#942

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF THE STATE HIGHWAY PATROL

AND

OHIO STATE TROOPERS ASSOCIATION

Before: Robert G. Stein

CASE# 15-03-050218-0017-07-15 &
15-03-050822-0115-07-15

Grievant:
Sgt. Matthew D. Witmer

Advocate for the EMPLOYER:

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INTRODUCTION

This matter came on for review before the arbitrator pursuant to the terms of the collective bargaining agreement (herein "Agreement') (Joint Exh. 1) between the Ohio Department of Public Safety, Division of the State Highway Patrol (herein "OSHP" or "Employer") and the Ohio State Troopers Association (herein "Union"). The parties' prior Agreement, which was effective during calendar years 2003 through 2006, is controlling in this matter because its time frame included the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to arbitrate this matter as a member of the panel of four (4) permanent umpires serving during the course of the Agreement pursuant to Article 20, Section 20.08. In lieu of an actual arbitration hearing, the parties agreed that the issue would be submitted to the arbitrator for his resolution based upon the arguments presented in the individual written briefs submitted by each of the parties. The instant matter actually is a review of two grievances—number 15-03-050218-0017-07-15 and number 15-03-050822-0115-07-15, which the parties have agreed to merge for combined arbitral review.

The parties have also stipulated to the submission of nine (9) joint exhibits and to a list of seventeen (17) factual stipulations regarding the events and circumstances leading to the two (2) grievances under considerations here. The parties acknowledge that the grievances are now properly before the arbitrator for his review.

ISSUE

Did the Employer violate the collective bargaining agreement by denying the Grievant vacation leave for July 1 though 4, 2005 and September 2, 2005? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 4—Management Rights
Article 20—Grievance Procedure
Article 43.04—Vacation Leave

BACKGROUND

Sergeant Matthew D. Witmer (herein "Witmer" or "Grievant") is the assistant post commander at the Medina Patrol Post 52 of the OSHP, supervising the 10:00 p.m. to 6:00 a.m. shift. He is the most senior of four sergeants assigned to that facility. Pursuant to Article 43.04, on January 31, 2005 the Grievant submitted a request for vacation leave for July 1 through July 5, 2005. Article 43.04(A), "Vacation Leave," includes the following language:

Vacation leave shall be taken only at times **mutually agreed to** by the Employer and the employee. The Employer may restrict the number of concurrent vacation leave requests at a work location based on work shifts.

A. Subject to the above limitations, employees who submit vacation leave requests no more than thirty (30) days and no less than twenty (20) days prior to the first day of the permanent shift dates referred to in Section 26.01 shall be granted vacation leave based upon seniority. (Emphasis added)

On July 28, 2005, the Grievant also filed a second vacation leave request for September 2, 2005, the Friday marking the beginning of the Labor Day weekend. Medina Post Commander, Lieutenant Westover, (herein "Westover") ultimately granted the Grievant's request for vacation leave only for July 5, 2005 "due to the requested leave **not being at a time that was mutually agreeable** between the Grievant and the Employer." (Emphasis added) (Stipulations 10 and 13) Westover's denials of the requested holiday vacation leaves were based on a determination that Witmer's supervisory coverage was necessitated due to the Independence Day and Labor Day summer holidays. Secondly, the Employer determined that there was an absence of any other available supervising sergeants due to already scheduled rotating days off for two sergeants and the extended absence of another sergeant, who was on FMLA leave.

In response to those vacation leave denials, the Union filed grievances on behalf of the Grievant on February 10, 2005 and August 12,

2005 (Joint Exh. 2). The parties agreed to combine the two (2) grievances for one resolution and to submit their written briefs for binding resolution of the grievances by the arbitrator.

SUMMARY OF THE UNION'S POSITION

The Union contends that the Employer acted unreasonably or arbitrarily in denying the Grievant's vacation leave requests. The Union challenges the Employer's right to rely on "operational necessity" as a *carte blanche* basis for purportedly justifying the denial of vacation leave based on employee seniority. The Union points out that OSP 203.15-01(C) directly addresses the situation in which no supervisor is available at a specific time by providing: "When a post has a shift or portion of the work day without a supervisor on duty, an adjacent post with an on-duty supervisor will be notified by computer message or telephone to assume responsibility of a situation should one occur." (Joint Exh. 4)

The Union also contends that DSP Policy 501.16(A)(5) (Joint Exh. 6) provides that vacation time requests will be granted or denied in accordance with the Agreement, which provides for vacation time to be granted on the basis of seniority. Additionally, the Union avers that Westover "could have worked to provide supervisory coverage" by establishing his own vacation leave times after he was apprised of his sergeants' requests for such leave in order to avoid potential lapses in

coverage over the summer holiday periods if supervisory coverage was, in fact, so critical. (Union brief p. 5)

The Union specifically challenges the mandate included in the March 2001 revision to OSP-203.15-01, which states: "During the Memorial Day, Independence Day, and Labor Day holiday reporting periods, posts **will make every effort** to maintain 24-hour supervisory coverage." (Emphasis added) (Joint Exh. 4) The Union contends that that "policy in no way demands that there will be 24-supervisory coverage during the three (3) major holiday reporting periods." (Union brief p. 7) The Union claims that the cited policy language was not an absolute directive in the absence of mandatory language, such as "shall" instead of "will." The Union insists that the unilaterally-imposed policy promoting 24-hour supervisory coverage during the summer holiday periods did not supersede the Agreement, which does not require 100% supervisory coverage.

The Union argues that the language in the Agreement allowing for vacation leave requests to be granted on the basis of seniority is controlling, and that the Agreement itself does not address the requirement for 24-hour summer holiday supervisory coverage. Because Witmer was purportedly entitled to enjoy his requested vacation leave time as the most senior supervisory sergeant, the Union requests that the grievances be sustained in their entirety and that the Grievant be

compensated with additional payment for the vacation days he was previously denied. Specifically, the Union petitions for Witmer to be compensated at 1½ times his regular rate for the dates of July 1 through 3, 2005 and September 2, 2005 and at 2½ times his regular rate for July 4, 2005.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer basically refutes all of the Union's claims and insists that it "has the right, pursuant to Article 4 of the Agreement, to determine the standards of service, to determine the overall methods, process, means, or personnel by which operations are to be conducted, and to manage its facilities, equipment, operations, programs, and services." (Employer brief p. 2) To carry out these goals, the Employer argues that it has the right to determine the appropriate level of supervisory coverage, while still adhering to any limitations set forth in the Agreement.

While recognizing the established seniority-based preference for the granting of vacation leave, the Employer emphasizes that approval of seniority-based leave requests is not necessarily automatic but is, in fact, subject to the **mutual agreement of the parties**, as specified in Article 43.04. The Employer contends that Witmer's two vacation leave requests were not unreasonably denied, based on the established state-wide OSHP policy requiring each post to make every effort to maintain 24-hour

supervisory coverage during the three summer holidays. Because those holidays each occurred on individual Mondays in 2005, the recognized holiday reporting period in each case actually began on the Friday immediately preceding the holiday and ended at midnight on the actual Memorial Day, Independence Day, and Labor Day holidays. (Employer brief p. 3) Therefore, those three weekends were deemed by the Employer to be unavailable to the Grievant for his requested vacation leave due to the unavailability of other less-senior Medina Post supervisory personnel to serve during the identified extended holiday period for the 10:00 p.m. to 6:00 a.m. shift.

The Employer stresses that the parties have stipulated (Joint Stipulation 15) that OSP Policy 203.15-01(C) "does not apply to the three designated holiday reporting periods," so "the Employer did not violate the CBA by not soliciting supervisory coverage at an adjacent post to allow for the Grievant to take vacation leave." (Employer brief p. 5)

The Employer also claims that, due to the extended FMLA absence of Sgt. Combs and the regular day off scheduled for Sgt. Gullett for Friday, July 1, only the Grievant and Sgt. Neff were available to cover the night shift, for which both worked eight (8) regular and four (4) federal overtime hours for which they were compensated. On Saturday, July 2, Gullett and Neff worked during scheduled hours earlier in the day before the Grievant began his scheduled shift at 10:00 p.m. while earning overtime

compensation. On Sunday, July 3, each of the three available sergeants (Gullett, Neff, and Witmer) was assigned an eight-hour shift. For the actual July Fourth holiday, Gullett worked the 8:00 a.m. shift, and the Grievant worked his regular shift beginning at 10:00 p.m., while also volunteering to work four (4) additional overtime hours. Post Commander Lt. Westover had previously chosen to work during the Memorial Day weekend, as per the Employer policy of requiring each Post Commander to work one of the three summer holidays. So Westover was not required to be available for service during either of the two remaining summer holiday weekends. Westover did, however, grant the Grievant's vacation leave request for Tuesday, July 5, which was outside of the holiday reporting period recognized in OSP-203.15-01.

On September 2, 2005, the Grievant was scheduled to work on Labor Day beginning at 10:00 p.m., with Neff having a regularly-scheduled day off and Combs and Gullett reporting at 6:00 a.m. and 2:00 p.m., respectively.

The Employer claims that, when OSP-203.15-01 was revised in March, 2001 to include the holiday work demand provisions for supervisory personnel, the Union was then put "on notice" of the Employer's intent to make this an on-going and consistent practice. The Employer maintains that "the scheduling of troopers is quite different from the scheduling of

post supervisors, as the coverage needs are different and have their own issues." (Employer brief p. 8)

Because the Grievant's vacation leave requests were allegedly denied in conformity with the Agreement, the Employer insists that the Grievant suffered no monetary loss and was paid in full for the regular and overtime hours he worked. Therefore, the Employer requests that the two grievances be denied in their entirety.

DISCUSSION

In this arbitral proceeding involving the interpretation and application of the Agreement, the burden of proof falls upon the party affirmatively asserting the violation of that Agreement to establish by a preponderance of clear and convincing evidence that a violation has occurred. That burden in this matter thus rests upon the Union.

Here, there is really no dispute between the parties as to the facts and circumstances giving rise to the instant grievance and its arbitration. Instead, what is disputed is whether the evidence establishes an actual contract violation.

In contract interpretation disputes, an arbitrator's primary role is to ascertain the mutual intent of the parties, as evidenced by the contractual language which they elected to include and then eventually ratified. The arbitrator's authority here is also limited by the specific

language included in Article 2.08, Section 5, which recognizes that that an "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."

As noted by The Supreme Court of Ohio in *Skivolocki v. E. Ohio Gas Co.* (1974), 18 Ohio St. 2d 244, paragraph one of the syllabus, "The Agreement must be given a just and reasonable construction which carries out the parties' intent, as evidenced in the contractual language." The first rule in interpreting contractual language is the "plain meaning rule." The "plain meaning" principle of contract interpretation applies when, as in the instant matter, there is specific language in a contract which speaks directly to and defines the outcome of a contested issue. *Beacon Journal Pub. Co. and Graphic Communications Int'l Union. No. 42C,* 00-2 Lab. Arb. Awards (CCH) P 4548 (Ruben 1999). If the language of a contract is free from ambiguity, an arbitrator should effectuate the clearly-expressed intent of the parties. *Duluth (Minn.) City and County Employees Credit Union and AFSCME Council 96, Local 3558,* 117 LA 28 (Befort 2002). In those circumstances, there is no need for an arbitrator to go beyond the face of a contract to resolve a dispute. *QUADCOM 9-1-1 Pub. Safety Communications System (Carpentersville, Ill.) and Local 73, Serv. Employees' Int'l Union,* 113 LA 987 (Goldstein 2000). The arbitrator is a

creature of the contract from which he derives his authority. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator cannot substitute his own sense of equity and justice because his award must be grounded in the Agreement's terms. An arbitrator is a creature of the contract from which he derives his authority. He is limited thereby and must, therefore, confine his decision as directed or prescribed.

As noted by many arbitrators, neither party should be able to gain through arbitration what it was unable to assert or establish in prior negotiations. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. Arbitrators apply the principle that parties to a contract are charged with full knowledge of the language which they chose to include. If that language is clear and unambiguous, an arbitrator is bound to give it no meaning other than that expressed. Even though the parties to an agreement may disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce its clear meaning. *S. Council of Indus. Workers and Johnstone-Tombigbee Mfg. Co., Inc.*, 00-1 Lab. Arb. Awards (CCH) P 3378 (Hovell 2000). Any "equity" arguments advanced cannot be used as a substitute for express contractual language. *Los Angeles School Dist.*, 85 LA 905, 908 (Gentile 1985). An arbitrator's decision must be based on the terms of the contract which the parties

themselves have written and adopted to govern their relationship, absent any inferences or intentions which are not apparent and not supported by words documenting any purported intent.

The parties have elected to include in the Article 4, "Management Rights" section, all of the provisions included in Ohio Rev. Code Ann. § 4117.08(C), which is commonly referred to as Ohio's Collective Bargaining Law for Ohio's public sector employees. The following language is included there:

> Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:
>
> 1. Determine matters of inherent managerial policy which include, but are not limited to, areas of discretion or policy, such as the functions and programs of the public employer, standards of service, its overall budget, utilization of technology, and organizational structure;
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> . . .
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> 3. Maintain and improve the efficiency and effectiveness of governmental operations;
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> 4. Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
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> . . .
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> 6. Determine the adequacy of the work force;
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> 7. Determine the overall mission of the employer as a unit of government;

8. Effectively manage the work force;

9. Take actions to carry out the mission of the public employer as a governmental unit;

. . .

Arbitrators generally have recognized that management has broad authority and discretion to control its operations, provided that, in exercising that authority, it does not abuse its discretion or violate any of the individual or collective rights of the employees under a collective bargaining unit. *PACE Locals 7-0087/96 and Kimberly Clark Corp.*, 01-1 Lab. Arb. Awards (CCH) P 3725 (Knott 2001).

> In reviewing an employer's exercise of discretion, it is not an arbitrator's function to substitute his independent judgment for that of the employer. Rather, an arbitrator is limited to determining whether an employer's decision is within the reasonable range of discretion, is not arbitrary or capricious, and was not motivated by anti-union animus or another improper reason.

Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264, 115 LA 190 (Landau 2001).

> Arbitrary conduct is not rooted in reason or in judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective standard or rule. An action is described as arbitrary when it is without consideration, in disregard of facts and circumstances of a case, and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

While one of the most firmly-established principles in labor relations is that management has a right to direct its workforce, the Union and Grievant have a reciprocal right or duty to challenge managerial action perceived by them to have been ill-founded, arbitrary, or capricious. *Minn. Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union*, 112 LA 1044 (1999). As already indicated, however, the Union here has failed to demonstrate that the Employer's challenged action was, in fact, unreasonable under the circumstances and resulted in a violation of the Grievant's rights under the Agreement.

> Traditionally, such matters as work assignments . . . have caused arbitrators to hold that, in the absence of specific contractual limitations or a showing of bad faith on the part of the employer, such decisions fall within the residual rights that adhere to the management functions. . . [Employer] prerogative is based on its management rights not ceded in a contract and also on the right and obligation to manage its business efficiently in the absence of language limiting that right.

Paper, Allied-Indus., Chem. and Energy Workers Int'l Union, Local 8-0001 and Stillwater Mining Co., 02-1 Lab. Arb. Awards (CCH) P 3100 (Difalco 2001).

> Management has the right to operate its business in an efficient and economical manner. An arbitrator cannot substitute his judgment for that of management unless the record evidences an abuse of management's discretion. An arbitrator will not lightly upset a decision reached by competent, careful management acting in the full light of all of the facts and without any evidence of bias, haste, or lack of emotional balance.

Norco Chem. Workers Union and Shell Chem. Co., 01-2 Lab. Arb. Awards (CCH) P 3996 (Massey 2001). Arbitrators have found that management

retains all of the rights to manage its business operations, except where it has contractually agreed that certain rights are subject to the Agreement, Union review, or further negotiations or discussions between the parties.

> Many arbitrators view management's right to operate its business as absolute, unless expressly limited by a collective bargaining agreement . . . [T]he inherent authority of management exists simply because of the employer/employee relationship. Accordingly, because a collective bargaining agreement is simply a series of bargained-for limitations on the authority of the employer to manage and direct the workforce, it is not analyzed from the perspective of whether employer actions are allowed. Instead, an arbitrator looks to the specific agreement to see if the employer has been prohibited from performing in a certain way or is required to perform in a certain way or if the employer's actions are unreasonable in that they interfere with employee rights protected by an agreement.

Hall China Co. and Glass, Molders, Plasterers and Allied Workers Int'l Union, 05-1 Lab. Arb. Awards (CCH) P 3390 (Allen 2004).

The arbitrator finds that the evidence submitted into the record regarding the facts surrounding the grievances supports the legitimacy and reasonableness of the Employer's decision to deny the Grievant's two vacation leave requests for time off during the recognized peak summer holiday periods. As indicated by the Employer in its written brief, "These three holidays have been designated as special weekends due to the amount of manpower needed to provide services to the public. These holidays have more fatalities, more alcohol-related incidents, more speeding violations, and present an overall more dangerous environment

for Ohio motorists, especially given the nice weather and the fact that kids are out of school." (Employer brief p. 4)

A well-established principle in labor relations is that management has the right to right to control its operations, including the right to approve vacation leaves. *City of San Jose and Ass'n of Bldg., Mech. and Elec. Inspectors (ABMET),* 01-1 Lab. Arb. Awards (CCH) P 3668 (Oestreich 2000). The Employer here clearly retained the right to determine the practicality or feasibility of the Grievant's vacation leave requests for the holiday dates based on recognized operational needs and circumstances. There is no contractual limitation on management's right to prohibit vacations during pre-identified times. "Management has an inherent managerial right to promulgate policy which is not restricted by the collective bargaining agreement." *Ctr. County Area Educ.-Tech Ass'n, AFT, Local # 3361 and Cent. Pa. Inst. of Tech. Joint Operating Committee,* 00-1 Lab. Arb. Awards (CCH) P 3440 (D'Aletto 2000). In March 2001, the Employer clearly communicated to the Union, through the revisions of OSP -203.15-01, its intent regarding summer holiday staffing levels based on its assessed operational needs on a statewide basis. The Union has failed to identify any contractual or other limitation precluding management from effectively implementing and enforcing that policy.

The Union's arguments focus on the Grievant's right to the requested vacation leaves based on his established seniority. Although

the Agreement recognizes seniority as the controlling factor in awarding vacation leave between competing petitioners, that right has to be first recognized as being "mutually agreed to by the Employer and the employee," based on the recognized terms in Article 43.04. Here, the Employer clearly never agreed to the granting of vacation leaves to the Grievant, who was aware of Article 43.04 and OSP 203.15-01 when he requested those leaves. "The Employer is not required to make all dates within the calendar year available for vacation selection. Restrictions upon management's prerogative should not be inferred from contract language." *220 Television,* 58 LA 1090, 1093 (1972)

> As a general rule, no employee has a contractual right to a particular vacation week . . . Any employee's right to take his vacation at the time he prefers is necessarily limited by the employer's **operational considerations.** It is clearly within management's prerogatives to schedule vacations in such manner and at such times that they do not interfere with operations. (Emphasis added)

Wellslie Coca-Cola Bottling Co., Inc. Clarksburg, Div. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local No. 789, 86-2 Lab. Arb. Awards (CCH) P 8364 (Spilker 1986). The arbitrator finds that none of the previous arbitration decisions cited by the parties are controlling in this matter because they were not based on similarly-situated employees impacted by identical circumstances or by the same policy considerations.

Unfortunately, because of existing scheduling limitations over the summer holidays because of on-going employee FMLA leave and the recognized right of other supervisory employees to enjoy their regularly-scheduled days off each week, the Grievant was adversely impacted by the Employer's decision to follow OSP 203.15-01 and to "make every effort to maintain 24-hour supervisory coverage." The Union has failed to prove that that decision was arbitrary or unreasonable in view of all of the existing circumstances As the arbitrator and parties themselves must certainly recognize, promotion(s) to leadership positions within the workforce also typically carry with them more responsibility for the employees in those leadership position and also sometimes lessen the affected supervisory employee's ability to exercise personal discretion or personal choice in all matters. The Grievant received full payment based on the regular and overtime hours he was required to work during those holiday periods, and he was able to enjoy all of his earned vacation time for 2005 on alternate dates.

"If a management decision is taken in good faith, represents a reasonable business judgment, and does not result in subversion of the labor agreement, there is no contract violation." *Teamsters, Local 117 and Bergen Brunswig Drug. Co.*, 00-2 Lab. Arb. Awards (CCH) P 3385 (Axon 2000), citing to *Shenango Water Co.*, 53 LA 741, 744 (1969). The Grievant was not entitled to take his vacation leave during the two

summer holiday periods because the Employer reasonably and non-arbitrarily exercised its management discretion by **not mutually agreeing** to the Grievant's leave requests based on its identified operational needs. "An employer's implied rights, discretion, and prerogatives may not be denied, rejected, or curtailed unless the same are in clear violation of the terms of the Agreement." *Fairway Foods, Inc.*, 44 LA 164 (Soloman 1965).

AWARD

The grievance is denied.

Respectfully submitted to the parties this 26th day of July, 2007.

Robert G. Stein, Arbitrator