

OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troopers Association

And

State of Ohio, Ohio State Highway Patrol

Case Designation:

DPS-2017-03318-01

Date of Hearing: May 7, 2019

Date of Briefs: June 24, 2019

Date of Award: July 19, 2019

APPEARANCES

For the Union

Elaine N. Silveira, Esq., OSTA Advocate
Larry Philips, OSTA Staff Representative
Jeremy Mendenhall, OSTA President
Kari Root, OSTA Vice President

For the Employer

Michael D. Wood, OSHP Advocate
Dustin Neely, OSHP Second Chair
Cullen Jackson, OCB

Witnesses

Christa Jamison, Grievant
Lydia G. Frey, Dispatch Manager
Laura A. Windbigler, Dispatch Supervisor

An arbitration hearing was conducted on May 7, 2019 at the Ohio Office of Collective Bargaining in Columbus, Ohio.

At the hearing the parties submitted the current collective bargaining agreement (CBA) as Joint Exhibit 1 (J1) and the grievance trail as Joint Exhibit 2 (J2). In addition, the Union entered August 25, 2017 payroll entry detail for employee Christa Jamison as Union Exhibit 1 (U1), October 6, 2017 payroll entry detail for employee Christa Jamison as Union Exhibit 2 (U2), duty assignment printout for pay period 9/3/17-

9/16/17 as Union Exhibit 3 (U3), and duty assignment printout for pay period 8/20/17-9/2/17 as Union Exhibit 4 (U4). The Employer entered OSHP Policy OSP-203.15 Work Schedules as Employer Exhibit 1 (E1), Supervisory notes as Employer Exhibit 2 (E2), working copy of bid sheet for pay period 8/20/17-9/2/17 as Employer Exhibit 3 (E3), and a compilation of grievance exhibits emailed by Larry Philips to Michael Wood on 9/8/17 as Employer Exhibit 4 (E4). All exhibits were accepted into the record.

The parties agreed that the matter was properly before the Arbitrator for determination. The stipulated issue is, "Did the Employer violate Article 43 when the Employer did not grant the Grievant's vacation request submitted during the bid window period? If so, what shall the remedy be?"

Both parties were given full opportunity to examine and cross examine witnesses, pose arguments, and present their respective cases. Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

RELEVANT CONTRACT PROVISION:

Negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio effective 2015 – 2018

ARTICLE 26 – HOURS OF WORK AND WORK SCHEDULES (Relevant Excerpt)

26.01 Shift 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 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.

ARTICLE 43 – VACATION ALLOWANCE (Relevant Excerpt)

43.04 Vacation Leave

Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee. The Employer may restrict the number of concurrent vacation leave requests at a work location based on work shifts.

- A. Subject to the above limitations employees who submit vacation leave requests no more than thirty (30) days and no less than twenty (20) days prior to the first day of the permanent shift dates referred to in Section 26.01 and 26.02 shall be granted vacation leave based upon seniority.
- B. Vacation leave or compensatory time requested at any other time shall be granted on a first-come, first-served basis. The Employer shall approve these vacation leave requests without unnecessary delay but in no event later than thirty (30) days after submission of the request.
- C. Requests made less than twenty-one (21) days prior to the commencement of the vacation leave period shall be considered by the Employer but need not be approved, regardless of staffing needs.
- D. Time off days immediately prior to, during, or immediately after a vacation day shall be considered as part of vacation leave.
- E. Subject to the limitations in paragraph one (1), employees may trade previously approved vacation leave dates provided the trade has no economic impact on the Employer.
- F. If an employee is called to work from a scheduled vacation leave period, or if an employee's previously approved vacation leave is cancelled, the employee will have the right to take the vacation leave at a later time and will be paid at time and one-half (1½) for the time the employee is in on-duty status. Upon submission of appropriate evidence, the employee shall also be reimbursed for any non-refundable travel and lodging costs incurred as a result of cancelling or returning from his/her vacation.
- G. Newly accrued vacation leave is not available for use until it appears on the employee's earnings statement.

BACKGROUND

This grievance involves the denial of vacation requests that were submitted during the bid window period of July 21 – July 31, 2017 associated with the September 1, 2017 seniority-based and location-based, semi-annual shift assignment scheduling process. (See J1, Article 26.01) The Grievant is Christa Jamison who, at the time, was the senior Dispatcher on the midnight shift at the Columbus Communication Center (i.e., Comm Center). The Comm Center responsibilities are unique among dispatch centers. The Comm Center dispatches for multiple entities including the Columbus Metro Post, General Headquarter Units (which are the special response team, aviation, the fairgrounds, and the Shipley building), the Department of Taxation, and the State Fire Marshall. The Comm Center also answers phone calls 24/7 for the State Fire Marshall's Office, and after hours and on weekends for the EPA. Further responsibilities of the Comm Center involve responding to Department of Correction warrants, receiving organ donor requests, weather warnings and nuclear power plant warning calls. Pertinent to the grievance is the relationship of the Comm Center to Post 97, which is the Ohio State House. Post 97 responsibilities include line checks for Police Officers and Troopers providing security for the State House, Rhodes Tower and Riffe Center, and monitoring security cameras for these facilities.

At the time of the grievance, the Comm Center was staffed with 12 Dispatchers although the minimum staffing requirement is 15. At Post 97, three Dispatchers were permanently assigned rather than five, which is the number of Dispatchers deemed necessary to cover a typical Post; a cadre of relief

and/or traveler Dispatchers make-up the necessary complement of staff. At the time of the grievance, Dispatchers identified as 'travelers' could be assigned, as needed, to as many as three locations. However, due to low staffing at the Comm Center travelers were only being assigned to the Comm Center or alternatively to Post 97.

On July 29, 2017 during the vacation bid window period, the Grievant submitted a vacation request for August 25, 2017. At the time, the Grievant was assigned to the Comm Center and was the most senior Dispatcher on the midnight shift. Also during the window bid period, Dispatcher Howard - a more senior Dispatcher than the Grievant - assigned to the 2:00PM shift at the Comm Center, submit a vacation request for August 25, 2017. The available relief Dispatcher was moved to cover the vacation request of the more senior Dispatcher Howard. The Grievant's vacation request for August 25, 2017 was denied and a notation of explanation was entered stating, *"No one else to move without creating OT."* A similar circumstance arose with the Grievant's vacation request for October 6, 2017, which was also submitted on July 29, 2017 during the vacation bid window. In this instance, Dispatcher Miller – a more senior Dispatcher than the Grievant – assigned to the 6:00AM shift at the Comm Center submitted a vacation request for October 6, 2017 as did Dispatcher Starling at P97. The available relief Dispatchers were moved to cover the vacation request of these more senior Dispatchers. The Grievant's vacation request for October 6, 2017 was denied and a notation of explanation was entered stating, *"A relief was moved to cover a VAC request during the vacation window period of a more senior dispatcher. A 2nd relief/traveler was moved to cover a VAC request at P97 of a more senior dispatcher. No one else to move."*

Ultimately, the Grievant was unable to have her requested vacation leave day on August 25; however, through a trade arrangement with another Dispatcher she was able to take vacation on October 6.

POSITION OF THE UNION

Vacation requests properly submitted during the vacation window period are sacred. It is one of limited circumstances where seniority rules the day. During the vacation window period, the senior Dispatcher on a given shift at a given location must be granted his/her vacation request. The language of the collective bargaining agreement is specific and clear. Article 43 states, "[t]he Employer may restrict the number of concurrent vacation leave requests at a work location based on work shifts." In reference to the window period, Article 43 goes on to state, "...employees who submit vacation leave requests...shall be granted vacation leave based upon seniority." On two separate occasions the Grievant properly submitted vacation leave requests during the window period, which were denied. In one instance the Grievant's leave request was denied because it conflicted with a more senior Dispatcher at a different location; in the other instance the Grievant's request was denied because it conflicted with that of a more senior Dispatcher on a different shift. As the most senior Dispatcher at the Columbus Communication Center on the midnight shift the Grievant's request should have been granted irrespective of vacation leave having been approved for a more senior Dispatcher on another shift or at another location. During the window period for bidding, the Employer has considerable discretion in making scheduling changes to accommodate vacation requests. Scheduling options

available to the Employer include: changing days off, assigning a 'Traveler' or posting overtime. These are all options that have been successfully used in the past. The Employer relies on the fact that the Comm Center is understaffed to justify their denial of leave. However, there is no contractual caveat that provides for the circumstance of understaffing to be a basis for denying vacation requests during the window period. Staffing is a management responsibility, but staffing decisions must be made in accordance with negotiated employee rights. In these circumstances, overtime could have been offered to provide the appropriate level of staffing that would accommodate the Grievant's properly submitted vacation request during the window period. Alternatively, the Employer could cross-train more Dispatchers to facilitate movement of Dispatchers between facilities to cover in times of understaffing. The Employer's current practice of requiring Comm Center Dispatchers to cover the State House dispatching functions, but not conversely allowing the State House Dispatchers to cover the Comm Center dispatching functions is a management decision that has created a staffing constraint that interferes with employee seniority rights granted in the CBA.

POSITION OF THE EMPLOYER

The language of Article 43 regarding the handling of vacation requests submitted during the bidding window period is not a guaranteed seniority right as the Union argues. Dispatch Centers across the State are not all equally staffed, nor do they have the same call volume levels; therefore, staffing requirements vary from center to center. The CBA does not require the Employer to incur overtime in order to grant vacation leave requests. It is a management right to determine under what circumstances the Employer will authorize overtime to meet staffing needs.

Contrary to the Union's assertion that the contract conveys a sacred senior right in the granting of vacation requests, the plain language of Article 43 states at the outset, "Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee." The Employer recognizes that there is a seniority-based preference in how vacation leave is granted, however all vacation leave requests are subject to the mutual agreement of the parties as stated plainly and clearly in the contract. The contract language which the Union relies upon as mandatory to make its argument is actually permissive in the Employer's favor. The language states, "The Employer may restrict the number of concurrent vacation leave requests at a work location based on work shifts." (Emphasis added) The Union's proposed staffing alternatives, including bridging Post 97 calls to the Comm Center or the use of a Traveler from another Post are not practical due to the differences in duties among the Posts.

The Employer used a methodical, long-standing practice in the scheduling of Dispatchers at the Comm Center and Post 97 that despite its best efforts resulted in some vacation requests having to be denied. The Employer's actions were reasonable and there is no suggestion that the denial of the Grievant's vacation requests occurred for any reason other than operation and business reasons. The contract is clear in that vacation leave is subject to mutual agreement and that the use of overtime is a management right. There is no contractual provision that requires the Employer to grant vacation requests without regard for the business and operational needs of the Employer.

DISCUSSION

In any contract language dispute the objective is to determine the true intentions of the contracting parties. In doing so the Arbitrator is guided by general principles of contract interpretation including but not limited to: giving words their normal or ordinary meaning, interpreting the contract as a whole, favoring outcomes that give effect to all clauses rather than those that would render a clause meaningless, and giving greater weight to specific terms over general terms.

Rights and Obligations Created by Contract Language

Determining the sufficiency of the workforce is a right reserved to the Employer in Article 4- Management Rights. Article 27 – Overtime establishes the Employer’s exclusive rights to determine when there is a need for overtime, and assign employees to work overtime. Article 43 – Vacation Allowance confers an Employer right in determining when vacation leave can be used, by requiring mutual agreement between the Employer and employee when the use of leave is requested. Within the four corners of the contract the Employer’s rights are not completely unfettered. With rights come responsibilities; and just as the rights conferred by the contract must be acknowledged, so too must be the obligations created by the contract. Significantly, one such obligation is that concerning the use of vacation leave. Article 43 establishes a seniority-based employee right (i.e., an Employer obligation) to use vacation leave. Subject to certain, specific limitations vacation leave requested during the bid window period shall be granted based upon seniority. The exact language is provided below:

Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee. The Employer may restrict the number of concurrent vacation leave requests at a work location based on work shifts.

- A. Subject to the above limitations employees who submit vacation leave requests no more than thirty (30) days and no less than twenty (20) days prior to the first day of the permanent shift dates referred to in Section 26.01 and 26.02 shall be granted vacation leave based upon seniority.*

The Employer’s rights must be exercised in a manner that does not negate the rights of bargaining unit members. In dealing with a case concerning this same provision of Article 43.4, Arbitrator Ruben said it thusly, “The provision [does] not give the Department the carte blanche to refuse vacation requests for any reason, or for no reason at all. Implied in the contract is the obligation to deal fairly and in good faith in the implementation of its provisions so as not to deprive the other party of the benefit of the bargain it struck.” (Ohio v. FOP #15-03-961122-0101-07-15, 1998) Management’s rights to establish minimum staffing levels, decide when to offer overtime and allow vacations must all be carried out in such a way as to recognize the contractual deal that allows bargaining unit members to use there leave benefits when requested, subject to some operational limitations.

Restricting Concurrent Vacation Requests

What does it mean to restrict concurrent vacation requests at a work location based on work shift? When dealing with vacation leave requests properly requested during the bid window period, the contract language clearly states that concurrent vacation leave requests may be restricted at a work location based on work shift. The language provides for two different factors that must be satisfied – location and shift. This makes the ‘unit of concern’ when it comes to vacation scheduling a particular shift at a particular location. It seems apparent that when the language was adopted the parties had a meeting of the minds around the notion that when approving vacation requests at a particular work location, the shifts operate independently. Thus, an absence on first shift due to vacation would have no bearing on whether an absence on second or third shift would be approved. Likewise, an absence on second or third shift due to vacation would have no bearing on whether a first shift vacation request would be approved. If the contract language only addressed work location, then the Grievant’s claim pertaining to 8/25/17 (U1) would be without merit because that vacation request was denied because of the vacation request of a more senior Dispatcher on 2nd shift (the Grievant is assigned to the midnight shift). Similarly, if the contract language only addressed work shift and not work location, then the Grievant’s claim pertaining to 10/6/17 (U2) would be without merit because that vacation request was denied because of the vacation request of a more senior Dispatcher at Post 97 (the Grievant is assigned to the Comm Center). If the Employer were affirmed in its denial of leave in either of the Grievant’s cases, plain clear language would be rendered meaningless – in one instance “based on shift” would be nullified, in the other instance “at a work location” would be nullified. The Employer’s scheduling methodology, which led to the denial of the Grievant’s leave requests on 8/25/17 and 10/6/17, deprived the Grievant (the most senior Dispatcher on a particular shift at a particular work location) of the benefit of the bargain struck in the second sentence of Article 43.4.

The Employer is understandably concerned for the overtime costs that it might incur as a result of accommodating vacation requests of the most senior bidders at a location based on work shift, as I believe the contract language requires. However, in the instant case, testimony in the record indicates that there was the option to bridge the Post 97 Computer Aided Dispatch (CAD) operations to the Comm Center. Dispatch Manager Frey testified that bridging the CAD in this way could be done, although in her estimation doing so would not be ideal and the practice is not done between the hours of 6:00AM and 6:00PM; then again, the grievance situation arose on the midnight shift and Frey did not testify that bridging would not satisfy the basic dispatching needs of the midnight shift in an isolated instance. Furthermore, during the hearing the Employer’s advocate pointed out through his direct examination of Dispatch Supervisor Windbigler, that had the Grievant requested personal leave for the dates that she was denied vacation, those subsequent personal leave requests would have been granted and overtime used to provide the necessary coverage in the Grievant’s absence. This was presented by the Employer as a legitimate avenue open to the Grievant, despite the fact that Article 45.04 states, “Personal leave is not intended to be used by an employee in place of vacation leave.” Thus, the overtime expense that figured mightily in the Employer’s denial of the Grievant’s vacation request, was seemingly dismissed by suggesting this alternative scenario.

At hearing, it was the testimony of Dispatch Manager Lydia Frey that at the time of the grievance the Comm Center was understaffed, and that Post 97 is permanently understaffed. According to Frey the Comm Center was staffed at 12 Dispatchers rather than the required 15 Dispatchers; and

Post 97 was staffed by three Dispatchers rather than the normal operational sufficiency level of five Dispatchers. Frey went on to testify that Post 97's short staffing is by design because the duties are so different at that particular Post that permanently assigned Dispatchers can lose proficiency in their skill set. To forestall this problem only three are assigned permanently and the other positions are filled by Travelers who are able to maintain their skills by working at both the Comm Center and Post 97. Dispatch Manager Frey testified on cross-examination that if Post 97 were staffed at five rather than three on a regular basis, there would be less need for Comm Center Travelers to fill-in at Post 97. Frey also testified that when the Comm Center is fully staffed at 15 Dispatchers rather than 12 – as was the case when the grievance occurred – there are more Dispatchers available to cover operations and allow for time off. Frey went on to testify that as of the date of the arbitration hearing the Comm Center's workforce was back up to 14 Dispatchers and the 15th Dispatcher was due to start within weeks.

The right conferred on the Employer in the first sentence of Article 43.4, "*Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee*" must be exercised in a fair, non-arbitrary manner. As both Arbitrators Ruben and Brundige before me have acknowledged in related cases, there are times and situations that legitimately invoke the Employer's right to withhold mutual agreement in granting the use of vacation. These are occasions when an operational necessity is established and, either by location or statewide, certain times of the year are blacked-out for vacation approval. Occasions such as holiday weekends or big event dates are examples of times when it is reasonable, and not at all arbitrary, to withhold mutual agreement in granting vacation requests. There may be other operational necessities involving training or tactical operations. However, no such operational circumstances were presented by the Employer in this case. The Employer's argument has been that it can rightfully deny the Grievant's leave requests because a plain reading of the first sentence of Article 43.4 says it can. Without an underlying operational reason for the denial, the Employer's action fits the very definition of arbitrary. Ostensibly, the Employer denied the Grievant's vacation leave requests across shifts and across locations, because approval of the requests would have led to the use of overtime and the Employer did not want to use overtime for this purpose. However, as mentioned above, the hearing record indicates that the Employer would have approved overtime to cover had the Grievant converted her vacation requests to personal leave requests. This, despite the fact that the Article 45.05 regarding the use of personal leave has the exact same language regarding restricting concurrent requests at a work location based on work shifts. I further note that the independence and latitude the Employer seeks in approving or denying vacation requests is provided in 43.4(C) as it applies to vacation requests made less than 21 days prior to the commencement of the requested vacation period. This language is distinctly different from that of 43.4(A) & (B) which state that requests submitted according to these two provisions "shall be granted".

Applying the principles of contract interpretation to the specific facts of this case, I find that the Employer's actions in denying the Grievant's leave request (who at the time was the senior Dispatcher at the Comm Center on the midnight shift) because of vacation requests on other shifts and other locations nullifies the specific terms of the second sentence in Article 43.4. In the bigger picture, if the Employer were to be affirmed in its argument that the first sentence of Article 43.4 is preeminent and gives it the right to deny leave requests without articulating an operational necessity, the bargain struck that provides that employee vacation requests "shall be granted" would be rendered meaningless. Taken to

an extreme the Employer could, through attrition, erode the bargaining unit without consequence for the concomitant loss to employees of the bargain struck concerning the use of vacation leave.

Summary

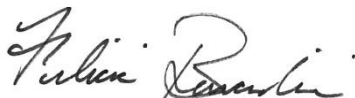
Management rights are not completely unfettered. They may not be exercised in a manner that impedes employee rights provided for in the contract. When it comes to the use of vacation leave, the Employer has the right to control when vacation requests are approved through the exercise of mutual agreement. However, as explained in prior arbitration awards, the Employer may not withhold mutual agreement in the absence of a demonstrated operational necessity, for to do so unreasonably deprives employees of the deal struck on using the vacation benefit. In the case at hand, the Grievant's leave requests were denied in one instance because of a leave requested on another work shift, and in another instance because of a leave granted at a different work location. Both cases nullify specific contract language that makes the operational unit of concern for purposes of granting vacation, a particular shift at a particular location. The Employer did not identify an operational necessity underlying its denial of these leave requests. Ostensibly it was done to avoid overtime costs; however testimony in the hearing record indicates coverage could have been achieved by bridging the Post 97 CAD to the Comm Center. Although not ideal, and therefore not done between 6:00AM and 6:00PM, the Grievant's vacation requests were for the midnight shift. Furthermore, the Employer's concern for the cost of overtime, although laudable, were negated by the fact that the Employer pointed out that had the Grievant converted her vacation requests to personal leave requests the Employer would have granted them and paid the overtime costs for coverage. This, despite the fact that the personal leave article states that personal leave is not intended to be used as vacation leave; and the fact that the personal leave article contains the same limitation that leave can be restricted at a location based on work shift.

AWARD

For the reasons herein stated the grievance is granted.

The Grievant is entitled to have the hours she worked in association with the denied leave request of 8/25/17 (10:00PM on 8/24/17 – 6:00PM on 8/25/2017) compensated at 1 ½ times the then applicable straight time hourly rate; subject to all appropriate deductions. There are no overtime hours awarded to the Grievant for the denied vacation request for 10/6/17 because the Grievant took the day off by working a trade with a coworker.

Respectfully submitted at Columbus, Ohio, July 19, 2019.

A handwritten signature in cursive script, appearing to read "Felicia Bernardini".

Felicia Bernardini, Arbitrator