

Decision and Award in the matter of Arbitration between:

Ohio State Troopers Association, Inc., Units 1 & 15

and

The State of Ohio, Department of Public Safety

Case # 15-03-070821-0110-04-01

Grievant: Class Action

E. William Lewis, Arbitrator

Hearing date: Waived by the parties, Briefs
only

Briefs received: June 15, 2010

Decision issued: July 7, 2010

Representing the Employer:

Lieutenant Kevin S. Miller
Attorney
Ohio State Highway Patrol
Association
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Representing the Union:

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6161 Busch Blvd.,
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The parties waived a Hearing, declaring the case facts to be straight forward. They jointly stipulated to the following case facts, and submitted six Joint exhibits:

Factual Stipulations

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 (07-110) was filed by the Union on behalf of the bargaining unit members working the 2007 Ohio State Fair Detail.
4. Officers who worked the Ohio State Fair Detail were scheduled to work 12 hour shifts, broken up into an 8 hour entry followed by a 4 hour overtime entry. Officers were paid shift differential for the additional 4 hours of overtime when the overtime was scheduled to begin between 2p and 12a.
5. Article 63.02 governing the hours for which the shift differential is applicable did not change in the time between the 2006 and 2007 Ohio State Fair Detail.
6. The following twelve hour shifts were scheduled in advance and worked by officers assigned to the 2007 detail: 6a-6p, 8a-8p, 9a-9p, 10a-10p, 12n-12a, 1p-1a, 2p-2a, 3p-3a, 5p-5a, and 6p-6a.
7. The 2007 State Fair began August 1, 2007 and concluded August 12, 2007. It was divided into two halves for operational purposes. Officers assigned the detail either worked the first half (Sept 30 to August 6) or the second half (August 6 to August 12).
8. The payroll entries for those who worked the 2007 State Fair Detail consisted of an 8 hour entry with an second entry of 4 hours of overtime.
9. Officers with start times between 2p and 12a were paid shift differential for all 12 hours of their assigned shift.
10. The parties agree that all of the above facts are true and accurate, but reserve the right to argue their relevance to this case.

Joint Exhibit #1
Ohio, 2006-2009

CBA--OSTA/State of

Joint Exhibit #2

Grievance Trail

Joint Exhibit #3
Payroll

2006-Ohio State Fair, detail
entries

Joint Exhibit #4
Roster

2007 Fair-detail assignment

Joint Exhibit #5
Entries

Sgt. Zupanc 2007 HMS

Joint Exhibit #6
3.23.2006)

DPS 501.14(Revision Date

BACKGROUND:

The Ohio State Fair, is an annual occurrence, held during the first two weeks of August. Law enforcement is provided by the Ohio State Patrol. The compliment constitutes nearly 300 officers, including volunteer HP Police Officers, Ohio State Troopers, and academy Cadets. The Cadets and Officers work twelve (12) hour shifts. These twelve hour shifts are composed of eight (8) hours at the regular rate of pay, followed by an additional four (4) hours at one and one-half (1.5) times the regular rate of pay.

At the conclusion of the 2007 Fair, a grievance was filed by the Ohio State Troopers Association(OSTA). The grievance, dated 8/20/07, claimed that the Employer violated ARTICLE 63-SHIFT DIFFERENTIAL. They requested the Department of Public Safety(DPS) pay shift differential to those Troopers and Officers whose hours, including overtime shifts, started between the hours of 2PM and 12AM. Therefore, the overtime hours worked between 2pm and 12am should be recalculated to include shift differential.

A Grievance Hearing was held on August 23, 2007, and management responded on August 27, 2007. Human Resources Management(HRM) denied the grievance, declaring that the shift differential was given to Units whose 12 hour shift began during the eligible hours.

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The grievance was appealed to Arbitration on August 28, 2007, and the parties have stipulated that the grievance is properly before the arbitrator.

ISSUE:

Issue statements were submitted separately by the parties, with their Briefs. Their submittals are substantially the same. The arbitrator formulated the issue as follows:

Did the Employer violate the CBA regarding Shift Differential, Article 63, when compensating bargaining unit members for their work at the 2007 Ohio State Fair? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 2 - EFFECT OF AGREEMENT

This Agreement represents the entire agreement between the Employer and the Union and unless specifically and expressly set forth in the express written provisions of this Agreement, all rules, regulations, practices, and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer.

ARTICLE 4 - MANAGEMENT RIGHTS

The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the right to: 1) hire and transfer employees, suspend, discharge and discipline employees; 2) determine the number of persons required to be employed or laid off; 3) determine the qualifications of employees covered by this Agreement; 4) determine the starting and quitting time and the number of hours to be worked by its employees;

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5) make any and all rules and regulations; 6) determine the work assignments of its employees;

ARTICLE 27 - OVERTIME

27.01 Overtime and Compensatory Time

Because of the unique nature of the duties and emergency response obligations of the Division, management reserves the right to assign employees to work overtime as needed.

1. Any member who is in active pay status more than forty (40) hours

in
regular
time
pay

one week shall be paid one and one-half (1.5) times his/her rate of pay including shift differential if ordinarily paid for all over forty (40) hours in active pay status. The regular rate of includes all premium pay routinely received.

ARTICLE 63 - SHIFT DIFFERENTIAL

63.02

Shift differential will be paid for all shifts where the starting time is between 2PM and 12AM. Employees eligible for shift differential will receive such differential for all hours of the shift.

UNION POSITION:

OSTA argues that bargaining unit members who worked the 2007 Ohio State Fair should have received shift differential for overtime hours that started between 2pm and 12am. The same Contract language (63.02) was in effect at the 2006 State Fair, and bargaining unit members were paid shift differential for overtime hours worked between 2pm and 12am(JE-3,JS #4).

Contractual language did not change regarding shift differential from 2006 to 2007. The 2006 Ohio State Fair Detail was paid shift differential for overtime hours worked between 2p and 12a. Therefore, according to OSTA, a past practice was established. A different understanding relative to the intent of Section 63.02 was had between the Union and the Employer. Therefore, the ordinary meaning of the language (63.02) was established by the 2006 Fair Detail compensation, argues the Union.

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The Union points out that past practice should clarify ambiguous language, or show a mutual amendment of the language by the parties¹. The payment of shift differential for the overtime hours worked (2p-12a) during the 2006 Fair establishes the past practice, declares the Union.

¹ Elqouri & Elkouri 5th Ed., pg. 630

Consequently, OSTA requests the arbitrator to grant the grievance in its entirety.

EMPLOYER POSITION:

The Employer argues that the duty assignment outlined in advance of the employee's workday, is the applicable shift, from which a shift differential determination is made. The CBA does not limit or define the duration of the shift. Ohio State Fair Law Enforcement Details are up to twelve hour shifts. If the Officers shifts started between 2p and 12a, they were paid shift differential(JS #6).

Prior to the 2007 State Fair, the Academy Staff made payroll entries for the Fair Detail. During the 2006 Fair if either the Officer's shift starting time or their overtime hours fell between 2p and 12a, they were paid shift differential for their overtime hours(JS #4). This interpretation of counting overtime hours as a separate shift, was in error, argues the Employer. HRM corrected this payroll error to comply with the contractual requirement in Section 63.02, for the 2007 Fair. Payroll entries do not change the fact that State Fair Details are 12 hour shifts, claims the State.

The State Fair has always been a twelve hour detail for the Highway Patrol(JS #s 4, 6). Those who volunteer for this Detail, are fully aware of the twelve hour shifts, per the DPS. They perform the same function for 12 hours, and should only be paid shift differential if their starting time is between 2p and 12a. If they are held over past twelve hours and the additional unscheduled work starts between 2p and 12a, shift differential would be paid for the additional unscheduled work.

The Employer has an obligation to discontinue erroneous payments and

bring operations into compliance with the Agreement's contractual provisions. This was done as soon as HRM became aware of the error, per DPS. Article 2 of the CBA specifically states: "This Agreement represents the entire agreement between the Employer and the Union and unless specifically and expressly set forth in the express written provisions of this Agreement, all rules, regulations, practices, and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of

the Employer”. Therefore, according to DPS, it was within their province to discontinue the improper practice.

The burden of proof is the Union’s and they have fallen significantly short of meeting that proof. The Employer requests the arbitrator deny the grievance in its entirety.

DISCUSSION AND OPINION:

There is no dispute that the Ohio State Patrol Detail that worked the 2006 Fair was paid shift differential for overtime hours starting between 2p and 12a(JS #4 & JE-3). Similar overtime hours worked by the 2007 OSP Detail did not include compensation for shift differential.

The Union argues that there was a different understanding of the intent of Section 63.02 between the parties relative to shift differential for the Fair Detail. They claim that the 2006’s Fair Detail’s shift differential compensation, a past practice, and has become the ordinary meaning of the language.

On the other-hand, The Employer argues that 2006 shift differential payments were in error. They corrected the error for the 2007 Fair Detail as soon as they became aware. The OSP Fair Detail was working a scheduled twelve hour shift. The overtime hours worked during the twelve hour shift, between 2p and 12a did not constitute a separate shift, but were part of the twelve hour shift.

Does the submitted evidence constitute a past practice, as claimed by the Union?

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Past practice may be used to clarify what is ambiguous, give substance to what is general and perhaps modify or amend what is seemingly unambiguous². To be a past practice certain qualities need to be present: first, there should be clarity and consistency; second, there should be longevity and repetition; and thirdly, there should be acceptability³. It is

² Richard Mittenhal-14th annual meeting, National AcademyElkouri & Elkouri-6th Ed. pg. 630Common Law of Workplace-pg. 82,83

³ Richard Mittenhal--14th Annual Meeting, National Academy

difficult to ascertain clarity and consistency, since submitted evidence addresses only two incidents(2006 & 2007). Evidence does not substantiate longevity and repetition. Again, with only two actual incidents (pro & con), not sufficient to sustain these qualities. Furthermore, the arbitrator's research shows this Section 63.02, has been unchanged, at-least, back through the previous CBA. Thirdly, acceptability is also difficult to confirm, since this was allegedly a payroll function error, and only one shift differential payment was made before "detected", and changed.

Without an established past practice, what is the ordinary meaning of this provision (63.02)? A shift is defined as: the working time of a group⁴. The CBA and ODPS Policy grants the Department authority to establish work schedules. This includes hours of the day and the number of hours in a shift(JE-6). Joint Stipulations and evidence, shows the Ohio State Fair Detail scheduled for twelve hour shifts(JS-4,6,9-JE-#4). Although payroll showed an eight hour and a four hour entry, this was an administrative function, in the arbitrator's opinion. The Employer, through their brief and JS-6, showed the 2007 Fair Detail was paid shift differential when the Detail's twelve hour shift started between 2p and 12a.

In the arbitrator's opinion, the language in Article 63-SHIFT DIFFERENTIAL, Section 63.02 is unambiguous. Therefore, without an established past practice modifying or amending what is seemingly unambiguous, the 2007 OSHP Fair Detail was paid in accordance with Article 63, Section 63.02.

AWARD:

The grievance is denied.

This concludes the arbitration decision.

Respectfully submitted this 7th day of July 2010.

⁴ Funk & Wagnalls, Webster's New World Dictionary

E. William Lewis
Arbitrator