

**SUSAN GRODY RUBEN, Esq.  
Labor Arbitrator and Mediator  
30799 Pinetree Road, No. 226  
Cleveland, OH 44124**

**IN ARBITRATION PROCEEDINGS PURSUANT TO THE  
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

**In the Matter of**

**OHIO STATE TROOPERS  
ASSOCIATION,**

**and**

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

**Grievance # 15-03-060810-0154-04-01**

**ARBITRATOR'S  
OPINION AND AWARD**

**This Arbitration arises pursuant to collective bargaining agreement (“the Agreement”) between the Parties, OHIO STATE TROOPER’S ASSOCIATION (“the Union”) and OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF HIGHWAY PATROL (“the Employer”) under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.**

**The Parties waived oral hearing, and submitted written stipulations and exhibits, and briefs on or about April 15, 2010.**

**APPEARANCES:**

**On behalf of the Union:**

**HERSCHEL M. SIGALL, Esq., ELAINE N. SILVEIRA, Esq., and LARRY K. PHILLIPS, Ohio State Troopers Association**

**On behalf of the Employer:**

**LIEUTENANT KEVIN D. MILLER, Professional Standards Section, Ohio State Highway Patrol**

**ISSUE**

**Did the Employer violate Article 40 of the Agreement when it dismissed the Grievants from the 2006 State Fair Detail?  
If so, what is the appropriate remedy?**

**RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT**

**...**

**ARTICLE 40 – PHYSICAL FITNESS AND WELLNESS POLICY**

**40.01 Purpose**

The Employer and the Union recognize the need for trooper/sergeant members of the bargaining unit to be in good physical condition. The parties agree the proper approach to overall wellness must have primary emphasis on the maintenance of good health of the employees, but must also provide a systematic standard for progressive discipline if physical fitness is not maintained.

**40.02 Health and Physical Fitness**

The Employer's "Health and Physical Fitness Program, File 9-500.23," shall be the program by which overall wellness will be maintained. Employees who exceed the maximum weight allowance of the program by not more than fifteen percent (15%) shall be tested to see if they meet or exceed all other fitness requirements. If they perform those requirements at the Ribbon Level, excluding body fat, they shall be deemed to have met physical requirements, and their excess weight, not exceeding fifteen (15%) of the allowance shall be disregarded.

**...**

**...**

**40.06 Health and Fitness Incentive Pay**

Troopers/Sergeants who have completed their probationary period and who meet all the sex, age and height based minimum fitness standards outlined in the program

shall receive health and fitness incentive pay in the amount of ninety dollars (\$90.00) per month for passing....

...

...  
...

#### **STIPULATED FACTS**

- 1. The grievance is properly before the Arbitrator.**
- 2. The Parties agree to submit the case on briefs for a binding decision by the Arbitrator.**
- 3. The instant grievance (06-0154) was filed by the Union on behalf of four Troopers – Eric Gekler, Amy Ivy, Tyler Kline, and Anthony Percy. Trooper Eric Gekler also filed an individual grievance, which was merged with the instant grievance.**
- 4. Trooper Gekler’s grievance requested the payment of the August 2006 HPFP incentive pay (\$90) that was denied him.**
- 5. At the Step Two hearing, the Union removed Troopers Kline and Percy from the grievance.**
- 6. Article 40.02 of the collective bargaining agreement states that the Employer’s “Health and Physical Fitness Program, File 9-500.23” (“HPFP”) shall be the program by which overall wellness will be maintained.**
- 7. An inter-office communication (“IOC”) was authored on May 23, 2006 detailing the personnel allocations and eligibility requirements for the 2006 State Fair Detail.**
- 8. The 2006 State Fair began August 2, 2006 and concluded August 13, 2006. It was divided into two halves for operational purposes. Officers assigned the detail either worked the first half (August 1 to August 7) or the second half (August 7 to August 13).**
- 9. Troopers Eric Gekler and Amy Ivy were weighed at their permanent assignments prior to reporting to the Fair and were found to be within their allowable weight according to the Division’s Health and Physical Fitness Program.**
- 10. Officers that fail to meet their applicable weight standards the month of the detail or during the preceding two months are ineligible to work the Detail.**
- 11. All officers reporting for the 2006 State Fair Detail were weighed at the Academy on the first day of the Detail and this data was entered into PeopleSoft by Academy personnel.**

12. Troopers Eric Gekler and Amy Ivy were assigned to work the second half of the 2006 Ohio State Fair Detail.
13. Troopers Eric Gekler and Amy Ivy were both found to be over their maximum allowable weight when weighed at the Academy on the first day of the Detail.
14. Troopers Eric Gekler and Amy Ivy were dismissed from the Detail and sent back to their permanent assignments.
15. The average overtime for the Detail was 32 hours.
16. The Parties agree that all of the above facts are true and accurate, but reserve the right to argue their relevance to this case.

## **PARTIES' POSITIONS**

### **Union's Position**

This is not a case of first impression. Arbitrator Eugene Brundige ruled on the same issue in 2001. Trooper Jack Holland, Jr. had been sent home from the 1999 Ohio State Fair Detail for allegedly being non-compliant with the Employer's HPFP policy. The facts of the Holland grievance are virtually identical to the instant case. Trooper Holland met his required weigh-in standards for all applicable months. When he arrived at the Academy to report for the Detail, he was re-weighed, found to be over his maximum allowable weight, and dismissed from the Detail.

In the Holland case, the Employer made two arguments. First, pursuant to OHP Policy 500.23, the Colonel can order a Trooper to "submit to an HPFP or phases thereof at any time." Second, the Academy scale is the "official" OHP scale, rather than scales at the various Posts. The Arbitrator dismissed both arguments, concluding "The additional weigh-in should have had no impact on Trooper Holland's right to work the available overtime." It was the Employer that certified Trooper Holland's weight at the Post, and it was the Employer that negotiated into the Agreement the HPFP Policy. Arbitrator Brundige awarded Trooper Holland the 52 hours of overtime pay he had been

denied when sent home from the Fair.

In the instant case, the Employer argues it issued a May 23, 2006 IOC that called for Troopers to be weighed at the Fair and have that weigh-in serve as the August HPFP weight. The IOC also said Troopers would not be weighed before the August report date to the Fair or later in August after the Fair.

Despite the existence of its May 23, 2006 IOC the Employer elected to follow the specific terms of the HPFP and weighed both Grievants in August before sending them to the Fair. They made their weights. The Employer wants it both ways. If Troopers Ivy and Gekler had weighed in excess of their allotted weight at the weigh-in conducted at the Post, they would have been prohibited from working the Fair Detail. When the Employer took a second bite of the apple at the Fair, and Troopers Ivy and Gekler did not make their weights, they were sent home. The Employer also denied Trooper Gekler the fitness pay secured by his HPFP weigh-in at his Post. The Employer argues it did not intend to have the Troopers weighed before the Fair. But actions, not intent, is at issue here.

Article 40.02 of the Agreement states the Employer's HPFP Policy, 500.23, will be the program by which overall wellness will be maintained. The policy requires monthly weigh-ins by the tenth of each month to be conducted at a Trooper's Post. The policy does not include any different set of requirements for Ohio State Fair. "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." Elkouri, 5<sup>th</sup> Edition, at 470.

The Employer attempted to unilaterally alter the contractual language and superseded the contractual policy by issuing an IOC, and then acting at variance with that IOC. As in the Holland case, "The additional weigh-in should have had no impact on

Trooper Holland's right to work the available overtime." The Grievants are entitled to 32 hours of overtime pay at the rate in effect in August 2006. Additionally, Trooper Gekler must be awarded his \$90.00 fitness pay earned in August 2006.

#### **Employer's Position**

Annually, an IOC is sent from the Training Academy (which is responsible for the Detail) setting out the personnel allocation and eligibility requirements. To be eligible for consideration, officers must meet all applicable HPFP standards, including monthly weights. If an officer selected for the Detail fails to meet the standard the month of the Detail or the two preceding months, s/he is ineligible or is sent home from the Detail. In the instant case, the Grievants' weights exceeded their maximum allowable weight during the official weigh-in at the Academy for the month of August (Trooper Ivy by five pounds and Trooper Gekler by six pounds). As a result, they were excused from the Detail and replacements were sent to fill their positions.

The Employer drafted the IOC in accordance with Arbitrator Brundige's 1999 decision, and in an attempt to promote uniformity and avoid any allegations of impropriety or preferential treatment at the local Post levels during the month of the Detail. The fact that the Grievants' weights were taken locally does not negate the process that had been outlined well in advance of the event.

In Arbitrator Brundige's decision, the grievant met his weight standard on each required weigh-in before the Fair, but was pulled out of the inspection line at the Fair and was found to be over weight; he was dismissed from the Detail. It is important to note not everyone was pulled from the inspection line and weighed. Arbitrator Brundige wrote:

Like most major programs, other documents and policies must be promulgated to effect full implementation. Management has routinely done so by the issuance of Inter-Office Communications such as those provided by management. The Union has recognized the validity and application of these unilaterally developed documents.

Arbitrator Brundige determined the grievant met the requirements of the IOC, and the additional weigh-in at the Fair (which was not addressed in the IOC) had no impact on his eligibility to work the Detail. The Employer was obligated to reimburse the grievant for all lost overtime as a result of his dismissal from the Detail.

Policy 500.23 provides, “those officers placed on discipline shall not be eligible for voluntary or special off-duty assignments until they are re-tested and found to be in compliance.” An officer does not enter discipline until s/he weighs over two consecutive months, and then fails to make weight on the 14-day re-weigh. Therefore, if one relied solely upon the policy language, officers could not be deemed ineligible due to one overweight weigh-in. Despite this language, the Employer’s practice regarding the Detail has been to dismiss or deem ineligible officers who fail to meet their applicable weight standards the month of the Detail or during the preceding two months. The Union has accepted this practice.

Since Arbitrator Brundige’s award, the Employer modified the pre-Detail IOC to explain the process by which weights would be taken and recorded. All officers working the 2006 Detail were put on notice two-and-one-half months before the Detail that their official weight for August would be taken at the Academy.

It is within the Employer’s discretion to determine when its officers are weighed, normally within the first ten days of the month as policy dictates. However, it is also important to note the policy provides, “The Superintendent may order an officer...to submit to an HPFP, or phases thereof, at any time.” If the Union believed the Employer did not have the right to weigh the officers at the Detail, it should have raised this during

the two-and-one-half month period before the Detail; it did not do so.

The Union believes an innocent mistake at the local level supersedes the established protocol set forth months in advance of the Detail. In a perfect world, communication breakdowns would not occur; but we do not live in a perfect world. Occasionally, in an organization of 1500+ employees throughout the State, communication can break down. "Arbitrators have noted that errors committed by lower ranked administrative employees, even when intentionally done, do not alter an established practice or create a new one." Elkouri, 6<sup>th</sup> Edition, at 626.

The weigh-ins prior to the Detail certainly were not intentional errors. The IOC affected 282 officers, and was followed in all occasions but four, of which only two chose to go to Arbitration. When these unfortunate, yet inevitable situations occur, it is Management's responsibility to rectify them in the most equitable and logical manner. When the officers were inappropriately weighed at their local facilities, Management had two options: allow the Post weight which violated the rules distributed to everyone, or follow the protocol that was established. In the instant case, Management felt in the interest of fairness and uniformity it was best to follow the protocol.

Arbitrator Brundige refused to allow in the additional weigh-in of Jack Holland in 1999 because the 1999 IOC did not specify which weigh-in determined eligibility for the Detail. Consequently, the Employer followed suit in 2006 by disallowing the Post-determined weights of the Grievants, which were taken in direct violation of the 2006 IOC. The Employer's attempt to apply fair and consistent rules to everyone should not lead to a financial penalty against the Employer and a \$2400.00 windfall to the Grievants who did not work the Detail. Should the Arbitrator rule the Employer made an error by relieving the Grievants from the detail, the Employer asks the Arbitrator to consider the alternative remedy of allowing the Grievants the opportunity to work an upcoming Detail.



The Union has fallen significantly short of meeting its burden of proof and asks the Arbitrator to deny the grievance in its entirety.

#### **ARBITRATOR'S OPINION**

**Article 40 – Physical Fitness and Wellness Policy -- provides in pertinent part:**

##### **40.01 Purpose**

The Employer and the Union recognize the need for trooper/sergeant members of the bargaining unit to be in good physical condition. The parties agree the proper approach to overall wellness must have primary emphasis on the maintenance of good health of the employees, but must also provide a systematic standard for progressive discipline if physical fitness is not maintained.

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##### **40.06 Health and Fitness Incentive Pay**

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**OSHP Policy 500.23 provides in pertinent part:**

##### **I. MONTHLY WEIGHT CHECKS**

The HPFP includes monthly weight checks conducted at each patrol post or equivalent facility where officers affected by the HPFP are assigned. The weight checks are conducted in the following manner:

1. Each officer is weighed by a supervisor....
2. ...
3. Officers are weighed on Division-provided scales which are situated on a reasonably level, uncarpeted surface and certified for accuracy by the County Auditor. Supervisors are required to balance the scales at zero before weighing each person.
4. ...
5. Supervisors will inform officers of their monthly weight and whether they comply with acceptable levels indicated in Chart A. Supervisors will inform those not in compliance during the monthly weight check that they must meet the minimum acceptable standards before the next monthly weight check.
6. ...
7. Weight checks are conducted within the first ten days of the month. Weights should be recorded as directed in Policy OSP-805.10, Monthly Weight Reporting – Direct Data Entry....

...

The May 23, 2006 IOC regarding the Detail provides in pertinent part:

To District & Section Commanders  
From Major P. L. Watts, Commander, Office of Recruitment & Training  
Subject 2006 Ohio State Fair Personnel Allocation

In order to be eligible for the detail, officers must meet all applicable HPFP standards. Officers must meet their standards during their June weigh-in period and each month thereafter through the Fair. All officers working both halves [of] the detail will be weighed at the Academy on their report day and this will be their official weight for August....

Please Note: Only official weights for August will be made at the Academy for officers working the 2006 State Fair. These units are not to be weighed in at their posts/sections in August prior to or after the Fair for any reason.

...

Units whose names are submitted as outlined above, should understand they are assigned to the detail, unless they become disqualified due to HPFP standards....

...

The Employer is to be commended for clearly setting out in the May 23, 2006 IOC the eligibility criteria for the 2006 Ohio State Fair Detail and then for attempting to enforce that criteria consistently. The Arbitrator notes, however, the IOC is addressed only to District & Section Commanders, and not to Troopers such as the two Grievants. Thus, it is not established in the record the two Grievants were on notice of the Academy weigh-in.

Despite the IOC's clarity that officers working the Detail were not to be weighed in at their Posts, the two Grievants were weighed in at their Posts in early August. These weigh-ins presumably were conducted by supervisors, as that is a requirement of OSHP Policy 500.23(I)(1). Both Grievants made their weight requirements at the August Post

weigh-ins, as they also had done in June and July. The scales at their Posts presumably were certified for accuracy by the County Auditor, as that is a requirement of OSHP Policy 500.23(l)(3).

According to the Step II Response from the Employer, on August 7, less than a week after their Post weigh-ins, Trooper Ivy weighed in at the Academy five pounds over her maximum allowable weight and Trooper Gekler weighed in at the Academy six pounds over his maximum allowable weight.<sup>1</sup> The Employer dismissed them from the Detail in an attempt to enforce the eligibility criteria consistently.

The Arbitrator understands the Employer's need for consistency and thus, its decision to dismiss Troopers Ivy and Gekler from the Detail. Based on the record, however, once all the facts and circumstances were reviewed or could have been reviewed by the Employer, there is too much inconsistency on the part of the Employer (the August Post weigh-ins inconsistent with the IOC, and what appears to be at least some Post scales that are inconsistent with the Academy scale), that it would have behooved the Employer not to cherry-pick the IOC – i.e., enforce the Academy weigh-in criterion while ignoring the Employer's own inconsistent actions pursuant to the IOC.

On these narrow grounds, i.e., 1) the record does not establish the Grievants were on notice of the Academy weigh-in; 2) the Grievants' supervisors erred when they did August weigh-ins at their Posts; and 3) it appears that at least the scale at Officer Gekler's Post is out of synch with the Academy scale, the Arbitrator finds the Employer's actions violated Article 40, which is in the Agreement to promote "good physical condition" and "good health." The Employer's actions in this matter went toward neither

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<sup>1</sup> According to Trooper Gekler's individual grievance regarding fitness pay, he was weighed in by his supervisor at 207 lbs. on August 3 at his Post, and his maximum allowable weight was 210 lbs. (Nothing in the record contradicts that information.) Yet when he reported to the Detail on August 7, the Academy scale put him at 216 lbs (210 maximum + 6 over), a puzzling (and unlikely) gain of 9 lbs. in four days. (Trooper Gekler had not yet started to work the Fair when he was weighed in at the Academy; so, presumably, it wasn't the funnel cakes.)

of these goals.

#### **AWARD**

The grievance is granted. The Employer is to pay to each of the two Grievants the 32 hours of overtime (at August 2006 rates) they were denied; and the Employer is to pay Officer Gekler an additional \$90.00 (gross), given he made weight at his August 3, 2006 weigh-in at his Post, thereby qualifying for that month's fitness incentive bonus.

These monies are to be paid to the Grievants no later than July 30, 2010.

**DATED: June 15, 2010**

Susan Grody Ruben  
**Susan Grody Ruben, Esq.**  
**Arbitrator**