

**CONTRACTUAL  
LABOR ARBITRATION PROCEEDINGS**

<b>IN THE MATTER OF</b>	)	
<b>ARBITRATION BETWEEN</b>	)	
	)	
<b>STATE OF OHIO</b>	)	
<b>DEPARTMENT OF PUBLIC SAFETY</b>	)	
<b>OHIO STATE HIGHWAY PATROL</b>	)	
	)	
<b>-AND-</b>	)	<b>DECISION IN:</b>
	)	<b>SCHEDULE CHANGE GRIEVANCE(S)</b>
	)	
	)	<b>WILLIAM OGDEN</b>
	)	<b>STEPHEN ZIENTEK</b>
<b>OHIO STATE TROOPERS</b>	)	<b>JAMES HANNON</b>
<b>ASSOCIATION, INC.</b>	)	<b>JOSEPH HERSHEY</b>
<b>UNITS 1 &amp; 15</b>	)	<b>CHARLES JACKSON</b>

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**CASE NOS.:** DPS-2018-03246-15; William Ogden  
DPS-2018-03273-01; Stephen Zientek  
DPS-2018-03286-01; James Hannon  
DPS-2018-03407-01; Joseph Hershey  
DPS-2018-03409-01; Charles Jackson

**GRIEVANCE:** The Grievance(s) protest the Schedule Change to provide assistance at Kent State University to avoid the payment of Overtime as violating Articles 26 & 27 of the Collective Bargaining Agreement.

**HEARING(S):** January 23, 2020; Gahanna, Ohio

**AWARD:** The Grievance(s) are Sustained.

**ARBITRATOR:** David W. Stanton, Esq.

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**APPEARANCES**

**FOR THE STATE OF OHIO  
OHIO STATE HIGHWAY PATROL**

Michael W. Wood, Labor Relations Officer III  
Jacob Pyles, Staff Lieutenant, Professional Standards

**FOR THE OHIO STATE  
TROOPERS ASSOCIATION**

Elaine N. Silveira, General Counsel  
Larry K. Phillips, Staff Rep.

Aaron M. Williams, Lieutenant, Professional Standards  
Thomas Dunn, OCB Policy Analyst  
Edward Mejia, Jr., Mobile Field Force Commander

Robert Cooper, Staff Rep.  
Bruce Elling, Staff Rep.  
Jeremy Mendenhall, President  
William Ogden, Grievant  
Stephen Zientek, Grievant  
James Hannon, Grievant  
Joseph Hershey, Grievant  
Charles Jackson, Grievant

### **ADMINISTRATION**

By email correspondence on November 25, 2019 from Cassandra Richards, State of Ohio, Office of Collective Bargaining, Dispute Resolution & Training Liaison, the undersigned was notified of his mutual selection from the Parties' Permanent Panel to serve as Impartial Arbitrator to hear and decide the "Schedule change to avoid the payment of Overtime Grievances" of Troopers William Ogden; Stephen Zientek; James Hannon; Joseph Hershey; and, Charles Jackson then in dispute between these Parties. On January 23, 2020, at the Ohio State Troopers Association, 190 West Johnstown Road, Gahanna, Ohio a transcribed Arbitration Proceeding was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where, the Grievants appeared and testified. The Evidentiary Record of this Proceeding was subsequently closed upon the Arbitrator's receipt of each Party's Post-Hearing Brief, filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence and subsequently modified per agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

### **GRIEVANCES & QUESTION TO BE RESOLVED**

Summarily stated, Grievances, as set forth in Joint Exhibit 2, were filed challenging Schedule Changes impacting the Grievants' consecutive days off to work the Kent State

University Detail on September 29, 2018 to avoid the payment of Overtime. Each affected Grievant is seeking Overtime for all hours worked at the applicable Overtime rate.

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As set forth in the Joint Exhibits provided, the “Statement of Issue” was framed as follows:

Did the Employer violate Articles 26 & 27 of the Collective Bargaining Agreement, when the Employer changed the Grievants’ schedules to avoid the payment of Overtime?

If so, what shall the remedy be?

/s/ Elaine N. Silveira

/s/ Michael D. Wood

**CITED PROVISIONS OF THE  
COLLECTIVE BARGAINING AGREEMENT**

The following provisions of the Collective Bargaining Agreement, Joint Exhibit-1, were cited and/or are deemed relevant herein as follows:

**ARTICLE IV  
MANAGEMENT RIGHTS**

The Union agrees that all of the functions, rights, powers, responsibilities, and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the expressed and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the rights to 1) hire and transfer Employees, suspend, discharge and discipline employees, 2) determine the number of persons required to be employed or laid off; 3) determine the qualifications of the Employees covered by this agreement; 4) determine the starting and quitting time and the number of hours to be worked by its Employees; 5) make any and all rules and regulations; 6) determine the work assignments of its Employees; 7) determine the basis for selection, retention and promotion of Employees to or for positions not within the Bargaining Unit established by this Agreement; 8) determine the type of equipment used and the sequences of work process; 9) determine the making of technological alterations by revising the process or equipment, or both; 10) determine work standards and the quality and quantity of work to be produced; 11) select and locate buildings and other facilities; 12) transfer or subcontract work; 13) establish, expand, transfer and/or consolidate, work processes and

facilities; 14) consolidate, merge, or otherwise transfer any or all of its facilities, property, processes or work with or to any other municipality or entity or effect or change in any respect the legal status, management, or responsibility of such property, facilities, processes, or work; 15) terminate or eliminate all or any part of its work or facilities.

## **ARTICLE 20 GRIEVANCE PROCEDURE**

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### **20.08 Arbitration**

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#### **4. Decisions of the Umpire**

The Umpire shall render his/her decision as quickly as possible, but in any event, no later than forty-five (45) days after the conclusion of the Hearing, or submission of the closing briefs, unless the Parties agree otherwise. The Umpire shall submit an account for the fees and expenses of Arbitration. The Umpire's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issue submitted to Arbitration.

The Umpire's decision shall be final and binding upon the Employer, Union and the Employee(s) involved, provided such decisions conform with the law of Ohio and do not exceed the jurisdiction or authority of the Umpire as set forth in this Article. The Grievance Procedure shall be the exclusive method of resolving Grievances.

The Parties may request that the Umpire, on a case-by-case basis, retain jurisdiction of a specific case. In that, the Parties are using a permanent Umpire, questions or clarifications of awards will normally be submitted to that Umpire without the necessity of a further Grievance or action. This statement, however, does not limit the ability of either Party to exercise any other legal options they may possess.

#### **5. Limitations of the Umpire**

Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement shall be subject to Arbitration.

The Umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the Umpire impose on either Party a limitation or obligation not specifically required by the language of this Agreement.

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**ARTICLE 26**  
**HOURS OF WORK AND WORK SCHEDULES**

**26.1 Shifts 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 1<sup>st</sup> and September 1<sup>st</sup> 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.

The decision of the post commander to make a schedule change based upon operational considerations shall only be grievable to the Agency Step with a review of the circumstances made by the Office of Field Operations. Dispatchers and Electronic Technicians will continue to bid on the basis of seniority only.

In accordance with this section, shift assignments will be permanent, and no rotation of shifts will occur, except for the relief dispatcher, who shall continue on a rotating schedule as in the past. The Employer shall have the right to change a member’s schedule for operational considerations, including time off days, or scheduled work shift with seventy-two (72) hours’ notice, or less when exigent circumstances exist, except as provided in Article 22. When a member’s schedule is changed, time off days shall not be split except in extraordinary circumstances (e.g. major emergency” conditions, such as a riot, a natural or man-made disaster; training; shift bid transition; or any other time mutually agreed to by the employee and the Employer) No employee scheduled to be off on a holiday listed in Section 44.01 shall be required to work that holiday in order to facilitate a permissive leave request (personal leave, compensatory time or vacation) from another employee unless the vacation leave request is submitted during the “window period” by a more senior employee in the same classification. Shifts shall be bid between fifty (50) and thirty (30) days prior to the beginning of the new assignment.

The relief dispatcher shall be paid the regular shift differential as provided in Article 63 for all hours.

**A. Special Response Team (SRT)**

1. Schedules for troopers assigned to the SRT will be bid by seniority, most senior first, at their designated district headquarters. Troopers will bid upon two reasonably

equal three-month periods that shall begin on the first day of the pay period that includes March 1<sup>st</sup> and September 1<sup>st</sup> of each year.

2. Vacations shall be scheduled in accordance with Section 43.04 among troopers of the team assigned to each district.

## **26.2 Permanent Shifts for Sergeants**

Permanent shifts for Sergeants shall be established for all facilities working in a continuous operation. Shift assignments shall be made by the facility administrator, on the basis of seniority. In accordance with this Section, shift assignments will be permanent, and no rotation of shifts will occur. The parties understand the “fill-in” or “relief” shift (or shifts) is a permanent shift for the purpose of this Article. Shift assignments will be bid in three (3) month scheduling blocks that shall begin on the first day of the next pay period that includes March 1<sup>st</sup> and September 1<sup>st</sup> of each year. Shifts shall be bid between fifty (50) and thirty (30) days prior to the beginning of the new assignment.

Sergeants will bid upon two reasonably equal three-month periods that shall begin on the first day of the pay period that includes March 1<sup>st</sup> and September 1<sup>st</sup> of each year based upon seniority as defined by Article 36. A bid period is two (2) reasonably equal three (3) month periods.

When a member’s schedule is changed, time off days shall not be split except in extraordinary circumstances (e.g. major emergency conditions, such as a riot; training; shift bid transition; or any other time mutually agreed to by the employee and the Employer). No employee scheduled to be off on a holiday listed in Section 44.01 shall be required to work on that holiday in order to facilitate a permissive leave request (personal leave, compensatory time or vacation) from another employee unless the vacation leave request is submitted during the “window period” by a more senior employee in the same classification.

If a personnel change is made during the course of the above “bid” schedule, the incoming employee(s) shall assume the shift slot of the departing employee(s) until the end of the six (6) month bid schedule.

## **26.3 Work Week**

The normal work week shall be forty (40) hours.

## **26.4 Report-in and Commutation Time**

Bargaining unit employees shall be at their work sites, report-in location or headquarters location promptly at their shift starting time. Any employee who must begin work at some location other than their actual work location or report-in location shall have any additional travel time counted as hours worked.

## **26.5 Meal Breaks**

Bargaining unit 1 members assigned to the Academy, as instructors, on a permanent or temporary basis, shall receive an unpaid meal break of one (1) hour during each tour of duty, usually scheduled near the mid-point of the shift.

Other bargaining unit 1 employees shall receive a paid meal break, not to exceed one-half hour, during each tour of duty. Troopers shall be subject to emergency calls during this meal break.

Sergeants assigned to field posts and sergeants assigned as Investigators shall receive a paid meal break, not to exceed one-half hour, during each tour of duty. Sergeants shall be subject to emergency calls during meal breaks. Sergeants assigned to all other positions shall continue to receive meal breaks in accordance with current practice in effect at the time of the signing of this Agreement.

## **26.6 Split Shifts**

Members of the bargaining units will not be required to work any split shifts except in local emergency situations.

## **26.7 Double Backs**

At any time when the starting times of shifts worked by a member are less than twenty (20) hours apart, the members will receive one and one-half (1-1/2) times his/her hourly rate, including premium pay for the second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

## **26.8 Area Assignments**

On any shift, assignments to patrol areas will be rotated equitably.

## **26.9 Electronic Technicians**

Electronic Technicians shall be scheduled Monday through Friday on the day shift.

# **ARTICLE 27 OVERTIME**

## **27.1 Overtime and Compensatory Time**

Because of the unique nature of the duties and emergency response obligations of the Division, management reserves the right to assign employees to work overtime as needed.

1. Any member who is in active pay status more than forty (40) hours in one week

shall be paid one and one-half (1.5) times his/her regular rate of pay including shift differential if ordinarily paid for all time over forty (40) hours in active pay status. The regular rate of pay includes all premium pay routinely received.

2. An employee may elect to take compensatory time off in lieu of cash overtime payment of hours in an active pay status more than forty (40) hours in any calendar week except that for voluntary statewide overtime details (e.g., State Fair, Boy's State and Girl's State), voluntary turnpike overtime and federally funded positions the Employer shall retain the right to pay compensatory time in cash rather than in time off. Such compensatory time shall be granted on a time and one-half (1.5) basis.

3. The maximum accrual of compensatory time shall be three hundred sixty (360) hours for all employees.

4. When the maximum hours of compensatory time accrual is rendered, payment for overtime shall be made in cash.

5. Upon termination of employment, an employee shall be paid for unused compensatory time at a rate which is the higher of:

a. The final regular rate received by the employee, or

b. The average regular rate received by the employee-during the last three years of employment.

## **27.2 Active-Pay Status**

For purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, personal leave, compensatory time, bereavement leave and administrative leave. Sick leave and leave used in lieu of sick leave shall not be considered active pay status for the purposes of this Article.

## **27.3 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, with the exception of 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.

When an off-duty overtime detail requiring bargaining unit work is offered out of a District it shall first be offered to qualified bargaining unit members in that District. If any openings remain, they shall be offered to exempt officers.

When an off-duty overtime detail requiring bargaining unit work is offered out of a Post or Section it shall first be offered to qualified bargaining unit members in that Post or Section. If any openings remain, they shall be filled by qualified bargaining unit members within the geographical District boundaries containing that Post or Section. If any openings remain, they shall be offered to exempt officers.

This does not apply to off-duty overtime work on the Ohio Turnpike or in instances where the Employer was notified less than forty (40) hours in advance of the off-duty detail.

#### **27.4 Report-Back Pay**

A. "Report-Back" occurs when a member of the bargaining unit is called to return to work to do unscheduled, unforeseen or emergency work after the member has left work upon the completion of the regular day's work, but before he/she is scheduled to return to work.

B. When a member reports back, he/she shall be paid a minimum of four (4) hours pay at his/her regular rate, plus shift differential if ordinarily paid.

C. Working a shift as the result of a mutually-agreed to shift trade shall not constitute a report back.

D. Regularly scheduled shift hours following report back are to be paid at straight time. For report back purposes "scheduled time" is that time scheduled by a post commander during the shift selection process set out in Article 26.

#### **27.5 Standby Pay**

Whenever an off-duty employee is placed on a standby basis by the Employer, he/she will be paid one-half of his/her regular rate of pay for all hours that he/she is actually on standby.

An employee is entitled to stand-by pay subject to the following: 1) the employee is on direct notice of the requirement to be available to respond; 2) the Employer directs that the off-duty activities are specifically restricted; 3) the employee must immediately respond to any summons from the Employer with the consequence of discipline for failure to respond/report.

#### **27.6 Requests for Compensatory Time Off**

Requests for compensatory time off must be submitted in writing in advance of the anticipated time off. Such requests shall be given reasonable consideration. Requests made within 24 hours in advance of the anticipated time off may be given reasonable consideration.

Compensatory time is not available for use until it appears on the employee's earnings statement.

### **27.7 Granting of Compensatory Time Off**

Compensatory time off shall be granted subject to the operational needs of the facility. If compensatory time off is denied based on operational needs, then the employee shall have the requested amount of time off converted to cash payment at the employee's current regular rate of pay. Compensatory time off shall not be unreasonably denied in accordance with FLSA standards.

### **27.8 Pyramiding of Overtime**

There shall be no pyramiding of overtime.

### **27.9 Specialty Exemptions**

If, during the duration of this contract, bargaining unit members are assigned to the Executive Protection Unit or assigned to work with the Executive Protection Unit for a detail they will be exempt from Sections 26 and 27 of this agreement.

## **FACTUAL BACKGROUND**

The operative facts which gave rise to the filing of these Grievance(s), challenging the Employer's Schedule changes to allegedly avoid the payment of Overtime, are except where otherwise indicated, essentially undisputed. The State of Ohio, Department of Administrative Services, Division of the Ohio State Police, hereinafter referred to as the "State" and/or the "Employer", is party to a Collective Bargaining Agreement, Joint Exhibit-1, with the Ohio State Troopers Association, Inc., Units 1 and 15 wherein the Parties have memorialized the terms and conditions of Employment for those Employees recognized in Article 5, titled "Union Recognition and Security". Additionally, Article 4, titled "Management Rights", acknowledges the Employer's contractual and inherent rights, and the Union's acknowledgement thereof,

among others, "...in regard to the operation of its work and business and the direction of its workforce...".

The instant matter involves multiple Grievances, combined by the Parties, concerning the Employer's schedule change impacting these Grievants - four (4) Troopers and one (1) Sergeant - to allegedly avoid the payment of Overtime for a demonstration at Kent State University requested by the Director of Public Safety on or about September 7, 2018. As the record demonstrates, the event involved a request for assistance at Kent State University for an "open carry rally" to be held on its Campus on September 29, 2018. Such involved a highly publicized and politically sensitive event involving Second Amendment Rights involving an event speaker, Kaitlin Bennett, who is an American Gun Rights Advocate, Anti-Abortion Activist and social media personality. She received media attention in 2018 for open carrying an AR-10 (assault rifle) at Kent State University after graduation.

Staff Lieutenant Edward Mejia testified this Open Carry Demonstration/March involved various unknown factors and possible outcomes. As the record demonstrates, this event was initially to be held at the Student Center Quad area of Kent State University, however, upon learning of the cost implications of the venue, Bennett's organization changed the event to a "march" conducted throughout the public areas on Campus. Mejia testified the planning thereof, as opposed to a contained event, was monumental wherein such circumstances involved "roaming around Campus" with very few known factors creating a fluid situation with multiple outcomes. While Bennett's group would be marching throughout the Campus armed with various firearms, some would be wearing full military gear along with their weapons. Additionally, counter protestors were planning to demonstrate at the location as well, including a group known as the "Proud Boys" led by Joey Gibson, who is an American far-right political

activist and founder of “Patriot Prayer”, a group which has organized protests in other cities. The Proud Boys is a far-right neo-fascist organization that admits only men as members and promotes political violence. Mejia testified these groups often come to protests armed with bats, pipes and improvised weapons with the intention of inciting violence. He characterized this situation, and the groups involved, to that at Charlottesville, Virginia which turned violent after protestors clashed with counter-protestors resulting in over thirty (30) injuries and one fatality. Mejia indicated multiple Agencies were contacted to coordinate resources, including operational and logistical matters with planning procedures running concurrently. Contingency plans, based on multiple scenarios, were considered and discussed during Planning Committee meetings. Even though the event was relatively uneventful, two Officers received injuries from protestors’ actions.

The record demonstrates the September 29, 2018 event was a planned event wherein Kent State University had knowledge of the event in question and requested the Employer's assistance at least twenty-two (22) days in advance thereof. Certain Grievants in this matter testified they had been approached previous to this event to inquire as to whether they wanted to work the Detail in an Overtime status. When they were requested to work this Detail, their schedules had not yet been changed. These Grievants declined the offer to work the Detail on Overtime; however, their schedules were subsequently changed and their days off split to accommodate personnel needs for this Detail. The Parties differed as to the definition of an “emergency”, that would otherwise warrant certain deviation of expressed contractual provisions. The Union contends this event was not an emergency and did not rise to the level of a riot as has been the case on previous matters but was a planned event and cannot therefore be considered an emergency warranting deviation from contractual mandates. The Employer

contends the language as written with respect to what constitutes an “extraordinary circumstance” is for example only and not intended to be written as a definitive list as suggested by the Union.

These Employees were in fact required to work the Detail in question at Kent State University resulting in the filing of individual Grievances which the Parties agreed to combine for arbitral efficiency to be adjudicated in one Arbitration Hearing. Each Grievance was processed through the course of the negotiated Grievance Procedure without resolution. When the Parties efforts to resolve these matters through the courts thereof proved unsuccessful, the “Schedule Change to avoid the payment of Overtime Grievances” of William Ogden, Stephen Zientek, James Hammon, Joesph Hershey, and Charles Jackson were appealed to Arbitration hereunder.

## **CONTENTIONS OF THE PARTIES**

### **UNION CONTENTIONS**

The Union concedes it is not challenging the Employer's agreement to honor this request for assistance; that the Employer could not determine the appropriate number of Units to be utilized; and/or, the Employer could not have mandated these units to work the detail. The Union contends the Employer simply cannot change work schedules to split days off solely to avoid paying Overtime. The Employer failed to advance any operational reasons requiring the Contract to be violated. Staff Lieutenant Mejia testified the Employer previously trained for these types of events including the Republican National Convention and a similar rally at the University of Cincinnati. The Employer was well-versed in techniques on how to handle these types of demonstrations. Its prior experiences further demonstrate it did not need to split days off or change schedules to avoid the payment of Overtime. Mejia did not offer any operational reason to justify splitting days off and such was done solely to avoid the payment of overtime.

Affected Grievants testified they had been approached and asked if they wanted to work the Detail in an Overtime capacity. When they were asked to work this Detail, their schedules had not been changed. Despite the Grievants declining the offer to work this Overtime to assist with this Detail, their schedules were subsequently changed and their days off split – to avoid the payment of Overtime. This, the Union contends, violates both Articles 26 and 27 of the Collective Bargaining Agreement.

The Union asserts the definition of “emergency” is “a serious unexpected and often dangerous situation requiring immediate action”. The Employer was aware of this Detail on September 7, 2018 when the request for assistance was made. Such automatically excludes this Detail from being considered an emergency; as it was expected. The Employer has experience with bonafide emergencies such as the one that occurred on April 11, 1993 wherein 450 inmates at the South Ohio Correctional Facility in Lucasville rioted and took over the Prison for 11 days. OSHP Employees were required to immediately respond to help contain the situation/Riot. Such was indeed an emergency. Grievant Charles Jackson testified that while working at the Elyria Post he was mandated to report to the Post, grab his riot gear and respond to the Toledo area where a white supremacist rally had gotten out of control and additional personnel was needed as soon as possible. That, as it contends, was an emergency. The Employer received advanced knowledge of this planned event, therefore rendering this situation something other than an emergency and negates any assertion this event was an emergency. The Union does not challenge the Employer's ability to render assistance when requested. The manner in which it did so here violated the Contract when it changed the Grievants’ schedules and split their off days to avoid the payment of Overtime.

For these reasons, the Union requests the Grievances be sustained and each Grievant be made whole.

### **EMPLOYER CONTENTIONS**

The Employer contends the Union has failed to meet its burden of proof to establish its action to change the Grievant's schedules to provide assistance at Kent State University for a highly publicized and politically sensitive event involving Second Amendment rights, did not violate either Article 26 and/or 27 of the Collective Bargaining Agreement. It emphasizes the Collective Bargaining Agreement details separate directions for the shift assignments for Troopers and Sergeants and those relevant sections are virtually identical. As contained therein, time off days can in fact be split for “extraordinary circumstances”. The language, as written, provides for examples and was not intended to be an all-inclusive list as suggested by the Union - since the event was not a “major emergency”, i.e., did not rise to the level of a riot, these individuals’ schedules could not be split.

Indeed, the Employer's involvement at Kent State University was, by definition, an “extraordinary circumstance”. The extent of the assistance was unknown and involved an open-carry demonstration, providing a wide variety of possible outcomes. This event was initially to be held at the Student Center Quad area at the University; however, given the cost implications, the organization determined to change the event to a March throughout the public areas on Campus. In this regard, the planning for a March is monumental compared to that involving a contained area. Instead of being confined to a specific building or specific area, Demonstrators could be roaming around the public areas of Campus, creating a more fluid situation with multiple potential outcomes. The group in question would be marching through Campus armed with various firearms with zealous attendees wearing full military gear wielding their respective

weapons. Counter-protestors were planning to demonstrate in addition to expected anti-gun protestors. Such groups often attend such protests armed with bats, pipes and improvised weapons with the intention of inciting violence. The combination of these groups could lead to a volatile situation similar to Charlottesville, Virginia resulting in injuries and one (1) fatality.

Based thereon, the combination of factors required a massive response by the Highway Patrol. Multiple Agencies were needed and contacted to coordinate resources while operational and logistical matters were arranged and planned accordingly. Contingency plans based on multiple scenarios were considered and planning procedures were conducted concurrently over a period of time. Fortunately, the event was relatively uneventful - two (2) Officers received injuries from the protestors' actions. In fact, one of the Grievants, who served as an Assistant Post Commander, indicated he was in charge of an enforcement detail wherein situations arose, and operational considerations changed more than seventy-two (72) hours in advance.

With respect to the Union's assertion the Employer changed the Grievants' schedules solely to avoid the payment of Overtime, it submits the Union did not offer any evidence relative thereto, nor did the Union question Mejia regarding the Overtime issue. The Employer emphasizes Article 4 titled "Management Rights" affords it the right and contractual authority to address operational needs and the direction of the working forces as an exclusive right of Management. The operation of its work and the business directly related to the topics of Employee Scheduling and Overtime which were present in this matter. The Employer was faced with the overwhelming task to provide assistance to a potentially volatile situation and in order to ensure the safety of the participants, the general public and the personnel assigned, the Employer was required to show a large presence to respond to these potential threats. The Employer exercised its rights afforded it under the Collective Bargaining Agreement to ensure



the detail was sufficiently staffed with qualified personnel ready to respond to an ever-changing situation.

The “examples” listed in Article 26, Sections 26.01 and 26.02, respectively, do not provide an all-inclusive listing of examples, but recognizes situations may arise that are unusual and exceptional which were not contemplated. In this matter, the Employer changed the schedules of these Employees resulting in their days off being split as a result of this extraordinary set of circumstances which, as it contends, was permitted under the Collective Bargaining Agreement. Had the Parties intended the list be all-inclusive, it would have utilized the verbiage, "i.e.", instead of "e.g." which signifies examples versus a definitive list. The Union failed to establish these schedule changes were effectuated solely to avoid Overtime; these schedule changes were made to address the extraordinary circumstances of the Kent State Detail to address this demonstration. The Employer did not avoid the payment of Overtime by paying for the hours worked over the scheduled hours rendering that argument moot.

For these reasons, the Employer requests the Grievance(s) be denied.

### **DISCUSSION AND FINDINGS**

The disposition of this matter hinges upon the determination of whether the Employer's action to change the work schedules of the Grievants, splitting their consecutive off-days and to allegedly avoid the payment of Overtime, in any way violated Articles 26 and/or 27 respectively, regarding a Detail to provide assistance at a Rally/March at the Kent State University.

The Union contends Article 26, Section 26.01, titled “Shift Assignments for Bargaining Unit 1”, and similar language found in Section 26.02 for Sergeants, indicates when a Member's schedule is changed, their time off days shall not be split except where “extraordinary circumstances” exist. The event in question was known well in advance of the actual date it was

to occur. The Kent State University, Director for Public Safety on September 7, 2018, requested the assistance of the Highway Patrol for this highly publicized and politically sensitive event concerning Second Amendment rights to occur on September 29, 2018, clearly some three weeks prior to the event. Inasmuch as this request for assistance was well in advance of the date of the event, there was no way it could be deemed “extraordinary circumstances” that would allow the Employer to change these Employee's schedules without incurring the payment of Overtime.

The Employer contends and relies upon the Management Rights Article in conjunction with Article 26 which affords it the ability to manage its workforce in the manner required. Based on these circumstances, which indeed were extraordinary as contemplated by Article 26, Section 26.01 affording it the contractual right to further its managerial objective of providing the assistance requested by the Director of Public Safety for the Kent State University, no violation of either Article cited was established by the Union.

The Collective Bargaining Agreement, Joint Exhibit-1, under which the Arbitrator's authority is recognized and conferred, contains a Management Rights Provision which, among other things, affords the Employer the ability to direct its workforce in a general and broad sense. As is generally recognized, a broad Management Rights Provision encompasses the operational objectives of the Employer with respect to the assignment of personnel as needed in furtherance of its operational and staffing objectives. However, certain limitations exist as contained in other specific Articles as negotiated by and between the Parties. In this particular matter, Article 26, titled “Hours of Work and Work Schedules” for both Units 1 and 15, respectively, indicate in Section 26.01, titled “Shift Assignments for Bargaining Unit 1” and Section 26.02, titled “Permanent Shifts for Sergeants” both address the change of a Member's schedule based on “conditions” or as characterized, “extraordinary circumstances”. In fact, it states, "when a

Member's schedule is changed, time off dates *shall not be* split except in extraordinary circumstances (e.g. major emergency conditions, such as a riot; a natural or man-made disaster; training; shift bid transition; or any other time mutually agreed to by the Employee and Employer)” (emphasis added). Other than the “natural or man-made disaster” “circumstance” contained in Section 26.01, Section 26.02, addressing Sergeants, is identical.

The facts and circumstances of this matter demonstrate on September 7, 2018, the Director of Public Safety for the Kent State University requested the assistance of the State Highway Patrol for what was characterized as a highly publicized and politically sensitive Rally surrounding Open-carry, Second Amendment rights to occur on September 29, 2018. The event speaker, Kaitlin Bennett, who was characterized as an American Guns Rights Advocate, Anti-Abortion Activist; and, social media personality, received media attention in 2018 for carrying an AR-10 (assault rifle) at Kent State University after graduating. Staff Lieutenant Edward Mejia characterized the Open-carry Demonstration/March as an event with an array of possible circumstances and outcomes. Initially, the event was to be held at the Student Center Quad area, however, upon learning of the cost to rent that venue it was changed to a March throughout the public areas of the Campus. This changed the complexity of the assistance request based on the fact it went from a confined area to one involving a March throughout the public areas of Campus.

Mejia testified this Group would be marching throughout the Campus armed with various firearms and some would be wearing full military gear. Additionally, Counter-protestors were also planning to demonstrate at this location, including a Group headed by Joey Gibson and his followers, otherwise known as “The Proud Boys”, who are known as a far-right neo-fascist organization admitting only men as members and promotes political violence. Gibson is an

American far-right Political Activist; and, founder of the “Patriot Prayer”, a group which has organized protests in Portland, Oregon and other major cities. This event, as characterized, with the involvement of these various Groups, rendered problematic the assistance and the manpower needs to provide the necessary Law Enforcement presence at this event. Based on the record, multiple Agencies needed to be contacted and coordination of resources was necessary based on operational and logistical concerns. This resulted in preparation of contingency plans for multiple scenarios and all planning procedures conducted concurrently. While the record demonstrates the event basically proceeded without any instances except for two Officers receiving injuries from the Protestor's actions, the Employer contends it was faced with an overwhelming task to provide assistance to this potentially volatile situation and sought volunteers for staffing this event.

Each Section of Article 26 addressing “Shift assignments” and “Permanent Shifts for Sergeants” is detailed in separate and independent language – Section 26.01 pertaining to Bargaining Unit 1; and, Section 26.02 for Sergeants. The Unit 1 language affords schedule changes with seventy-two (72) hours notice; however, when a schedule is changed, time off days will not be split, except in “extraordinary circumstances”. The “Permanent Shifts for Sergeants” Section does not indicate a seventy-two (72) hour window for schedule changes, but does note when a schedule is changed, time off days will not be split, except in “extraordinary circumstances”. The question arises as to whether or not this planned event for September 29, 2018, which the State Police received request for assistance on September 7, 2018, constitutes an “extraordinary circumstance” as set forth in Article 26, Sections 26.01 and 26.02.

Clearly, the definition of an “extraordinary circumstance” is overly broad and can be subject to various definitions. Designated “examples” are set forth in Article 26 assist with the

determination of whether this event should provide the basis for the schedule changes and resultant split off-days. The record demonstrates efforts were made to ascertain volunteers for this and the named Grievants were requested to work this event and each declined. It is clear both Kent State University and the Ohio State Police had knowledge of this event at least by September 7, 2018, some twenty-two (22) days in advance of the event in question to occur on September 29. Clearly, the event in question was not, or could not be construed to be, a spontaneous or contemporaneous event unforeseen by those it affected. Here, advanced notification was indeed provided, which should have afforded the Employer enough time to make whatever operational modifications required to facilitate this request.

The telling point, with respect to this matter, includes the Employer's request of the named Grievants to volunteer for this event on an Overtime basis. As the record demonstrates, each individual declined, thus resulting in their Shifts being modified, and their days off split, to mandate their presence for this event. While the Collective Bargaining Agreement, at Article 27, titled "Overtime", Section 27.03, titled "Overtime Assignments", indicates "the Employer determines the need for overtime, the scheduling of overtime and requiring of overtime as exclusive rights of the Employer; it goes on to indicate, "the Employer will not change in employee's schedule or scheduled shift starting time solely to avoid the payment of overtime without the Employee's consent". Clearly, consent was not provided to change the affected Employees' Shifts - each declined the Overtime offer - resulting in the Employer's action of changing their Shifts and splitting their off-days to work this Detail.

Given the amount of time to plan for this event, given the Employer's request for these named Grievants to indeed sign up and provide such assistance - on Overtime - taken in conjunction with the ramifications of what in fact occurred, suggests that indeed their off-days

were split for which the penalty as imposed is the payment of Overtime. The testimony of record indicates several of these Grievants were requested to work this Detail on an overtime basis; however, they declined. At that point in time, their work schedules had not been changed. While the Arbitrator is indeed mindful of the Employer's need to provide sufficient staff for whatever operational need may arise, the penalty, if you will, of affecting one's consecutive off-days carries with it the penalty of Overtime at the applicable rate of pay.

The Employer was well aware of this Detail for which it received the request on September 7, 2018 to occur on September 29, 2018. This planned event, while potentially volatile in nature, was nonetheless orchestrated and did not rise to an unexpected, unforeseen and/or spontaneous event which provided little, if any, prior planning where schedule modifications would be appropriate under Article 26. Accordingly, when the Employer changed the named Grievant's work schedules resulting in a split of their offdays, the penalty for doing so in violation of the Collective Bargaining Agreement, is the payment of Overtime. Based thereon, the appropriate remedy which would have been based on an Overtime Detail as the record demonstrates these individuals were previously requested to work, entitles each of them to the payment at the applicable Overtime rate for all hours worked for this event on September 29, 2018. Accordingly, the Grievances of William Ogden; Stephen Zientek; James Hannon; Joseph Hershey; and, Charles Jackson are hereby Sustained for which each named Grievant shall receive the applicable Overtime rate for all hours worked on September 29, 2018.

**AWARD**

The Grievances are Sustained.

*David W. Stanton*

David W. Stanton, Esq.  
NAA Arbitrator

May 18, 2020  
Cincinnati, Ohio