IN THE MATTER OF ARBITRATION	)	
	)	
	)	**GRIEVANCE ID: DPS-2016-01673-2**
BETWEEN	)	
	)	**DARIN PLUMMER**
	)	
FRATERNAL ORDER OF POLICE, OLC, INC.	)	
	)	**BEFORE: ROBERT G. STEIN, NAA ARBITRATOR**
AND	)	
	)	
STATE OF OHIO: DEPARTMENT OF SAFETY, DIVISION OF THE OHIO STATE HIGHWAY PATROL	)	
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FOR THE UNION: **Douglas Behringer**
General Counsel
FOP, OHIO LABOR COUNCIL, INC.
222 EAST TOWN STREET
COLUMBUS, OHIO 43215-4611

FOR THE EMPLOYER: **LT. DARRELL G. HARRIS**
ADVOCATE FOR THE STATE OF OHIO
OHIO STATE HIGHWAY PATROL

INTRODUCTION

This matter came before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Ex. 1) between The State of Ohio ("Employer"), specifically including the officers of the Ohio Investigative Unit ("OIU") of the Ohio Department of Public Safety, and the Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2 ("Union"). That Agreement is effective from July 1, 2015 through June 30, 2018 and includes the conduct which is the subject of the instant grievance.

Robert G. Stein was mutually selected to impartially arbitrate this matter, grievance DPS-2016-01673-2, as a member of a recognized permanent panel of arbitrators, pursuant to Article 20.06(1) of the Agreement. A hearing was conducted on November 2, 2016 at the Ohio Office of Collective Bargaining, located at 1602 West Broad Street in Columbus, Ohio. The parties mutually agreed to that hearing date and that location, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. No transcript was recorded of the proceedings, which concluded with the parties' submission of post-hearing briefs on December 6, 2016.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have agreed that the matter is properly before the arbitrator for a determination on the merits. (Union brief p. 2) The parties have also stipulated to the statement of the issue to be resolved in this matter and to the submission of two (2) joint exhibits.

ISSUE

Did the Employer violate the Agreement? If so, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 6—MANAGEMENT RIGHTS
ARTICLE 20—GRIEVANCE PROCEDURE
ARTICLE 22, Section 22.02—Posting of Work Schedules
ARTICLE 43—DISABILITY LEAVE
ARTICLE 57—SHIFT DIFFERENTIAL

BACKGROUND

Darin Plummer ("Plummer" or "Grievant") has been an employee of the State of Ohio for approximately eighteen (18) years as an enforcement agent of the OIU. He was on temporary disability leave after elbow surgery before he made the request in April 2016 to return to work in a light-duty capacity during his regular night shift from 4:00 p.m. until 2:00 a.m. on Wednesdays through Saturdays each week for a period of from four (4) to six (6) weeks. Typically during those night hours, OIU officers focus on liquor control enforcement activity in the field.

Plummer was approved to work in a light-duty status on April 25, 2016 and was assigned to work 6:00 a.m. to 2:00 p.m. on Mondays through Fridays at the Columbus office of the OIU. Plummer's immediate supervisor, Harry Love, informed Plummer that the latter would be assigned to work his normal night hours, but that night assignment was subsequently denied by Captain Gary Allen, the Commander of the OIC.

A grievance was electronically filed by Plummer on April 27, 2016, alleging the Employer's violation of the following Agreement sections: Article 22.02—Posting of Work Schedules; Article 43.01—Disability Leave; and Article 57—Shift Differential. (Joint Exh. 2)

Because the instant matter remained unresolved at the Agency Step of the Agreement's grievance procedure, as identified in Article 20.08, it was advanced to the arbitration level. Thus, the grievance has been submitted to this arbitrator for final and binding resolution.

SUMMARY OF THE UNION'S POSITION

The Union contends that the first Agreement violation was committed by the Employer involving Article 22.02 when Plummer was directed to work the dayshift hours after he had requested to work light duty during his normal night shift hours and had been advised by his supervisors that that request would be granted. Further, the Grievant's work schedule had already been posted reflecting that night assignment. (Union Exhs. 3, 4) Article 22.02 provides: "Work schedules will be posted for a work period of four (4) weeks or greater and shall be posted for a minimum of four (4) weeks in advance." The Union insists that the Employer was required to adhere to that posting and permit Grievant to be assigned to night shifts for his light-duty assignment. The Union argues: "Nowhere in the contract or the transitional work program agreement (Employer Exh. C) or Rule 504.04 (Employer Exh. A) does it state that the posted schedule shall not apply to light duty or transitional work." (Union brief p. 3) The Union asserts: "Once those schedules were posted, Article 22 required them to be implemented." (*Id.*) "Mr. Plummer did not receive 4 weeks' notice of the change and neither he nor the Union agreed to the schedule change." (Union brief p. 6)

The Union claims that the Grievant's supervisors had approved the night hour assignment for Grievant, indicating that there were sufficient administrative duties available during that period, including answering the telephone. The Union avers that Grievant's

supervisors were "in the best position to determine where work is available and they agreed to the requested shift, so obviously they felt there was enough work available. The Employer has presented no documents or argument that prevents the use of light duty on night shifts." (Union brief p. 6) The Union also insists that Grievant is entitled to any shift differential funds which he would have earned pursuant to Agreement Article 57, plus interest, had he not been precluded from working the night shift assignment.

The Union requests that its grievance be sustained and that Plummer receive the foregone pay differential he sustained by working the day shift during his relatively brief light-duty transitional assignment from April 25, 2016 to May 16, 2016.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer contends that the Union has failed to sustain its burden of proving that the former violated the Agreement by assigning Grievant to work daytime hours during what resulted in his three (3) week light-duty transitional assignment. The Employer insists that the ultimate decision to place Plummer on the day shift was made because that was the shift that the Employer had more light-duty work available for Grievant to perform and that the specific start and end times for his shift were mutually agreed to by the Employer and the Grievant. (Employer brief p. 5)

Regarding the Employer's purported violation of Section 22.02 of the Agreement by requiring Grievant to work different hours from those posted in the four-week work schedule, the Employer responds:

> The Grievant signed a Transitional Return to Work Participation Agreement and returned to work in a light duty assignment on April 25, 2016. Transitional Return to Work Programs are governed by the language of Section 42.09 of the bargaining agreement and are not subject to the requirements of Section 22.02.

> Section 22.02 only addresses regular work schedules, and a light duty work schedule/Transitional Return to Work Program does not constitute a normal or regular work schedule.

(Employer brief p. 6)

The Employer also emphasizes that light duty assignments are made based on operational needs and where and when the Employer has the most light-duty work available, rather than on an individual employee's shift preference.

> After receiving Grievant's request to return to work in a light duty status, the Employer had the contractual right to place him on an administrative schedule and in a location where the Employer had light duty work available. The Commander of the Ohio Investigative Unit, Captain Gary Allen, testified that he made his decisions based on operational need, policy and procedure, and contractual language. Only Captain Allen had the authority to approve a light duty schedule, upon consultation with the Office of Personnel. Captain Allen conferred with the Labor Unit of the Patrol and [Human Capital Management Manager Jennifer] Tipton prior to placing the Grievant on the 6 a.m. shift.

(*Id.*) Further, the Employer notes that the light-duty policy for the OIU clearly states in policy 504.06 that: "The work days and hours of employees on a light duty assignment are subject to the needs of OIU." (Employer Exh. A)

The Employer emphasizes that Grievant only belatedly referenced any purported specific sleep disorder or need to sleep during specific daytime hours, and Plummer did not submit any limitations on his work and/or sleep time based upon the recommendation of his own physician. The Employer avers: "[P]ursuant to Section 42.02, the Employer had the bargained-for authority to place the Grievant on the 6 a.m. to 2 p.m. work schedule because this was the schedule where work was available, and the work was capable of being performed by the Grievant based on the medical documentation provided. As stated, no medical documentation provided by the Grievant precluded him from working this shift." (Employer brief p. 5)

Article 57 of the Agreement provides for a $.75 per hour shift differential for each hour worked during the period from 5:00 p.m. until 6:00 a.m. by bargaining unit members. The Employer denies that Plummer qualified to receive any such pay differential because he did not work within those time or hour parameters during his light-duty assignment.

Based on the above assertions, the Employer requests that the Union's grievance be denied in its entirety.

DISCUSSION

In this arbitral proceeding involving the interpretation and application of the Agreement, as asserted by the parties' advocates, the arbitrator is a creature of the contract from which he derives his authority, and he must confine his decisions. An arbitrator's decision must be based on the terms of the contract which the parties themselves have created and adopted to govern their relationship. It is the contract and its precise terms which must be examined to determine the merits of the case. The arbitrator's sole duty is to find out what was intended by the language actually incorporated into the Agreement.

> It is generally recognized that the primary function of an arbitrator in construing a contract is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties' intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result.

NSS Enters., Inc. and Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 12, 114 LA 1458 (2000).

It must be recognized that the Union, as the grieving party in this matter, has the burden of proving by a preponderance of the evidence that the Employer has violated the Agreement if it is to prevail.

> An established principle in labor relations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a contract violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement.

Am. Std., Paintsville, Ky. and United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH.) P 3213 (Allen 2005). Essentially, the Union must demonstrate that the Employer had a duty or obligation under the Agreement that it failed to meet or carry out in a reasonable manner. After a thorough review of the facts surrounding this grievance, the evidence submitted, and the arguments presented by the parties, the arbitrator finds that the Union has failed to meet its burden of demonstrating that the Employer has violated any specific section of the Agreement by assigning Plummer to work day shift hours during his light-duty assignment period.

Despite the fact that Plummer's supervisors preliminarily approved his assignment to night shift hours and that that specific assignment was posted on a four-week calendar, that assignment decision was overridden by the recognized superior authority of Captain Allen. Pursuant to OIU Policy 504.06, Allen has the recognized discretion and authority to grant light duty assignments for the transitional work program and to determine the work days and hours based on the needs of the OIU. Although the FOP makes a credible point that first lines supervisors are most likely have more immediate knowledge of the work of investigators in the OIU that does not mean they have the final word on the needs of the OIU, particularly when considering an accommodation of an alternative light duty assignment that was limited in duration and departed from the Grievant's normal day to day work.

In this matter "the buck stops" with Captain Allen, Commander of the Ohio Investigative Unit who according to his testimony oversees the statewide operation of the OIU. Allen's credible hearing testimony indicated that his decision to assign Plummer to work day shift hours during his transitional light-duty work period was reasonably and legitimately based on his determination that the assigned daytime work assignment offered the most administrative work opportunities and potential productivity for Plummer to provide assistance.

Pursuant to Article 6 of the Agreement, the Employer has specifically retained the management rights to "determine the starting and quitting time and the number of hours to be worked by its employees" and to "determine the work assignments of its employees."

It has been recognized by arbitrators generally that the Employer retains its vested management rights so long as its exercise of those discretionary rights is in compliance with the Agreement's provisions and is not unreasonable, arbitrary, capricious, or motivated by improper means or reasons. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264*, 115 LA 190 (Landau 2001). Arbitrators generally have recognized that management has broad authority to control its methods of operations, provided that, by exercising its authority, it does not violate the collective or individual rights of the employees under a collective bargaining agreement. *PACE Locals 7-0087/96 and Kimberly Clark Corp*., 01-1 Lab. Arb. Awards (CCH) P 3725 (Knott 2001). "If a management decision is taken in good faith, represents a reasonable business judgment, and does not result in subversion of the labor agreement, there is not a contract violation." *Teamsters, Local 117 and Bergen Brunswig Drug Co*., 00-1 Lab. Arb. Awards (CCH) P 3385 (Axon 2000), citing to *Shenango Water Co*., 53 LA 741, 744 (1969).

> Management has the right to operate its business in an efficient and economical manner. An arbitrator cannot substitute his judgment for that of management unless the record evidences an abuse of management discretion. An arbitrator will not lightly upset a decision reached by competent, careful management acting in the full light of the facts and without any evidence of bias, haste, or lack of emotional balance.

Norco Chem. Workers Union and Shell Chem. Co., 01-2 Lab. Arb. Awards (CCH) p 3996 (Massey 2001). In this matter, the evidence indicates that the Employer's actions were based on its legitimate and reasonable intention to benefit most from the hours and efforts expended by Plummer during his transitional light-duty work period.

AWARD

The Union's grievance is denied.

AWARD

The Union's grievance is denied.

Pursuant to Article 29.09(3)(a), the arbitrator's fees and expenses shall be equally divided between the parties.

Respectfully submitted to the parties this 30th day of January 2017,

Robert G. Stein, Arbitrator