

OFFICE OF THE ARBITRATOR

March 22, 2011

In the Matter of the Arbitration Between:

OHIO STATE TROOPERS ASSOCIATION,)	
)	
And)	OCB 15-03-20090419-057-04-01
)	
THE STATE OF OHIO, DEPT. OF PUBLIC)	Patrick J. Phouts - Grievant
SAFETY, DIVISION OF HIGHWAY PATROL)	

APPEARANCES

For the Union:

Herschel M. Sigall, Esq.	Counsel
Elaine N. Silveira, Esq.	Asst. General Counsel
Jason Greenwood	Sgt/Witness
Patrick J. Phouts	Grievant

For the Employer:

Kevin D. Miller	Lieutenant, Management Representative
Anne R. Ralston	Sergeant, 2 nd Chair
Charles Linek III	Staff Lieutenant

Arbitrator:

Virginia Wallace-Curry

INTRODUCTION

The instant arbitration arose as a result of a grievance filed on August 13, 2010, by the State Troopers Association (the "Union") on behalf of Patrick J. Phouts (the "Grievant"), alleging that The Ohio Department of Public Safety, Division of Highway Patrol (the "Employer" or the "Division") violated article 51.02 of the Collective Bargaining Agreement (the "Agreement") when it denied the Grievant "Court Time" on April 10, 2009, for attendance at a court proceeding which arose out of the scope of his employment. When the parties were unable to resolve the matter, it was submitted to arbitration.

STATEMENT OF FACTS

The facts in this case are not in dispute. The Grievant is a trooper assigned to the St. Clairsville Patrol Post. On March 16, 2009, the Grievant responded to a request for back-up by his shift supervisor, Sergeant Jason Greenwood. While in route to the scene, the Grievant activated his emergency lights and siren as he approached three cars in his path. Two cars immediately pulled over to the right of the roadway. The third car, driven by a 16 year old who had just secured her license, did not pull over to the right. Instead, she elected to enter the on-ramp for the expressway. She turned left into the lane in which the Grievant was traveling. The Grievant attempted to swing further left to avoid the accident but collided with her car.

Sgt. Greenwood arrived on the scene and began investigating. No one was seriously injured as a result of the crash. The mother of the driver told Sgt. Greenwood that her daughter, the driver, panicked and failed to respond to the siren in the appropriate manner. In his report, Sgt. Green assigned responsibility for the accident to

the young driver of the car, because Ohio Revised Code requires drivers to immediately pull to the right upon the approach of an emergency vehicle displaying flashing lights and a siren.

After Sgt. Greenwood turned in his report, Post Commander, Lieutenant Norris, told Greenwood that the Grievant should be cited for the accident. Sgt. Greenwood refused to issue the citation because in his professional judgment the responsibility for the accident lay clearly with the driver of the second vehicle. The following day, Sgt. Greenwood was given a direct order to charge the grievant with violation of ORC 4511.30 (Driving on the left side of the roadway in an intersection). St. Greenwood had no choice but to comply with a direct order, and he issued a citation to the Grievant.

On April 10, 2009, while off-duty, the Grievant appeared in Northern Court for his arraignment during which he entered a not guilty plea. The prosecutor assigned to the case contacted Sgt. Greenwood, the investigating officer. After Greenwood related the facts surrounding the case and the issuance of the citation, the prosecutor dismissed the case without prejudice to the State, which elected not to re-file it.

After his appearance in court on April 10, the Grievant entered a request for minimum court appearance pay and the request was denied. The Union filed a grievance alleging a violation of Section 51.02 of the Agreement.

ISSUE

Did the Employer violate Article 51 when it denied the Grievant's request for minimum court appearance pay for April 10, 2009, when he attended a court proceeding involving the citation he received for the crash on March 16, 2009? If so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 51 – COURT LEAVE

51.01 Granting of Court Leave

The Superintendent shall grant court leave with full pay at regular rate to any employee who:

1. Is summoned for jury duty by a court of competent jurisdiction, or
2. Is subpoenaed to appear, based on any action arising out of his/her employment, before any court or other official proceedings.

51.02 Compensation

- C.** Employees appearing in a court or other official proceeding based on any action arising out of their employment during their off duty hours shall be guaranteed a minimum of three (3) hours at one and one half times their regular rate or their actual hours worked, whichever is greater....

51.03 Granting of Leave When Bargaining Unit Member is a Party to the Matter Before the Court.

Any employee who is appearing before a court or other legally constituted body in a matter in which he/she is a party may be granted vacation time, leave of absence without pay, personal leave or compensatory time off. Such instances would include, but not be limited to, criminal or civil cases, traffic court, divorce proceedings, custody, or appearing as directed as a parent or guardian of juveniles.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that Article 51 was intended to cover action where the Trooper is mandated to explain the events of an on-duty accident. Article 51.02 (C) states:

Employees appearing in a court or other official proceeding based on any action arising out of their employment during their off duty hours shall be guaranteed a minimum of three (3) hours at one and one half times their regular rate or their actual hours worked, whichever is greater....

The Grievant appeared in court on April 10, 2009, as a result of any action arising out of his employment. The Grievant was on active duty and responding to a

call for assistance from Sgt. Greenwood. The Grievant was not responsible for the accident that ensued and he was wrongfully cited. Nonetheless, the Grievant received a citation and pursuant to its summons appeared in court. The Grievant's time spent in defending his public and official conduct clearly falls within the express language of Article 51.

Article 51 makes a distinction between situations that are public concerns of the Employer and the private concerns of the Trooper as an individual. The Employer rests its case on contractual language intended to limit the application of Article 51 to on-duty mandated court appearances. Traffic court, divorce proceedings, personal injury cases are not covered by Article 51, nor should they be. These actions are categorized by the general identification as cases in which one is a party to such action. They are personal in nature and do not arise out of the Trooper's active duty performance.

If the driver of the second vehicle had been issued the citation, the Employer would acknowledge that Article 51 time would apply to any appearance in court by the Grievant. What if the driver of the second vehicle sustained injury and was told by Lt. Norris that the Grievant was responsible for the accident. Under Ohio law, the State of Ohio has immunity from suit. However, the State consents to be sued only should such action be undertaken in the Ohio Court of Claims. The driver of the second car would bring an action in the Court of Claims alleging the actions of the Grievant caused her injury and damage. This action is bifurcated in nature. First, the Claimant would have to prove that the Grievant would have personal liability for his acts. The State would not waive immunity if it were demonstrated that the Grievant's actions were manifestly

outside of the scope of his employment or that he had “acted with malicious purpose, in bad faith, or in a wanton or reckless manner.”

The filing in the Court of Claims would be entirely based on the contention that the Grievant was responsible for the accident. For our purposes, the point is that the Employer acknowledged at the arbitration hearing that in all appearances and for all time invested in the Court of Claims proceedings, the Grievant would be paid. That would be true even if the Grievant remained the cited party in the accident. In the Court of Claims, the Grievant would be called to answer for his on duty conduct, just as in the municipal court, he was called to answer for his on duty conduct.

The Employer's response to a Trooper's presence in a court or administrative proceeding is logically dependent on whether the appearance is job related or not. The issue of on-duty vs. off-duty is a constant in the relationship between the Employer and Troopers. If the Grievant had been injured on the way home from the accident he would have been eligible for sick leave. If he were injured in the instant accident he would be eligible not only for workers' compensation but for contractual "Occupational Injury Leave," which unlike workers' compensation provides full pay.

There is no logical reason to interpret the contract other than providing encouragement for the Trooper to defend his/her on-duty conduct in a court or administrative hearing. As a further example, assume that a local police department responded to the accident instead of Sgt. Greenwood. Assume further that the police officer wrongfully cited the Grievant in conflict with the Employer's assessment as witnessed by Sgt. Greenwood. The Employer and the State of Ohio would have an interest in establishing that the Grievant was not responsible for the accident. That

interest would manifest itself in having a strong position before the Court of Claims in defending a claim for damages by the occupants of the second vehicle. Providing the Grievant the opportunity to defend the citation of paid time would be advisable. There would be no suggestion that the Grievant waive appearance and plead guilty to the charges and pay the \$80 in assessed costs. All interests are served in a construction of Article 51 that provides that “employees appearing in court or other official proceeding on *any* action arising out of their employment” be compensated for their time.

The Employer testified that there have been grievances withdrawn that dealt with the same interpretation of the contract. Many grievances are filed and withdrawn by grievants for reasons known only to the grievant. This is a case of first impression at arbitration. Had earlier cases reached a level where it was up to the Union to decide whether or not to take it to arbitration, such cases would have been arbitrated.

The contract was intended to cover for instances such as this where the Trooper was called to answer for actions taken while officially acting as a Trooper. In such cases, the Trooper is as much a representative of the State as he is an individual Trooper or a private citizen. Clearly, this is true in any action where the Trooper is mandated to explain the events of an on-duty accident. Such cases will have impact on the State of Ohio as much or more than on the individual Trooper.

For all these reasons, the Union requests that the grievance be sustained and the Grievant be awarded three hours of court time pay as provided in Article 51.02.

Employer's Position

The Employer asserts that the Grievant is not entitled to compensation for his court appearance because he was named as a party before the court. In interpreting

the meaning and intent of Article 51, all three subsections must be examined. Section 51.02 states that officers will receive paid court leave when they are summoned *for jury duty or subpoenaed to appear* in court based on an action arising out of his/her employment. Section 51.02 outlines how they will be compensated. Section 51.03 is applicable, if an officer is a party to a matter before the Court. In such a case, the officer may be granted leave.

In the instant case, The Grievant was not summoned for jury duty and he was not subpoenaed to appear before any court or official proceeding. He was the defendant in the case, and undeniably a party to the matter before the court. The Grievant falls under Section 51.03 and may be granted leave. The Union attempts to read Section 51.02 out of context. If Section 51.02 were intended to stand alone, there would be no reason for the language in Section 51.01.

There is no provision that allows compensation as the Union is requesting. The Union is attempting to stretch the common sense application of the meaning of “arising out of his/her employment.” A trooper who receives a citation while they are working and chooses to appear in court to contest the charge is not appearing on an action that arose out of their employment. Their violation of law has nothing to do with their employment. The fact that they are a law enforcement officer and allegedly broke the law while on-duty does not entitle them to compensation to fight their own personal legal battles.

The Union’s interpretation would lead to a significant financial windfall for those who choose to exploit the system. Every trooper issued a citation from a patrol car crash will appear at the initial appearance and plead not guilty so their case is set for

trial. They will collect their three hour minimum pay and return to the court for a second time on the trial date. On the trial date, they will then change their plea to no contest, pay the fine and collect another three hour minimum. What would John Q. Citizen think if a trooper who was at fault in a crash could make two court appearances to contest his/her on-duty citation and pocket \$145 from the incident (assuming an hourly rate of \$26.70 x 1.5 for overtime x 2 days minus a \$95 fine for the citation). The Union's interpretation would also mean that a trooper who commits any violation or criminal act while on-duty would be entitled to compensation while going through any legal proceedings.

The Employer's position on the interpretation of this Article has remained the same and establishes a past practice. The very issue surfaced on two separate occasions in the past. In 2001, Trooper June Clark was issued a citation as a result of an on-duty patrol car crash. She appeared in court while off-duty to contest the citation and requested court appearance pay. In 2006, Trooper Cynthia Lottman was cited out of an on-duty patrol car crash and made the same request for compensation. In both examples, the employees were denied compensation. Grievances were filed and on both occasions and both times the grievances were withdrawn by the Union.

The relevant contract language in Article 51 has remained the same since 2000. Certainly, if the Union did not agree with the Employer's interpretation of Article 51, it could have bargained for different language in the three rounds of negotiations that occurred after the initial grievance in 2001. The Union is attempting to gain through arbitration something that should have been brought to the negotiation table. The Union

failed to present a single piece of evidence to demonstrate its intent of the negotiated language.

The Union raises the question of whether a trooper would be paid to appear in court when the trooper is personally sued as a result of the performance of official duties. This was an attempt to dispel the Employer's position of Section 51.03. S/Lt. Linek advised if the trooper was acting within the scope of their duties they would be compensated. This very issue is specifically addressed in Article 56 – Indemnification of Members. The State of Ohio is required by Ohio Revised Code to indemnify officers from liability and damages incurred while performing their duties. If an officer was personally sued as a result of his on-duty actions, yet was acting within the scope of his employment, the Employer would allow the employee to attend in uniform as a witness and represent the Division. The Union's attempt to compare this to the case at hand is an apples to oranges comparison.

The Employer argues that the language of Article 51 is clear and unambiguous. The "plain meaning rule" as outlined in Elkouri and Elkouri states that "if words convey a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." To modify the language or interpret it in any fashion other than what is specifically written would significantly alter the meaning and position of the Employer at the time of the signing. The clear language states that if a trooper is a party in a matter before the court, they may be allowed permissive leave and cites traffic court as an applicable example of the section.

For all these reasons, the Employer requests that the grievance be denied in its entirety.

DISCUSSION

In the opinion of the Arbitrator, the grievance must be denied. There is no language that grants court leave time for the situation posed by this grievance. Section 51.01 clearly defines the circumstances under which court leave will be paid to an employee: 1) when the employee is summoned for jury duty; or 2) when the employee is subpoenaed to appear based on an action arising out of his/her employment. In the instant case, the Grievant was not summoned for jury duty nor subpoenaed to appear in court for an employment related action. He was given a traffic citation for his involvement in an accident that occurred while on duty, and he chose to appear in court to contest the citation.

The Union's interpretation takes the language of Section 51.02 (C) out of context. The Arbitrator agrees with the Employer's assertion that the subsections of Section 51.02 set out the ways compensation is paid for the sanctioned court appearances cited in Section 51.01 and cannot be read standing alone. It would be illogical for the parties would propose a third scenario for payment of court leave in Section 51.02 (C), i.e. for **any** action arising out of his/her employment, and segregate it from the other two scenarios proposed in Section 51.01. Clearly, Section 51.02 (C) refers to any employment related action in which the employee is subpoenaed.

Rather, it is Section 51.03, not Section 51.02 (C) that applies to the facts in this case. Section 51.03 governs all other actions in which the employee is a party to the matter before the court, such as criminal or civil cases, traffic court, divorce proceeding, etc. Under the scenarios of Section 51.03, the employee may be granted leave to

appear in court rather than receive compensation. In the instant case, the Grievant was a party contesting a traffic citation, which is one of the examples listed in Section 51.03.

The unfortunate thing is that the Grievant was wrongfully issued the citation for the accident. The Grievant was alleged to have violated the law, which is not an action taken within the scope of employment. However, the evidence did not support a violation. Thus, the Grievant was acting within the scope of his employment when the other driver failed to yield to his emergency vehicle. However, the clear and unambiguous language of Article 51 does not include a scenario in which the employee is cleared of wrongdoing and, thus, appeared in court on an action arising out of his/her employment. The only scenarios in which an employee can be compensated for court time is when summoned for jury duty or subpoenaed to appear in an action arising out of his employment, neither of which happened in this case.

The Union was aware that the Employer had refused compensation for employees who appeared in court on traffic citations they received while on duty. If the Union wanted to clarify the circumstances under which such compensation would be paid, it had a couple of times to raise the issue at the negotiating table and did not. Therefore, the Union must be seen as acquiescing to the Employer's interpretation of the language.

AWARD

For all the reasons cited above, the grievance is denied.

/s/ Virginia Wallace-Curry
Virginia Wallace-Curry