
6	Officer Margaret Brown	06/19/00		
7	Officer Chad German	06/19/00	3736	2
8	Officer David Bresko	06/19/00	553	1