

OPINION AND AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO STATE TROOPERS ASSOCIATION

AND

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

Grievances: DPS-2018-01375-15 & DPS-2018-01373-01
Grievants: Sgt. William Lee, et. al & Tpr. Stephen Pacheco, et. al

Date of Hearing: November 4, 2019
Place of Hearing: Gahanna, Ohio

Arbitrator: Sherrie Passmore

Date of Award: January 30, 2020

APPEARANCES

State Advocate: Lieutenant James M. Thompson

Union Advocate: Elaine N. Silveira, Esq.

INTRODUCTION

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

A hearing was held on November 4, 2019. Both Parties were represented by advocates who had a full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make arguments. Post-hearing briefs were timely filed electronically on or before December 30, 2019.

STATEMENT OF ISSUES

1. Was the grievance timely filed under Article 20.07 of the Agreement?
2. The parties did not agree on how to frame the second issue. The second issue was submitted by each party as follows:

Employer - Did the Employer violate Articles 7 and 27.03 in its practice of distributing overtime to units assigned to the Ohio Turnpike? If so, what shall the remedy be?

Union - Did the Employer violate Articles 7 and 27.03 when the Employer did not offer the Grievants the opportunity to work available federal overtime and allowed non-bargaining unit employees to work said overtime? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE AGREEMENT

Article 7 – Non-Discrimination

Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement.

Article 20 – Grievance Procedure

20.07 – Grievance Procedure

Agency Step

An employee having a grievance shall file a grievance in the electronic system within twenty (20) calendar days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance. The parties shall reference the date the grievance was submitted in the electronic filing system to confirm timeliness. Grievances submitted beyond the twenty (20) day time limit will not be honored.

Article 27 - Overtime

27.03 – Overtime Assignments

It is understood and agreed that determining the need for overtime, scheduling overtime, and requiring overtime are solely the rights of the Employer. The Employer will not change an employee's schedule or scheduled shift starting time solely to avoid the payment of overtime without the employee's consent, except for dispatchers whose schedules may be changed as outlined in Article 22.

Mandatory overtime, assigned by the Employer, shall be assigned as equitably as practical and shall first be assigned to members in the classification that routinely perform the required task at the facility. In the event of multiple overtime assignments, reverse seniority shall be used.

Good faith attempts will be made to equalize overtime opportunities at any one installation.

BACKGROUND

Prior to 2012, the Ohio State Highway Patrol was comprised of ten districts. One of those districts consisted of the three highway patrol posts located on the Ohio Turnpike: Swanton (Post 89), Milan (Post 90) and Hiram (Post 91). Effective March 1, 2012, the Turnpike District was eliminated, reducing the total number of districts to nine. Each of the Turnpike Posts was made part of the closest Field Patrol Post District. Swanton became part of District 1, Milan part of District 2 and Hiram part of District 4.

Turnpike Patrol Posts are funded solely by the Ohio Turnpike Commission. This includes funding for equipment, facilities, employee salaries, and overtime. Troopers assigned to the Turnpike Patrol Posts are given overtime opportunities that District Field Patrol Posts do not have access to.

In April 2018, the Ohio State Highway Patrol received a federal grant of 12,000 hours to utilize for distracted driving enforcement. Those hours were divided among the nine districts. Each district then distributed its allotment of the overtime hours among the Field Patrol Posts within that district. Bargaining unit employees were offered the opportunity to work the overtime hours available at their posts. Exempt employees were only permitted to work those overtime hours if hours were left over.

The Grievants, Sergeant William Lee and Trooper Stephen Pacheco, are assigned to the Hiram Post in District 4. On April 19, 2018, each filed a grievance alleging that the failure to allow Turnpike Post bargaining unit employees to work the federally funded distracted driving overtime hours distributed to their district in April 2018 violated Article 7 Non-Discrimination and Article 27.03 Overtime Assignments. The grievances state that non-bargaining unit employees worked the hours before Turnpike Post employees were given the opportunity to work them. The grievances were filed as class action grievances on behalf of all Unit 1 and 15 personnel assigned to the three Turnpike Patrol Posts: Swanton, Milan, and Hiram. At the Union's request, the grievances were combined at Step Two and proceeded to arbitration on November 4, 2019. At the outset of the hearing, the Employer raised an objection to the timeliness of the grievances.

POSITIONS OF THE PARTIES

Position of the Union

The Employer waived its right to raise an objection at the arbitration hearing to the timeliness of the grievances. The Employer would have been aware of the timeliness issue at the Step Two hearing and failed to raise it. The grievances should also be deemed timely because the violations alleged are continuing violations.

The Grievants were discriminated against because they are assigned to the Ohio Turnpike. They were denied the opportunity to work federal overtime disseminated to their district, District 4, for distracted driver enforcement in April 2018. The hours were divided among the field posts only. Troopers and sergeants at those posts were all granted the opportunity to work that overtime. Grievants should be afforded the opportunity to work the overtime just like the other posts in their district. No evidence was introduced to justify the discrimination between turnpike posts and non-turnpike posts.

According to an IOC issued by Major Joshua Swindle on March 27, 2018, Lieutenants/Staff Lieutenants were to be permitted to work the distracted driver overtime only after it was posted to bargaining units and hours remained. Although the Grievants were not allowed to work any of the hours, Lieutenants/Staff Lieutenants did work the distracted driver overtime. In fact, three exempt officers worked 25% of the overtime hours in District 4.

Bargaining unit work should be completed by bargaining unit members. They should be offered overtime first and only if hours remain may exempt officers work the overtime. Working the road and writing tickets is the primary duty of troopers and sergeants, not exempt officers.

Position of the Employer

The filing of these grievances was untimely. Under Article 20.07, a grievance must be filed within 20 days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance. The grievances in this case were filed on April 19, 2018. Grievants should have been aware they were ineligible to work federal overtime opportunities years before then.

Because Turnpike Patrol Posts are funded solely by the Ohio Turnpike Commission, it has been a longstanding practice to offer those Posts separate overtime opportunities from those offered to Field Patrol Posts. The time to have challenged the issue of whether Turnpike Patrol Post personnel should be allowed to work District Field Patrol Post overtime would have been at the time the Turnpike Patrol Posts joined the District Field Patrol Posts on March 1, 2012 and it was announced that no changes were expected or planned for Turnpike personnel. The practice of offering separate overtime opportunities was in place both before and after 2012.

The practice of separating overtime opportunities for Turnpike and Field Patrol Posts should be treated as an implied term of the Agreement, By always engaging in this practice, it has become so well known and understood that it may be said the Agreement was entered into upon the assumption that the customary action would continue and became an implied term of the Agreement.

No operational changes were made after the Turnpike District was eliminated on March 1, 2012. The practice of separating Turnpike and Field Post overtime was never contractually addressed in either of the two OSTA collective bargaining agreements negotiated after that.

The Union claimed the Employer violated Article 27.03 but did not explain how such a violation could be possible since that section provides that the need for overtime, and the scheduling of such overtime are “solely the rights of the Employer.” Article 27.03 is silent on overtime assigned to Ohio Turnpike bargaining unit members except in regard to off-duty overtime. It mandates the procedure for offering such overtime but provides that those procedures do not apply to off-duty overtime work on the Turnpike. Due to the regulations of the Ohio Turnpike Commission, only Turnpike Patrol Post personnel may be assigned off-duty details on the Turnpike except in the case of emergencies.

The Employer did not violate Article 7, which addresses non-discrimination. The Union did not prove that the separation of overtime between Turnpike Patrol and Field Patrol was based on age, sex, marital status, race, color, creed, origin, or any other basis prohibited by Article 7.

Article 27.03 requires “Good faith attempts will be made to equalize overtime opportunities at any one installation.” In order to provide fair overtime opportunities for all bargaining unit members, the Employer has long divided overtime opportunities between the Turnpike Patrol Posts and District Field Patrol Posts. Turnpike personnel have the opportunity to work enforcement overtime hours funded by the Turnpike Commission which Field Patrol bargaining units are not eligible to work.

DISCUSSION

Arbitrability

The Employer claims this grievance is not arbitrable. As the moving party, the Employer has the burden of proof as to this claim. The Employer did not meet this burden.

The challenge to arbitrability is that the grievance was not timely filed. Article 20.07 of the Agreement mandates that grievances be filed within twenty days of the date on which the grievant knew or should have reasonably had knowledge of the event giving rise to the grievance. It further provides that grievances submitted beyond the twenty day time limit “will not be honored.”

The Employer argues that the grievance was over six years late. The Districts were realigned in 2012 and it was announced that there would be no changes regarding Turnpike personnel. Since there were no changes, they should have known they would not be eligible to work federal overtime in their new District because it has always been the Division’s practice to not allow Turnpike units to work federal overtime. The Employer did not prove this. Its witnesses testified to how federal overtime was handled in 2018 and currently, but none testified as to how long that practice had been in place. Sergeant Lee’s un rebutted testimony was that Turnpike units had been permitted to work federal overtime in the past.

For purposes of determining timeliness in this case, whether Turnpike units were permitted to work federal overtime in the past is not relevant. The violation alleged by these grievances is a continuing one. The denial of the April 2018 overtime was a separate and independent event from any prior overtime denials. For continuing violations, the failure to protest prior breaches is not fatal to the claim of one protesting the current actions.

The timeline for filing a grievance in this case was triggered when the Grievants knew or should have known they were being denied the opportunity to work distracted driver overtime in April 2018, not when they might have anticipated they would be denied

that opportunity. The grievances were filed within 20 days of the Grievants being told no Turnpike personnel would be permitted to work that overtime and therefore were timely filed.

Merits

Having determined these grievances are arbitrable, the inquiry turns to whether they are meritorious. This case presents a contract interpretation issue. The parties did not agree to the specific wording of this issue, but did agree that the issue was limited to whether Articles 7 and 27.03 were violated.

Article 7 of the Agreement prohibits discrimination against any member on any basis specified therein. It also prohibits discriminating against any member “for the purpose of evading the spirit of this Agreement.” The Union argues that this prohibition was violated because Turnpike Posts were treated differently than non-Turnpike Posts in offering the opportunity to work federal overtime. As the moving party, the Union has the burden of proof as to this claim. The Union did not meet that burden.

It was not proven that the differences in treatment between Turnpike and non-Turnpike units were aimed at evading the spirit of the Agreement. If anything, the record supports that the opposite is true. Ample evidence was presented that Turnpike units were not given the opportunity to work federal overtime in an attempt to equalize overtime opportunities overall. Although not required, the attempt to equalize opportunities between Turnpike and non-Turnpike units was within the spirit of Article 27.03 – Overtime Assignments, the other section of the Agreement alleged to have been violated. Article 27.03 provides that mandatory overtime be assigned as equitably a

possible. It also requires good faith attempts to equalize overtime opportunities at any one installation.

Proof of discrimination based on disparate treatment requires a showing that the individuals alleged to have been discriminated against are similarly situated to those alleged to have been more favorably treated. That was not proven here. Although Turnpike units were not offered federally funded overtime, they have significant opportunities to work overtime that are not available to non-Turnpike units because of the way the Turnpike is funded. Each month, the three Turnpike posts are given a bank of overtime hours based on the number of personnel at each post which are paid for by the Ohio Turnpike Commission. The hours roll over from month to month until the end of the year. These are called TAC hours and may only be worked by Turnpike units. Turnpike Patrol Posts are also offered extra-duty overtime opportunities that Field Patrol Post units are not entitled to.

The Hiram Post had more TAC overtime opportunities than it could use throughout 2018. At the end of April 2018, the month at issue herein, there were 33 unused TAC hours at the Hiram Post that could have been used for enforcement activities, including distracted driving. That same month there were 392.5 TAC hours unused by the Swanton Post. If the Hiram Post had ran out of TAC hours in April 2018, those 392.5 hours could have been redistributed to the Hiram Post. The Hiram Post had unused TAC hours every month in 2018 that carried over from month to month until December.

Article 27.03 addresses the assignment of overtime. The relevant language within that provision cited by the Union as violated is as follows:

It is understood and agreed that determining the need for overtime, scheduling overtime, and requiring overtime are solely the rights of the

Employer. The Employer will not change an employee's schedule or scheduled shift starting time solely to avoid the payment of overtime without the employee's consent, except for dispatchers whose schedules may be changed as outlined in Article 22.

Mandatory overtime, assigned by the Employer, shall be assigned as equitably as practical and shall first be assigned to members in the classification that routinely perform the required task at the facility. In the event of multiple overtime assignments, reverse seniority shall be used.

Good faith attempts will be made to equalize overtime opportunities at any one installation.

The Union argues that the assignment of federal overtime in April 2018 violated this language because it was not offered to bargaining unit members before exempt officers were permitted to work it.

The April 2018 distracted driver overtime was divided up among the field patrol posts. It was offered to the bargaining unit members at the field posts before it was offered to exempt officers. This was voluntary overtime. The above language does not address the assignment of voluntary overtime other than requiring good faith attempts be made to equalize overtime opportunities at any one installation. There is no language in any part of Article 27.03 regarding the assignment of voluntary overtime to exempt officers except for off-duty detail, which is not at issue in this case and does not apply to off-duty overtime on the Turnpike. Accordingly, I cannot find that a violation of Article 27.03 was proven.¹

¹ Whether the assignment of federal overtime to exempt officers after offering it only to bargaining unit members at the Field Patrol Posts violated some other provision of the Agreement was not before this arbitrator.

AWARD

For the reasons stated above, the grievances are denied. The Union did not carry its burden of proving a violation of Article 7 or Article 27.03.

A handwritten signature in black ink, reading "Sherrie J. Passmore". The signature is written in a cursive, flowing style with a large initial 'S'.

Sherrie J. Passmore
Arbitrator

January 30, 2020