

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL
AND
THE OHIO STATE TROOPERS ASSOCIATION

Grievant: Laura A. Windbigler

Case No. 15-03-20120313-0029-04-01

APPEARANCES:

For the Union:

Advocate: Herschel M. Sigall, Attorney
Elaine M. Silveira, Attorney

For the Employer:

Advocate: Jacob D. Pyles

OPINION AND AWARD

Arbitrator: Dwight A. Washington, Esq.

Date: September 17, 2014

INTRODUCTION

The matter before the Arbitrator is a Grievance brought pursuant to the Collective Bargaining Agreement ("CBA") in effect July 1, 2012 through June 30, 2015 between the State of Ohio Department of Public Safety, Division of the State Highway Patrol (hereinafter "OSP" or "Employer") and the Ohio State Troopers Association, Inc. ("Union").

The issue before the Arbitrator is whether OSP violated the CBA when it denied Grievant, Laura A. Windbigler ("Windbigler"), shift differential for hours worked as a traveler dispatcher on the day shift.

This matter was submitted by written statements and joint exhibits. The parties waived the hearing and, on August 4, 2014, submitted written statements to the Arbitrator. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Windbigler, in February 2012 was assigned to the Mansfield Patrol Post as a traveler dispatcher. A traveler dispatcher is required to report to three (3) different assigned posts and different shifts based upon operational needs.

On February 13, 2012, the Grievant's shift began at 11:00 p.m. and was to end at 7:00 a.m. on February 14, 2012. Due to weather conditions, the Grievant was mandated to work an additional hour. The Grievant was not paid shift differential payment for the one (1) hour she was mandated to stay.

The Employer denied the shift differential payment because the one (1) hour of overtime occurred after the conclusion of her shift and the Grievant was not entitled to shift differential for all hours worked like a relief dispatcher. Relief dispatchers, aka fill-ins, are entitled to shift

differential for all hours worked in accord with the CBA. The Employer contends that relief dispatchers as defined under the CBA and the OSP policy are different from traveler dispatchers.

The Union disagrees, and contends that traveler dispatchers operate as relief or fill in dispatchers within their assigned area and therefore, in accord with Article 63.05 which states “. . . all fill-in shifts will receive shift differential for all hours worked” are entitled to shift differential. Additionally, in 2008, the parties executed a settlement agreement to resolve a class grievance that paid shift differential to traveler dispatchers who worked multiple shifts for “all hours worked.” (Union Written Statement, p. 2). The settlement included retroactive shift differential pay for traveler dispatchers who were denied first shift pay “. . . and to **reinstate payment for SFT** (shift differential pay) **and PSD** (premium shift differential) **prospectively.**” (Union Written Statement, p. 5).

The Union contends that if traveler dispatchers are required to work multiple shifts, then shift differential payment for all hours worked is required in accord with the 2008 class grievance settlement. (Joint Exhibit (JX) 5).

On February 18, 2012, the Grievant claimed shift differential from 7:00 a.m. to 3:00 p.m. This request was also denied by the Employer based upon the fact that Grievant's shift did not start between 2:00 p.m. and 12:00 a.m. and she was not a “relief dispatcher” as defined in the CBA or OSP policy. According to the Employer, Article 63.05 does not refer to nor apply to “traveling” dispatchers and “relief” and “traveling” dispatchers are treated differently in the following areas: scheduling/shift changes (CBA Article 22.08); pay for working at locations other than on bid list (CBA Article 22.09(1)); premium pay for traveler required to work at alternate location (CBA Article 22.09(2)); and relief dispatchers are treated separately in OSP-

203.15 with no reference that relief and traveling dispatchers are “one in the same.” (Employer’s Written Statement, p. 5).

The Union seeks that the Grievant be paid differential for all hours worked on day shift retroactively and prospectively.

ISSUE

Did the Employer violate a prior settlement agreement and/or Article 63.05 when it denied shift differential pay to the Grievant when she worked the first shift? If so, what shall the remedy be?

RELEVANT PORTIONS OF THE CBA AND THE OSP RULES AND REGULATIONS

COLLECTIVE BARGAINING AGREEMENT

Article 22.09 Alternate Report-In Locations

Article 22.09 (1)

If a Dispatcher, excluding “Travelers,” is required to work at a facility other than where the Dispatcher submitted his/her shift bid they will be paid Dispatch Premium for all hours worked at the alternate report-in location.

Article 22.09(2)

If a “Traveler” is required to work at a facility other than one of the three facilities designated as their report-in locations, they will be paid Dispatch Premium for all hours worked at the alternate report-in location.

Article 22.09(3)

Additional mileage and travel time that occurs as a result of reporting to a facility other than the assigned report-in location, or in the case of a “Traveler” to their primary report-in location shall be counted as hours worked and the additional mileage shall be paid at the current rate as referenced in Section 25.02.

Article 26.01 Shifts Assignments for Bargaining Unit 1

Shift assignments will be made by the facility administrator on the basis of seniority. Schedules for troopers assigned to field locations will be bid by seniority, most senior first, at each facility. Troopers will bid upon two reasonably equal three month periods that shall begin on the first day

of the pay period that includes March 1st and September 1st of each year. After all troopers have bid, and prior to reviewing cost savings days and vacation requests submitted during the "window period," the post commander shall review the schedule and determine if any changes are needed based upon operational considerations. Operational considerations shall include, but shall not be limited to: the balance of experience per work shift group and special training. A bid period is two (2) reasonably equal three (3) month periods. The post commander may, per bid period, change a schedule for one (1) three (3) month period for up to four (4) troopers based upon operational considerations. No individual trooper will have their schedule changed for operational considerations more than once per twelve (12) month bid cycle beginning with the first bid after ratification.

The decision of the post commander to make a schedule change based upon operational considerations shall only be grievable to Step 2 with a review of the circumstances made by the Office of Field Operations. Dispatchers and Electronic Technicians will continue to bid on the basis of seniority only.

In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur, except for the relief dispatcher, who shall continue on a rotating schedule as in the past. The Employer shall have the right to change a member's schedule for operational considerations, include time off days, or scheduled work shift with seventy-two (72) hours notice, or less when exigent circumstances exist, except as provided in Article 22. When a member's schedule is changed, time off days shall not be split except in extraordinary circumstances (e.g. major emergency conditions, such as a riot, a natural or man-made disaster; training; shift bid transition; or any other time mutually agreed to by the employee and the Employer). No employee scheduled to be off on a holiday listed in Section 44.01 shall be required to work on that holiday in order to facilitate a permissive leave request (personal leave, compensatory time or vacation) from another employee unless the vacation leave is submitted during the "window period" by a more senior employee in the same classification. Shifts shall be bid between fifty (50) and thirty (30) days prior to the beginning of the new assignment.

The relief dispatcher shall be paid the regular shift differential as provided in Article 63 for all hours.

A. Special Response Team (SRT)

1. Schedules for troopers assigned to the SRT will be bid by seniority, most senior first, at their designated district headquarters. Troopers will bid upon two reasonably equal three-month periods that shall begin on the day of the pay period that includes March 1st and September 1st of each year.
2. Vacations shall be scheduled in accordance with Section 43.04 among troopers of the team assigned to each district.

Article 63

Shift Differential

Article 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.

Article 63.03

The Employer retains the right to redefine the shift hours to qualify for shift differential based on the management needs of the Employer. Employees will receive shift differential payment only for time actually worked, not for sick leave, disability leave, vacation, personal leave, occupational injury leave, bereavement leave, holiday time off or compensatory time off. Authorized shift differential will be expressed as (flat rate) cents-per-hour. The established rate shall be one dollar (\$1.00) per hour for second and third shift. No additional shift differential will be paid where shift differential is automatically computed into the overtime compensation time.

Article 63.05

All fill-in shifts will receive shift differential for all hours worked.

OHIO STATE HIGHWAY PATROL

Policy No. OSP-203.15

B. Bid Procedure

2. Shift assignments will be permanent and no rotation of shifts will occur, except relief/fill-in and traveling dispatchers, who may work a rotating schedule. Shifts shall be bid according to the Bargaining Unit 1 agreement. The normal work week shall be 40 hours. <41.1.01c>

C. Work Schedule

14. Permanent shifts will be established for all dispatchers except those designated as relief/fill-in and traveling dispatchers. Any dispatcher may have their days off changed for operational reasons with 14 days notice. Changing dispatchers' schedules with less than 14 days notice should be avoided except in the most exigent of circumstances. These changes will result in the payment of premium dispatcher pay. The scheduled days off of a relief dispatcher shall be changed before the scheduled days off of a permanent dispatcher are changed. Dispatcher schedule changes that occur as a result of dispatcher training are exempt from the payment of dispatch premium pay, provided 14 days notice has been given.

15. The starting times for all dispatcher work shifts will be determined by the dispatcher supervisor/facility manager. Relief and traveling dispatchers may have their starting times changed for operational reasons. Change made with less than 14 days notice will result in the payment of dispatcher premium for all affected hours.

POSITION OF THE PARTIES

Position of the Union

The Union contends that the stipulated facts indicate the Grievant worked various shifts as a traveler during the work weeks of February 14 and February 18, 2012. As a result of working multiple shifts, the Grievant is entitled to “shift differential for all shifts worked and a premium shift differential where there is a third shift worked within the same work week.” (Union Written Statement, p. 2).

The Union, argues that a settlement agreement between the parties reached in 2008 to resolve a class action grievance controls the instant grievance. The 2008 settlement, provided that traveling dispatchers will be paid shift differential and premium shift differential for all hours, where required. The Union recognizes the parties imposed certain “self-limiting” restrictions in the settlement agreement, such as: the agreement is not precedent setting; the agreement shall not be introduced in any subsequent arbitration; and in any way utilized in any subsequent arbitration. Despite the foregoing, the Union contends the utilization of the 2008 settlement agreement is appropriate because of the proviso which specifically allows for its use “to enforce **its** provisions and **terms**.” (JX 5, p. 1, emphasis added).

The settlement agreement in 2008 was based in part upon a November 2005 Q&A correspondence prepared by the Commander of the Office of Human Resource Management (Major Robert Young) to address a variety of questions regarding recent creation of the traveling dispatcher position by the Employer. (JX 6). Major Young stated that traveling dispatchers would receive “shift differential for those two shifts¹ and premium shift differential if a traveler

¹ The two shifts were previously defined as swing shifts, a.k.a. relief shifts. Traveling dispatchers were not assigned a permanent post and were assigned to a patrol post within an assigned area. All post(s) had relief dispatchers who were assigned to a particular post. In the event the relief dispatchers were unavailable, a traveling dispatcher was scheduled.

worked a third shift.” (JX 6, p. 2). The 2008 settlement agreement incorporated Major Young’s understanding of shift and premium differential pay to travelers, and this practice remained in place until this grievance.

Article 63.05 of the CBA states that all fill-in shifts are entitled to shift differential for **all** hours worked is applicable to the traveler dispatcher. The Employer, who unilaterally created this position, sole purpose was for the traveling dispatchers to fill in when required. The distinction between relief dispatchers and traveling dispatchers is non-existent, and in fact is one in the same.

The remedy sought by the Union is that the 2008 settlement agreement be enforced and that shift differential be paid for all hours worked by the Grievant during the weeks she worked multiple shifts, and that in the future the terms of the 2008 settlement agreement be honored by the Employer.

Position of the Employer

The Employer contends that the CBA, OSP policy nor past practice makes the traveling dispatcher and the relief dispatcher one in the same as alleged by the Grievant.

The Grievant, as a “traveler” was assigned to the Mansfield Patrol Post, but was scheduled to work in three (3) other assigned posts as operationally needed, as opposed to relief dispatchers, who bid a swing shift at their one (1) assigned post. Another difference is that the traveler position is a posted position whereas the relief dispatcher is a scheduled position.

The CBA treats the “traveling” dispatchers differently regarding pay applicable to report-in locations (JX 1, CBA Art. 22.09(1)); pay specifically relating if a “traveler” is required to report to a location other than their three (3) designated report-in locations; (JX 1, CBA Art.

22.09(2)); and mileage payments and hours worked as applied to travelers. (JX 1, CBA Art. 22.09(3)).

The CBA in accord with the parties' intent is specific when discussing dispatch premium pay, mileage, reimbursement and travel time. However, the CBA "does not state that 'traveling' dispatchers will be paid shift differential for all hours worked . . . " (Employer's written statement, p. 4). The CBA also fails to state that relief/fill-in dispatchers and traveling dispatchers are one in the same.

The CBA Article 26.01, language provides that "relief" dispatcher(s) shall be paid the regular shift differential for **all** hours. If the parties had intended to compensate traveling dispatchers similarly, such language would have been included in Article 26.01.

The payment of shift differential is governed by Article 63.02 which states that when the shift starting time is between 2:00 p.m. and 12:00 a.m., that differential shall be paid for all shifts, and eligible employees ". . . will receive such differential for **all** hours of the shift." (JX 2, CBA Article 63.02, p. 110, emphasis added).

The Grievant's starting time, i.e., 11:00 p.m., made her eligible for shift differential on February 13, 2012. The dispute is that the Grievant was held over for an additional hour which resulted in overtime (OT). However, based upon Article 26.01 and Article 63.02, shift differential was not applicable.

Also on February 18th, the Grievant's shift was from 7:00 a.m. until 3:00 p.m. Her eight hours of shift differential were denied because her shift did not start between 2:00 p.m. and 12:00 a.m., and she is not a "relief/fill in" dispatcher, making her eligible for shift differential for all hours worked under Article 63.05.

The October 6, 2008 settlement agreement occurred prior to contract negotiations in 2009. No language was agreed to which specifically states that traveling dispatchers would be paid the regular shift differential for all hours comparable to the relief dispatcher. The 2008 settlement agreement is no longer binding and unless specifically incorporated into the existing CBA, the settlement agreement applicability to this grievance is moot.

Finally, the Q&A document (JX 6) of Major Young fails to impact this matter in any respect. The document was generated in November 2005, prior to contract negotiations in 2006 and 2009. Once again, the Union did not bargain language in the current CBA to include any of the language penned by Major Young regarding traveling dispatchers.

DISCUSSION AND CONCLUSION

Based upon the written statements of the parties in lieu of a hearing, and exhibits of the parties, the grievance is granted in part and denied in part. My reasons are as follows:

The Union's position in declaring the 2008 settlement agreement as the basis for sustaining this grievance fails to apply the parties' language within the agreement which specifically limited further inquiry into that settlement **unless** either party was required ". . . to **enforce** its provision and term." (JX 5, emphasis added). Given the clear mandate of the parties, the enforcement of the 2008 settlement agreement as sought by the Union as it relates to the instant grievance is denied.

An additional barrier for enforcing the 2008 settlement agreement rests with the arbitral concepts of "waiver" and "zipper clauses." Generally, a party may waive their ability to make changes within a CBA on topics that are not specifically addressed in the CBA. See Elkouri & Elkouri, Sixth Ed., Ch. 13. Moreover, parties by their conscious actions may waive certain interest by not incorporating specific language into the CBA as a result of judicial orders,

administrative decisions, arbitration awards, regulatory mandates, etc. Simply, one of the parties must advance the subject during the negotiation process or face the peril that clearly “bargainable issues” were never discussed or became part of the CBA. No evidence exists that during the most recent contract negotiations, that Articles 29 or 63 were modified to embrace the principle(s) of the 2008 settlement agreement.

If the parties had intended that travelers and relief/fill in dispatchers are one in the same under the CBA, the language in Articles 63.02 and 29.02(1), (2) and (3) would state so. Also, if the parties intended travelers to receive differential for all hours worked, regardless of the shift start time, the CBA would contain express language in that regard similar to the relief dispatchers.

The 2008 settlement agreement did not become a part of the 2009-2012 contract of the parties and by its own limiting language, therefore the purpose for its use herein is inappropriate. Therefore, the plain meaning of Articles 63.02 and 63.05 will be applied to this issue without adding to or taking away from the language which is clear and unambiguous.

This grievance specifically addresses February 14, 2012 and February 18, 2012 in seeking shift differential pay for the Grievant as a “traveler.” The initial inquiry to resolve is whether the “relief/fill-in” and “traveler” dispatchers are the same for purposes of CBA Article 26.01. The “relief/fill-in” dispatchers under Article 63.05 are entitled to shift differential “. . . for all hours worked.”

Traveler Versus Relief Dispatcher(s)²

According to the Union, both the traveler and relief dispatchers are the same based upon travelers are sent to assigned posts as a **relief or fill-in for a regular dispatcher** or a relief dispatcher.

The evidence indicates that “relief” dispatchers submit shift bids. (JX 1, CBA Art. 22.09(1)). Travelers do not submit shift bids, but are assigned to work at one of three facilities. (JX 1, CBA Art. 22.09(2)). The “relief” dispatcher is entitled to premium shift differential if required to work at an alternate report-in location. (JX 1, CBA Art. 22.09(1)). “Travelers” are entitled to premium shift differential only if required to work at a location other than one of the three facilities. (JX 1, CBA Art. 22.09(2)).

As noted earlier, OSP Policy 203.15 (JX 3, pp. 1-4) refers to “relief/fill-in” in multiple locations, but is silent on treating “traveling dispatchers” comparable. The CBA is also silent in this regard. The evidence submitted by the Union fails to support its position that relief/fill-in dispatchers and travelers are one in the same. Therefore, the Union’s position is not supported by the evidence.

February 14, 2012

It is undisputed, that the Grievant was mandated to work an additional hour at the conclusion of her regular shift on February 14, 2012. It is also undisputed, that Grievant’s shift began at 11:00 p.m. which entitled her to the regular shift differential under Article 63.02.

The one hour shift differential was disapproved because the overtime did not start between 2:00 p.m. and midnight and that the Grievant was not a relief dispatcher, according to the Employer. The real issue before the arbitrator, which is dispositive of this matter, is if an

² Relief dispatchers are referred to as “fill ins” in OSP Policy 203.15. (JX 3, p. 1; JX 3, p. 3). Nowhere in the CBA or OSP policy is “travelers” referred to as fill-ins.

Employer extends the traveler's shift which started between 2:00 p.m. and midnight, is shift differential applicable for **all** hours of the shift, including the extended portion?

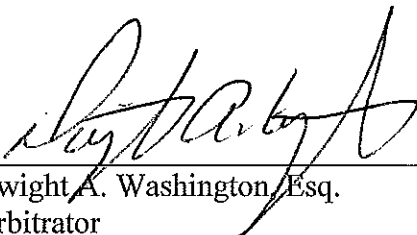
Article 63.02 is clear that the Grievant's starting time was between 2:00 p.m. and midnight. At the conclusion of her shift at 7:00 a.m., the Employer extended her shift by mandating she remain until 8:00 a.m. on February 14, 2012. Article 63.02 is unambiguous in that shift differential **shall** be paid for "**all hours of the shift**" where the starting time is between 2:00 p.m. and 12:00 a.m. The operative word is "starting," not when that shift ends. Based upon the plain meaning of Article 63.02, the Grievant is entitled to shift differential from 7:00 a.m. to 8:00 a.m. The grievance is sustained regarding the February 14, 2012 one hour shift differential sought.

February 18, 2014

The Grievant worked from 7:00 a.m. until 3:00 p.m., and her request for shift differential for the shift was denied by the Employer. Given my earlier determination that "travelers" are not the same as "relief/fill-in" dispatchers, the remedy sought is contrary to Articles 63.02 and 63.05. I find that the Employer did not violate the CBA, and deny the remedy sought by the Union for the alleged violation on February 18, 2014.

Therefore, the grievance is granted regarding the remedy sought for February 14, 2012, but denied regarding the remedy sought for February 18, 2012.

Respectfully submitted, this 17th day of September, 2014.



Dwight A. Washington, Esq.
Arbitrator

Copies of this Opinion and Award were sent electronically to the individuals listed below on September 17, 2014:

Elaine M. Silveira
esilveira@ohiotroopers.org

Jacob D. Pyles
jpyles@dps.state.oh.us

Alicyn Carrel
Alicyn.Carrel@das.ohio.gov