OPINION AND AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE TROOPERS ASSOCIATION

AND

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

Grievance: DPS-2016-05125-1
Grievants: Matthew Hunter, Robert Laman, & Trenton Terrill

Date of Hearing: July 25, 2017

Arbitrator: Sherrie Passmore

Date of Award: November 15, 2017

APPEARANCES

Advocate for the State: Michael D. Wood, Labor Relations Officer

Advocates for OSTA: Elaine N. Silveira, Sgt. Jeremy Mendenhall,
Larry K. Phillips, & Bruce Elling

INTRODUCTION

This arbitration arises pursuant to the collective bargaining agreement ("Agreement") between the parties, Ohio Department of Public Safety, Division of State Highway Patrol ("Employer" or "OSHP") and Ohio State Troopers Association ("Union" or "OSTA"). Sherrie Passmore was appointed as the Arbitrator under the authority of the Agreement.

A hearing was held on July 25, 2017. Both Parties were represented by advocates who had a full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make arguments. Because of jurisdictional and procedural issues raised immediately prior to the start of the hearing, the parties agreed to waive the requirement under Article 59.02 that the arbitrator issue a bench decision at the conclusion of the hearing and agreed to submit briefs on those issues as well as the merits. Post-hearing briefs were timely filed on October 2, 2017.

JOINT STATEMENT OF ISSUE

Did the Employer violate Article 59.02 of the Collective Bargaining Agreement? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE AGREEMENT

59.2 Working Out of Class

A. Position Descriptions

New employees shall be provided a copy of their position description. When position descriptions are changed, employees shall be furnished a copy. Any employee may request a copy of his/her current position description. Classification specifications are available on the Department of Administrative Services' website.

B. Grievance Steps

Filing the Grievance at the Agency Step

If an employee or the Union believes that he/she has been assigned duties not within his/her current classification, the employee or the Union may file a grievance at the Agency Step. The Agency Director or designee shall investigate and issue a decision within fifty (50) calendar days. A copy of the Director's or designee's decision shall be provided to the grievant and the Union in the electronic grievance filing system. If the

grievance is not resolved or no Management response is received within fifty (50) days from submission, the grievance shall be automatically eligible for appeal. If the parties mutually agree, a meeting to attempt to resolve the grievance may be held at the grievant's work site prior to the issuance of the decision of the Director or designee. If the Director or designee determines that the employee is performing duties which meet the classification concept and which constitute a substantial portion of the duties (i.e., twenty percent (20%) or more of the employee's time if to a higher classification or eighty percent (80%) of the employee's time if to a lower classification) specified in another classification specification, the Director or designee shall order the immediate discontinuance of the inappropriate duties being performed by the employee, unless the parties agree to the reclassification of the person and position pursuant to the provisions of this Article. If the duties are determined to be those contained in a classification with a lower pay range than the employee's current classification, no monetary award will be issued.

If the duties are determined to be those contained in a classification with a higher pay range than that of the employee's current classification, the Director or designee shall issue an award of monetary relief, provided that the employee has performed the duties as previously specified for a period of four (4) or more working days. The amount of the monetary award shall be the difference between the employee's regular hourly rate of pay, and the hourly rate of pay at the applicable step of the higher pay range for the new classification. The applicable step shall be the step in the higher pay range which is approximately four percent (4%) higher than the current step rate of the employee. If a step does not exist in the higher pay range that guarantees the employee approximately a four percent (4%) increase, the employee will be placed in the last step of the higher pay range. The placement into the last step does not necessarily guarantee a four percent (4%) increase. If the higher level duties are of a permanent nature as agreed to by the Union and the Employer, the employee shall be reclassified to the higher classification.

If the duties are determined to be those contained in a classification with a lower pay range eighty percent (80%) or more of the time than that of the employee's current classification: 1) the Director or designee shall issue an award to cease the assignment of the lower level duties, and take appropriate action to assign duties consistent with the employee's current classification; or 2) the parties mutually agree to reclassify the employee to the lower level classification, the employee may be reassigned to the appropriate classification; or 3) if the duties cannot be assigned by the Employer, other actions, as appropriate, may be initiated under this Agreement. Management shall discuss options with the Union.

In no event shall the monetary award be retroactive to a date earlier than four (4) working days prior to the date of the filing of the original grievance. The date of the filing of the grievance shall be determined by the date of submission in the electronic grievant system.

Appeal to Alternative Dispute Resolution (ADR)

Grievances which have not been settled under the foregoing procedure may be appealed to ADR. This appeal must be filed within fifteen (15) calendar days of the employee's receipt of the Director or designee's decision or appeal activation. Regardless of whether a response is submitted by the agency, if no action is taken by the Union within thirty (30) days of eligibility for appeal, the grievance will close.

The parties shall schedule an arbitrator to determine if an employee was performing the duties which meet the classification concept and consist of a substantial portion of the duties (i.e., more than twenty percent (20%) of the employee's time if to a higher classification or eighty percent (80% of the employee's time if to a lower classification) as specified in the classification specification other than the one to which the employee is currently assigned and for what period of time.

Present at the hearing shall be a Union representative, the grievant or the employee whose duties are being challenged, and a management representative and agency designee who will present their arguments to the arbitrator. The employee's position description will be admitted into evidence at the hearing. If the Union disagrees with the

accuracy of the position description, it may file objections with the Management advocate accompanied by its version of what actual duties were performed at least two (2) days in advance of the arbitration hearing. The objections filed by the Union will be admitted into evidence. The arbitrator will issue a binding bench decision at the conclusion of the hearing, which will identify if the employee was working out of classification and for what period of time. If the arbitrator determines that the employee is performing duties in a classification which carries a higher pay range than the employee's current classification, the arbitrator shall order the Employer to immediately discontinue such assigned duties. If the arbitrator determines the duties of the position to be of a lower classification, the arbitrator shall order the Employer to immediately discontinue such assigned duties. The arbitrator's decision concerning a lower classification is restricted to determining whether duties are performed for a substantial portion of time. Only when the employee is performing duties inconsistent with the employee's original classification assignment more than eighty percent (80%) of the employee's time will a determination be made to instruct the Employer to discontinue the assigned duties.

The determination of a monetary award shall be in accordance with the process outlined in the Agency Step above. However, if the Union and the Office of Collective Bargaining agree that the higher level duties are of a permanent nature and that the situation is otherwise in compliance with the provisions of this Article, they may mutually agree to reclassify the employee to the higher level classification. Likewise, the parties mutually agree to reclassify the employee to a lower classification.

The remedy ordered at any step of the grievance procedure, including a monetary award, shall be in accordance with the process outlined in the Agency Step above.

The expenses of the arbitrator shall be borne equally by the parties.

BACKGROUND

The Grievants, Matthew E. Hunter, Robert M. Laman, and Trenton N. Terrill, are employed as Electronic Technicians (ETs) at the Ohio Department of Public Safety, Ohio State Highway Patrol Division. Hunter is an ET3, Laman is an ET2, and Terrill is an ET1.

In December 2013, the Grievants were directed to install printers, docks and associated wiring into patrol cars. On December 30, 2013, and January 16, 2014, the Grievants filed working out of class grievances alleging the performance of these duties is outside the ET classifications. The grievances further allege that these duties are assigned to the Infrastructure Specialist (IS) classification series, a higher paying series in the OCSEA bargaining unit. The requested remedy stated in the grievances is reclassification of the ETs.

POSITIONS OF THE PARTIES

Position of the Union

The Union's position is that the Arbitrator has jurisdiction to issue a decision on the merits of these grievances alleging that Article 59.02 was violated.

The Union points out that Article 59.02 has remained virtually unchanged in substance since its inception and that the ability to grieve the issue was added in the 2006-2009 Agreement. Since no language was added limiting the classifications that could be considered in determining if a grievant was working outside his or her classification, the Union argues the Arbitrator has the ability to decide these grievances.

In further support of its position that the Arbitrator has jurisdiction over these grievances, the Union cites a 1996 decision issued by Arbitrator Harry Graham. In OCSEA/AFSCME Local 11 v. State Ohio, #02-10-951016-0011-01-00, 2/8/1996, Arbitrator Graham opined that an "arbitrator has authority under the Agreement to award pay to a person working in a higher rated position in a bargaining unit that may be represented by another union other than OCSEA/AFSCME Local 11."

The Union also takes the position that these grievances can be decided as a class action. Article 20.05 permits class action grievances and a member from each ET classification filed a grievance and testified as to how their class was affected.

The Union argues that ETs are working out of class because they have routinely performed duties over the past few years that are not in their position descriptions and should be performed by the IS class. It points to testimony from ET3 Matt Hunter that he routinely fixes issues that his district IS cannot or will not do. The Union contends installing printers is an example of ETs performing work not in their job descriptions. Another

example the Union cites is vehicle installs for other state agencies. The Union notes that the ET position descriptions at the time the grievances were filed limited their duties to Ohio State Highway Patrol equipment and/or facilities and that the position descriptions have since been modified to extend their duties to include equipment and/or facilities of other state agencies.

The Union further notes that since the grievances were filed, the duties listed under 65% time under the ET position descriptions have been substantially modified. It suggests these changes were made to circumvent these grievances. The Union argues that the substantial changes are evidence that ETs meet the requirement under Article 59.02 that an employee has been performing the duties of a higher classification more than 20% of the time.

Position of the Employer

The Employer's position is that the grievances are not procedurally arbitrable because the Arbitrator has no authority to grant the remedy requested by the Union. Article 59.02 does not give the Arbitrator the authority to reclassify an employee and SERB is the only entity that can determine appropriate bargaining unit classifications. The monetary relief requested by the Union may not be granted because the request is based on pay ranges for a classification in another bargaining unit. Article 2 provides that the Agreement represents the entire agreement between the parties and, therefore, it's inappropriate to consider pay ranges outside of the OSTA Agreement. Pay ranges outside the Agreement may also not be considered because Article 20.08 prohibits an arbitrator from adding to the language of the agreement.

The Employer objects to this grievance proceeding as a class action. Because Article 59.02 uses the term "employee" as opposed to "employees", it does not contemplate a class action working out of class grievance. Although Article 20.05 provides for class action grievances, the Employer contends that the grievances herein do not fit the Article 20.02 definition of grievance within the meaning of that Article. That definition requires an "alleged violation, misinterpretation, or misapplication" of a specific contract provision and the Union did not claim any of those things in this grievance. Even if considered as a class action grievances, the Employer argues that the Union has the burden of proving the specific requirements Article 59.02 for each aggrieved employee.

The Employer's position on the merits is that the Union has not met its Article 59.02 burden of proof. The Union did not prove ET employees perform duties outside their classification and in a higher classification 20% or more of their time. Most of the duties ETs are alleged to have been working out of class fall within their class specifications. Any duties ETs have performed that fall outside of their classifications were not proven to have been directed, approved or condoned by the Employer.

DISCUSSION

Arbitrability

The first issue to be resolved is whether these grievances are arbitrable. The Employer's raises two procedural objections to moving forward to arbitration:

1. The Union has requested remedies that cannot be granted, and
2. The working out of class grievance process does not allow for class action grievances.

The Union did request a remedy that can be granted. Article 59.02 specifically proscribes the remedies the arbitrator must award if a grievant prevails. Monetary compensation is one of those remedies. Reclassification is not. Although the Union listed reclassification as the requested remedy on the grievance forms, it has also requested monetary compensation. The Employer did not raise its objection to going forward based on the Union's remedy request until the day of hearing. In response, the Union indicated that while it had no objection to the grievants being reclassified, its main concern was that the grievants be compensated for performing higher level duties.

The Employer argues there is no authority to grant the particular monetary compensation sought in this case, the difference in pay between the ET classifications and the IS classifications. The Employer reasons this would require improperly looking outside the OSTA Agreement because IS employees are in the OCSEA bargaining unit. Referencing the higher paying classification of another bargaining unit in fashioning a monetary award in a working out of class grievance is not improper. Article 59.02 specifically requires it. The Article mandates that a monetary award be based on the pay rate of the higher paying classification. Nothing in the Article indicates that only classifications within the OSTA bargaining unit may be considered. To find otherwise would produce an absurd result. An employee could be assigned duties of higher pay range classification but would never be entitled to be compensated for those duties if the higher pay range classification is in another bargaining unit.

These grievances were not properly brought as class actions. Article 20, the general grievance procedure, includes a provision for class actions but does not apply here. These grievances were brought pursuant to Article 59. The language of that Article demonstrates

that it was intended as a stand-alone procedure for resolving working out of class disputes. It provides a process and timelines different from the general grievance procedures set forth in Article 20. The Article 59 process requires different steps, different timelines and individualized proof and determinations (e.g., the percentage of time and specific days an employee performed duties outside the employee's classification). It does not contemplate or provide for class actions. Although these grievances cannot proceed as class actions, there is no reason they cannot be heard as combined individual grievances.

Merits

Having determined these grievances are arbitrable, the inquiry turns to whether they are meritorious. This is a working out of class dispute arising under Article 59.02. The crux of the grievances is that the Grievants are performing duties that they believe are outside their classifications and should be performed by IS employees, who are in a higher paying classification.

In an Article 59.02 working out of class grievance alleging performance of duties in a higher paying classification, the burden is on the Union to prove:

1. The employee was assigned and performed duties outside the employee's classification,
2. The duties outside the classification meet the classification concept of the higher paying classification, and
3. The duties performed in the higher paying classification constitute a substantial portion of the employee's duties, which is defined as 20% or more of the employee's time.

Outside classification duties Grievants allege they are performing are the installation of printers and associated peripheral accessories, the configuration of printers once the dock and wiring are completed and the installation of other computer related

equipment. These are duties that fall within ET classifications. The installation of electronic equipment in highway patrol facilities and other state agency vehicles are listed as job duties in the ET1 class specification. Grievant Trenton Terrill testified that, as an ET1, the only equipment he was directed to install was printer docks and wiring. He agreed on cross that the equipment is electronic and that ETs install electronic equipment. He testified he did not configure the software for the printer. The job duties listed in the ET2 and ET3 classification specifications include the installation of complex electronic equipment as well as the installation of computer and software systems.

The Union exhibits put into evidence do not prove that any of the Grievants performed duties outside their classifications for a substantial portion of their time:

- Union Exhibits 1, 2, 3, and 4 are a series of memos that delineate boundaries for ET and IS duties. That those boundaries changed or that ETs are sometime assigned or perform some of the same duties as IS employees is not proof that ETs are working out class. It is not unusual for duties to crossover between classifications. If contested duties are within an employee's classification, as is the case here, then the employee is not working out of class. None of the memos direct ET employees to perform duties that are exclusively IS duties.
- Union Exhibits 5 and 11 are updated ET position descriptions (PDs). The Union did not contest the accuracy of the updated PDs but suggests that the changes were made to circumvent the grievances. It is appropriate to update PDs as duties change over time, but the duties listed in a PD must fall within the language of the class specification. The updates made to the ET position descriptions are consistent with the ET class specifications and accordingly not suspect.

- Union Exhibit 6 is a memo regarding the springtime change in communication systems. It provides simple instructions for making adjustments in the software parameters to reflect the time change and directs the changes to be performed by District ET and/or IS employees. This memo did not apply to ET1 employees since, as Terrill testified, they are assigned to Central Office. As noted above, ET2 and ET3 employees can install software. This is an example of duties crossing over and not of working out of class.
- Union Exhibit 7 is a memo from ET3 Hunter to his manager updating him on a problem with a MCT crashing. Hunter was contacted by an IS employee who surmised it may have been an electrical connection issue, a duty of ET employees. After determining that was not the problem, Hunter continued to troubleshoot the problem. Although management concedes the duties described in the memo are duties assigned to IS employees, no evidence was presented that management directed ETs to perform such work or condoned such work being performed. Regardless, this single incident does not prove that ET3 Hunter is performing IS duties a substantial portion of his time.
- Union Exhibit 8 is two emails offered to show ETs are performing IS duties. The first email shows an IS copied ET3 Hunter to make him aware of a possible connectivity issue, an ET duty. The next email is from an IS to an ET2 to arrange a time to work together to solve a problem about equipment where ET and IS each have certain responsibilities. It mentions that ETs in other district solved the problem by reprogramming. There is no indication of which employee(s) were involved, the

amount of time spent on the task or that these the Employer directed these employees to undertake this task.

- Union Exhibit 9 consists of lists of vehicles from agencies outside OSHP that ET employees installed equipment into from 2014 to present. The ET1 classification specifically lists the installation of "basic electronic equipment in other state agency vehicles" as a duty. Although no specific reference is made in the ET2 and ET3 class specifications, higher level ETs are expected to know and perform duties of lower levels.

Viewed collectively, these exhibits are either about duties that are within the ET classification specifications or about individual incidents where ETs performed an IS task, only one of which was specifically shown to involve one of the Grievants. There was no evidence of how long the work took or that the Employer directed ETs to perform the work in those situations. This does not satisfy the proof required under Article 59.02.

The record does not contain sufficient evidence from which a determination can be made that the alleged outside classification duties meet the class concept for IS employees. The concepts are contained in the IS classification specifications which were put into evidences as exhibits. What is lacking is any explanations of how the alleged out of class duties meet those concepts or evidence from which that could reasonably be deduced.

Nor does the record contain sufficient evidence that alleged out of class duties were performed 20% or more of any Grievant's time. The generalized testimony that ET employees "routinely" perform IS duties is too vague to make that determination.

Based on the record, I cannot find that any of the Grievants worked outside their classifications 20% or more of their time performing duties that meet the classification concept of a higher paying classification.

AWARD

For the reasons stated above, the grievance is denied.

Sherrie J. Passmore
Arbitrator

November 15, 2017