In the Matter of the
Arbitration between

FRATERNAL ORDER OF POLICE OHIO LABOR COUNCIL, INC., UNIT 2

and

OHIO DEPARTMENT OF PUBIC SAFETY DIVISION OF THE OHIO STATE HIGHWAY PATROL

Grievance #DPS-2016-03257-2

Grievant: Susan G. Baker

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Michael D. Wood, Labor Relations Officer
Lt. Marty Fellure, Office of Personnel
Sean Tatter, Agent In Charge
Sarah Valasek, Assistant Agent In Charge
Abigail Ledman, OCB Policy Analyst
Jessie Keyes, OCB 2nd Chair

For the Union:

Douglas J. Behringer, General Counsel
Susan G. Baker, Grievant
Steve Stouker, FOP Unit 2
Renee Engelbach, Paralegal

The Ohio Department of Public Safety Division of the Ohio State Highway Patrol (hereinafter referred to as "Employer") and Fraternal Order of Police Ohio Labor Council, Inc., Unit 2 (hereinafter referred to as "Union") have submitted the grievance of Susan G. Baker (hereinafter referred to as "Grievant") to the Arbitrator for decision. Hearing was held at Columbus, Ohio on January 25, 2017. The parties submitted post hearing briefs which were received by the Arbitrator on February 22, 2017. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision is as follows:

Did the Employer violate Article 22.02 and 22.12 of the Collective Bargaining Agreement, and if so, what is the appropriate remedy?

FACTS

The Grievant is employed by the Employer as a liquor control agent in the Toledo, Ohio District Office. Her normal hours of work are 8:00 a.m. to 4:00 p.m. The Collective Bargaining Agreement provides that the Employer may alter work schedules with four weeks notice, and the posted work schedule for the week of July 17 through July 23, 2016 were properly posted in advance changing all agents' schedules to 8:00 p.m. through 4:00 a.m. that week. The reason for this posted change was that the Republican National Committee was taking place in Cleveland, Ohio that week, and it was anticipated that the Toledo District agents might be needed to work in Cleveland. The convention ended on Thursday July 21, 2016.

An additional reason for the change in the schedule related to a request which the Employer received from the Put-in-Bay police department for assistance during its annual Christmas in July event on July 22 and July 23, 2016. This event is typically characterized by a significant amount of drinking on the island. The Employer posted an overtime sign up sheet for the Put-in-Bay event. That notice included the dates and total number of overtime hours available, but not the times during which the overtime was to be worked. The Grievant testified that because the times for the

overtime were not posted, she opted not to sign up. Of the thirteen agents, nine did sign up for the overtime. On July 21, 2016 the Employer conducted a briefing for the Put-in-Bay event, at which time details for the event were discussed for the first time. It was at that time that it was announced the those who had volunteered to work the overtime would have their schedules changed from 1:00 p.m. to 9:00 p.m. and the overtime would be worked from 9:00 p.m. to 2:00 a.m. The schedules of those not volunteering for overtime would remain from 8:00 p.m. to 4:00 a.m. There was no dispute that employees may opt either in or out of overtime at any time prior to the date of the scheduled overtime. The Grievant, did not decide to opt in when advised of the shift change, but did mention in an email to her supervisor, Sarah Valasek, Assistant Agent In Charge, that there would likely be alcohol violations earlier in the day. Valasek responded that the schedule had been set, and the Grievant's schedule was not changed.

On Friday, July 22, 2016, all of the agents, including the Grievant and two other agents who opted out of overtime, left Put-in-Bay to return to the mainland by 10:30 p.m. The agents who had volunteered to work overtime were permitted to go home, since their altered shift had already concluded at 9:00 p.m. The Grievant and two other agents, however, were required to work until 4:00 a.m. since their shift had begun at 8:00 p.m. They remained at the Fremont District office completing daily paper work until that time. On Saturday July 23, 2016, all of the agents remained on Put-in-Bay until approximately 3:00 a.m., and with travel time from the island worked until approximately 4:00 a.m.

The Grievant filed the instant grievance alleging that the 8:00 p.m. to 4:00 a.m. shift was imposed in an effort to intimidate her in the exercise of her rights to decline offered overtime. The matter proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 22 -HOURS OF WORK AND OVERTIME

22.02 Posting of Work Schedules
It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time. Work schedules will be posted for work periods of four (4) weeks or greater and shall be posted for a minimum of four (4) weeks in advance. Work schedules shall not be established solely to avoid overtime but for efficient operations. After the schedule has been posted it will remain in effect for the duration of the posted period and may be changed only with four (4) weeks notice of a date or in emergency situations or employer-required training provided by non-department personnel.

22.08 Overtime Assignment
Unscheduled overtime will be offered to employees on duty starting with the most senior qualified employee ... If the overtime assignment is not filled by the above, it will be assigned to that work location. If the overtime assignment cannot be filled by either of the above, the least senior qualified employee on duty will be required to work. If the least senior employee is unavailable, then the next least senior employee(s) shall be required to perform the overtime assignment(s). Scheduled events and overtime to be worked at other facilities will follow the selection procedure outlined above with seniority being determined in the defined area. ...

22.12 No Intimidation
No supervisor shall intimidate or unduly influence an employee to waive his/her rights under this Article.

POSITIONS OF THE PARTIES

Union Position: The Union contends that the Grievant's schedule was not changed in the same manner as those who volunteered for overtime solely to punish her for not choosing to volunteer for the overtime. The Collective Bargaining Agreement permits schedules to be changed without four weeks notice only in the event of an emergency or training. Neither of those circumstances occurred here. The schedule of those who volunteered for overtime should therefore not have been altered. There was no reason to do so since they were already scheduled to work from 8:00 p.m. to 4:00 a.m. Those schedules were altered in order to punish those who

did not volunteer for overtime by rewarding those who did. In fact, there was no reason to alter the Grievant's schedule at any time during the week of July 22. She did not work at the RNC, and her schedule was changed to avoid overtime in the event she was needed at the RNC, which violates the CBA. Requiring the Grievant to remain at work until 4:00 a.m. on Friday July 22 while those who volunteered for overtime were permitted to go home, is further evidence of the intention to intimidate and punish. The grievance should be sustained, and the Grievant should be made whole.

Employer Position: The alteration of the schedules of those agents who volunteered for overtime at Put-in-Bay was done in an effort to effectively provide adequate coverage for the Christmas in July event and was dictated in part by the requirements for transportation on and off the island. Those who volunteered for the overtime consented to the schedule change, and any, including the Grievant, could have opted in or out of overtime at any time prior to July 22, 2016. The Grievant has had her schedule changed on her request on a number of occasions, and there was no evidence that she was denied changes in any discriminatory fashion. There was no evidence presented at hearing to demonstrate that there was any intention to punish or intimidate the Grievant, and the allegation alone is insufficient to meet the Union's burden of proof. Finally, the Employer notes that there was no grievance filed regarding improper scheduling in order to avoid overtime or in violation of Double Back Pay provisions. Those matters are not before the Arbitrator in this grievance. The grievance should be denied in its entirety.

DISCUSSION AND ANALYSIS

This being a case of an alleged violation of the contractual language of the Collective Bargaining Agreement, the burden of proof rests with the Union to demonstrate that the Employer has violated the provisions of the Collective Bargaining Agreement by a preponderance of the evidence. In this case, the Union's case focuses on the allegation that the

Employer's action in not altering the Grievant's schedule similarly to the schedule of those who had volunteered for the Put-in-Bay overtime was motivated by a desire to punish the Grievant. If proven, there is no doubt that such an action would violate Section 22.12 of the Collective Bargaining Agreement which prohibits intimidation of employees for exercising their rights under Article 22. The question in this case, is whether the Union has brought forth sufficient evidence to prove the existence of that improper motivation by a preponderance of the evidence.

The Union first points to the fact that although the shifts for the entire week of July 19 through July 23, 2016 were scheduled from 8:00 p.m. to 4:00 a.m. purportedly due to the RNC in Cleveland, the RNC was concluded on July 21, and there was therefore no reason to schedule the last two days of the week for those hours. The Union next notes that the offered overtime was unnecessary since the agents were already scheduled between 9:00 p.m. until 2:00 a.m., the time period covered by the overtime under the altered schedule. Had the original schedule been maintained, these hours would have been covered without overtime. It further points to the fact that the agents were off the island by 11:00 p.m. on July 22, indicating that they were not needed at all. The Union finally notes the fact that the other agents who had volunteered to work overtime were permitted to go home upon return to the mainland, while the Grievant was expected to work until 4:00 a.m. The Union's argument is essentially that all of these factors taken together add up to proof that the Grievant's schedule was punishment for not volunteering for overtime.

The problem with the Union's contentions, is that each of them is adequately explained by the Employer with evidence of a legitimate rational reason for the actions taken. The initial scheduling of 8:00 p.m. through 4:00 a.m. was intended to cover both potential coverage requirements for the RNC as well as the Put-in-Bay Christmas in July event. The scheduling was changed to 1:00 p.m. for the shift start of those who volunteered to work overtime in order to provide coverage earlier in the afternoon, while still permitting the overtime to be worked

into the early morning hours as needed. Clearly the scheduling for such an event is not precise, but must be made anticipating a scenario which requires the presence of as many agents as possible. The fact that the agents were not needed until 2:00 a.m. on July 22 is evidence that the situation was under control, not that the scheduling of the overtime was never necessary. The Union's arguments that these factors add up to the conclusion that the Grievant's schedule was intended as punishment require that the Arbitrator conclude that the Employer had conjured a rather elaborate scheme of overtime scheduling for the express purpose of punishing the Grievant and one other employee who did not volunteer for overtime. There is simply insufficient evidence to reach such a conclusion.

The Arbitrator additionally cannot accept the contention that the scheduling was for the purpose of intimidation because the Grievant was required to stay until 4:00 a.m. on July 22, 2016 while those who volunteered for overtime were not. As the Employer notes, those who had volunteered for overtime had already worked more than eight hours by the time of their return from Put-in-Bay. The Grievant had not, having started her shift later in the day. Had the Grievant left for the day, she would have been short hours for the shift. The requirement that she stay and complete paper work was therefore not without a reasonable basis.

Finally, while the Grievant's request for an earlier schedule was not granted, there is insufficient evidence to support the conclusion that this was not done as punishment. First it must be noted that the request itself was less than clear. Although the Grievant pointed out that earlier coverage might be needed, she did not clearly request to alter her schedule. More importantly, there was no evidence whatever that the motivation for denying the request was punishment. There was no evidence of any personal animosity between the Grievant and her supervisors. Additionally, there was no evidence that the Employer has imposed more onerous schedules on the Grievant or others on occasions when they did not volunteer for overtime in the past. The only evidence in support of this conclusion was the Grievant's stated feeling that punishment or intimidation was the reason for the scheduling. This alone is simply insufficient

to demonstrate the existence of improper motivation on the part of the Employer.

The Arbitrator is forced to conclude in the instant case that the Union has failed to meet its burden of proof to establish any violation of the Collective Bargaining Agreement. The grievance must therefore be denied.

AWARD

The grievance is denied.

Dated: April 10, 2017

Tobie Braverman, Arbitrator