**OCB AWARD NUMBER: 2086**

|  |  |
| --- | --- |
| **SUBJECT:** | **ARB SUMMARY # 2086** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **KRISTEN RANKIN** |
| **OCB GRIEVANCE NUMBER:** | **15-03-20070821-0110-04-01** |
| **DEPARTMENT:** | Department of Public Safety |
| **UNION:** | OSTA |
| **ARBITRATOR:** | E. William Lewis |
| **GRIEVANT NAME:** | Class Action |
| **MANAGEMENT ADVOCATE:** | Lt. Kevin S. Miller |
| **2ND CHAIR:** |  |
| **UNION ADVOCATE:** | Elaine N. Silveira |
| **ARBITRATION DATE:** | By Brief, June 15, 2010 |
| **DECISION DATE:** | July 7, 2010 |
| **DECISION:** | DENIED |
| **CONTRACT SECTIONS:** | Article 63.00 |
| **OCB RESEARCH CODES:** | 115.6—Shift Differential; 115.501—Overtime; 24.368—PastPractices-Work Assignments; 115.201—Hours of Work |
|  |  |

**HOLDING: Grievance DENIED. The Arbitrator found the Employer did not establish a past practice in regards to the Ohio State Fair Patrol Detail in 2006 to 2007.**

The Grievants are Ohio State Troopers who worked during the Ohio State Fair Detail. During the Ohio State Fair, law enforcement is used. These 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. Officers with start times between 2:00 pm and 12:00 am were paid shift differential for all 12 hours of their assigned shift.

The Union arguedthat the bargaining unit members who worked the 2007 Ohio State Fair should have received shift differential for overtime hours that started between 2:00 pm and 12:00 am. The 2006 Ohio State Fair Detail was paid shift differential for overtime hours worked between 2:00 pm and 12:00 am. Therefore, according to OSTA, a past practice was established. This past practice should clarify ambiguous language or show a mutual amendment of the language by the parties. The Union requested that the Arbitrator grant the grievance in its entirety.

The Employer arguedthat the duty assignment outlined in advance of the employee’s workday is the applicable shift from which a shift differential determination is made. In this case, Officers were scheduled to work 12 hours in advance. If the Officer’s shift started between 2:00 pm and 12:00 am, they were paid shift differential; however, overtime hours worked during 12:00 am through 2:00 pm did not warrant shift differential. The interpretation of counting overtime hours as a separate shift was in error. Human Resource Management corrected this payroll error to comply with the contractual requirement in Section 63.02, for the 2007 Fair. If the Officers were held over past twelve hours and the additional unscheduled work started between 2:00 pm and 12:00 am, shift differential would be paid for the additional unscheduled work. The Employer had an obligation to discontinue erroneous payments and bring operations into compliance with the Agreement’s contractual provisions. The Employer requested that the Arbitrator deny the grievance in its entirety.

The Arbitrator denied the grievance becausethe Employer did not establish a past practice in regards to the Ohio State Fair Patrol Detail in 2006 to 2007. 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 acceptability. It is difficult to ascertain clarity and consistency, since submitted evidence points to only two incidents (2006 &2007). In addition, acceptability is not present because after the one error was made in 2006, the Employer corrected the mistake in 2007. Further, the Arbitrator determined that a shift is defined as the working time of a group. Section 63.02 gives the Employer the authority to set shifts and to develop a work schedule. This includes hours of the day and the number of hours in a shift. As such, the Employer paid for the 2007 Fair Detail in accordance with Section 63.02.