

OPINION AND AWARD

In the Matter of Arbitration

Between

The Ohio State Troopers Association

And

State of Ohio, Department of Public Safety, Division of State Highway Patrol

Case Designation

DPS-2018-03275-01

DPS-2018-03281-01

DPS-2018-03294-01

Date of Documents and Briefs: May 29, 2020

Date of Award: June 30, 2020

APPEARANCES

**For the Union**

Elaine N. Silveira, Esq., Advocate

Jeremy Mendenhall

Larry Phillips

**For the Employer**

Michael D. Wood, Labor Relations Officer 3, Advocate

**Grievant**

LaDonna Klocinski, Trooper

Kyle Pohlabel, Trooper

Timothy Tillman, Trooper

The Parties agreed to submit this case to the Arbitrator on briefs and joint exhibits; no hearing was held. The stipulated issue before the Arbitrator is as follows: "Did the Employer violate Article 27 of the collective bargaining agreement, by selecting the Grievant to work the Kent State Detail on September 29, 2018 in the manner it did? If so, what shall the remedy be?"

Joint Exhibits submitted into the record are as follows: Collective Bargaining Agreement as Joint 1 (J1); Grievances for Troopers Pohlabel, Klocinski and Tillman as Joint 2a, Joint 2b and Joint 2c respectively (J2a, J2b & J2c); Payroll Entry Summary dated 9/29/18 for Trooper Klocinski, Trooper Pohlabel and Trooper Tillman as Joint 3, Joint 4 and Joint 5 respectively (J3, J4 & J5); Personnel Bulletins dated 9/01/18 for Posts Swanton and Dayton as Joint 6 and Joint 7 respectively (J6 & J7); The Kent State University request to the OSHP for assistance dated 9/07/18 as Joint 8 (J8); OSHP IOC From Major Swindell to District/Section Commanders identifying selected Officers for the Kent State Detail as Joint 9 (J9); OSHP Civil Disturbance Refresher PPT as Joint 10 (J10); Payroll Code Usage Detail for 9/29/18 as Joint 11 (J11).

**RELEVANT CONTRACT PROVISIONS:**

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

**ARTICLE 4 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 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.

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## **BACKGROUND**

A Second Amendment Rights event was planned for September 29, 2018 at Kent State University. The featured speaker was to be Kaitlyn Bennett, a gun rights advocate who had received media attention in 2018 for open-carrying an AR-10 at Kent State University after graduating. The event was to be a rally/march through the public areas of the Kent State campus. University administrators anticipated that the rally would be attended by groups of individuals openly carrying firearms, some dressed in full military gear, others armed with improvised weapons intent on inciting violence. Counter-protesters were also expected to attend the rally. It was thought that the faceoff between protesters and counter-protesters could lead to a dangerous situation, not unlike that experienced in Charlottesville, Virginia a year prior. In its planning for this event, Kent State University requested assistance from the Ohio State Highway Patrol. As a result, a detail of approximately 350 OSHP personnel from multiple locations across the State was assigned to work at Kent State on Saturday, September 29, 2018.

The request for assistance from Kent State to the Highway Patrol was made via letter dated September 7, 2018. Two weeks later, on September 25 Major Swindell, Commander of the Office of Field Operations sent an Inter-Office Communication (IOC) to District/Section Commanders regarding particulars of the Kent State Detail and identifying the personnel who had been assigned. There were both Mobile Field Force Units (MFF), specially trained and equipped to respond to such events, and supplemental field units assigned to the Detail. The IOC set the report time for the Detail at 10:00AM and projected that the Detail would conclude at approximately 6:00PM. The IOC further stated that the Detail was to be considered, "a normal workday with schedule changes occurring at the post and district level." The IOC established that accrued overtime (including drive-time), beyond the normal 8-hour shift, would be approved.

Grievants Klocinski and Tillman, were two of five Troopers detailed to Kent State from the Swanton Post. Trooper Klocinski is the most senior trooper at the Swanton Post, whereas Trooper Tillman is the fourth most senior trooper at the Swanton Post. There are ten troopers at the Swanton Post with less seniority than Trooper Klocinski who were not assigned to the Kent State Detail, and there are eight less senior than Trooper Tillman. Grievant Pohlabel was among five troopers detailed to Kent State from Dayton Post 57. Trooper Pohlabel is the fifth most senior trooper at the Dayton post; there are eight troopers at Dayton Post 57 with less seniority who were not assigned to the Kent State Detail. All three Grievants were among the 190 assigned supplemental field units – they were not part of the 84 assigned Mobile Field Force Units. Grievant Klocinski was paid 6.5 hours of overtime for working the Kent State Detail, Grievant Pohlabel was paid 7.5 hours of overtime and Grievant Tillman was paid 5.5 hours of overtime.

#### **POSITION OF THE UNION**

The Union's contention is that each of the three Grievants was mandated to work a detail, which resulted in several hours of overtime when less senior troopers were available to be assigned. The labor agreement, at Article 27.3, reads as follows:

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.

Because this was an event that entailed multiple overtime assignments, reverse seniority should have been used. Had the labor agreement been properly applied the three Grievants would not have been mandated to the Kent State Detail, less senior troopers would have been assigned.

Civil Defense training is provided annually at the local district level; therefore, all troopers at the Swanton and Dayton Posts (where the Grievants are posted) were equally qualified to be assigned to the Kent State Detail. Thus, there is no contractual basis to pick and choose troopers as if there were unique qualifications for working the Detail. There are no troopers who "routinely perform the required task" and therefore, no reason to have assigned the Kent State Detail to some troopers over others. This was the very type of overtime situation anticipated by the contract language requiring mandatory overtime be assigned in reverse seniority order. There were multiple overtime assignments, and no troopers uniquely qualify to serve as the supplemental field units for this Detail.

The Employer's argument, that all assigned troopers were approved and paid for all accrued overtime associated with the Detail, falls flat because the grievances are not based on the Employer's

actual payment of overtime, but based on the Employer's failure to follow clear contract language in making the overtime assignments. Furthermore, the Employer's argument that the nature of the Detail presented exigent circumstances, that in some way demanded the Employer act without regard for relevant negotiated provisions of the CBA, also falls flat. The Employer knew of the Kent State request for assistance as early as September 7, 2018, providing a full three weeks for planning and executing all aspects of the Detail – including staffing. In a companion grievance pertaining to schedule changes associated with the Kent State Detail, Arbitrator Stanton recently rejected this very Employer argument and found that there was no basis for invoking either the "emergency conditions" or "operational necessity" language of Article 26 pertaining to work schedules. Similarly, this Employer argument must fail when considering how Article 27 was applied when troopers were selected for this overtime assignment. It should have been based on reverse seniority as negotiated in the CBA. If it had been, none of these three troopers would have been assigned.

For these reasons, the grievances must be sustained. As remedy, the Grievants should be awarded the overtime rate of pay for all hours worked the day of the Kent State Detail.

#### **POSITION OF THE EMPLOYER**

By virtue of its management rights, as captured in Article 4 of the labor agreement, the Employer retains its responsibility and right to, "determine the work assignments of its employees." It is pursuant to this management right that the Employer selected personnel to attend a work detail at Kent State University.

The Kent State Second Amendment Rights Rally scheduled for September 29, 2018 had all the requisite ingredients for a large, and potentially disruptive and dangerous event. In responding to Kent State's request for assistance, the Highway Patrol's aim was to ensure enough qualified personnel were on-site and ready to address any eventuality that the day presented. To this end, the Employer assigned both its Mobile Field Force (MFF) and supplemental field units. The MFF is a contingent of troopers specially trained, equipped and designed to provide an organized response to events such as the one at Kent State. In assigning the supplemental field units to serve as backup to the MFF, troopers who had recently received updated Civil Defense (CD) training were selected for the Detail. The Grievants had each received the updated CD training. Accordingly, they were each assigned to the Kent State Detail.

The Employer rejects the Union's underlying thesis, that the Kent State Detail was an 'overtime assignment.' As stated in Joint 9, the IOC from Major Swindell, the Kent State Detail was a normal

workday. Each of the three Grievants was scheduled to work their shift on the day of the Detail, and each had received the updated CD training. Therefore, each was assigned to the Detail on their normal workday. These three Grievants were not assigned to an overtime assignment – for each, it was their normal workday. The likelihood that a normal workday will run longer than a typical regular shift does not make it an overtime assignment. By way of comparison, a day when a weather event is forecast the likelihood of overtime may increase on a given shift. This increased likelihood does not make work on such a day an overtime assignment. The same is true for a normal workday that requires attendance at out of town training or involves attendance at a crash toward the end of a shift. The prospect of a normal workday involving overtime does not make it an overtime assignment.

All troopers assigned to the Kent State Detail, including the three Grievants, received overtime for the time worked beyond their normal workday. On the day of the Detail, had the Employer determined to send some of the attending troopers home early, reverse seniority may have come into play; however, that was not the case. All assigned troopers worked the full assignment. Invoking the role of reverse seniority is misplaced in the instant scenario.

For the reasons stated herein, the grievances should be denied.

#### **DISCUSSION**

The essence of the issue before the arbitrator is whether the Kent State Detail on September 29, 2018 was a mandatory overtime assignment as contemplated in Article 27.03. This is a contract interpretation grievance and as such the Union bares the burden of proof.

The Union argues that the Kent State Detail should be governed by the language of 27.03 because the assignment was certain to involve overtime (so certain, that the Operation IOC anticipated the authorization of overtime for all assigned personnel), and multiple troopers were being assigned to the Detail. Thus, the Employer was mandating multiple troopers to a Detail to work overtime. The Union's position is that the circumstances of the Kent State assignment are precisely addressed in the last sentence of the second paragraph of Article 27.03, "In the event of multiple overtime assignments, reverse seniority shall be used."

The Employer argues that the Kent State Detail was not an overtime assignment, but simply a work assignment. The Grievants were normally scheduled to work on the day of the Kent State Detail



and were thus assigned to work their shift at the Detail. The likelihood that the day's assignment would result in some overtime does not make it an overtime assignment as contemplated by Article 27.03.

Along side this fundamental argument of whether the Kent State Detail was a work assignment, or an overtime assignment are subordinate assertions by the parties. From the Union there is the assertion that the Kent State Detail cannot rightly be considered an emergency and therefore cannot fall outside of the negotiated provisions of the labor agreement. Also, from the Union is the argument that all troopers are equally trained in civil defense response and therefore all troopers were equally qualified to be assigned to the Detail. Countering this, the Employer asserts that there was an operational necessity to assign troopers to the Kent State Detail with updated civil defense training and these Grievant fit that operational parameter.

As to the matter of whether the request for assistance from Kent State constituted an emergency, it is well considered and established at this point that the request for assistance did not constitute an emergency. This is an argument directly relevant to the issue put before Arbitrator Stanton, but less relevant to the instant grievance(s) . There is no qualifying language in Article 27 like that found in Article 26 which allows the Employer to abridge a specific negotiated provision when exigent circumstances exist.

As to the matter of whether the Grievants were more prepared (or qualified) to undertake the Kent State Detail, or simply as equally qualified as all other troopers, the record is incomplete. In the Discussion segment of its brief the Employer states that the Grievants had received "updated CD training" and in the Conclusion segment states that the Grievants were assigned due to their "completion of the most recent and updated CD training." Is the Employer pointing out that the training templated had been recently updated, or that the Grievants were up to date in their training, or both? There is a joint stipulation by the parties that civil defense training is conducted annually at the local District level. However, there is nothing in the record to clarify whether all troopers within a District attend the annual training at the same time, or whether troopers within a District attend the annual training at different times throughout the year. Is it the Employer's position that the Grievants had more recently attended (vis'a vis' the September 29, 2018 event date) the annual civil defense training in comparison to other troopers; thus they were more up to date in their training than were other troopers (those not assigned to Kent State)? Joint exhibit 10 is the civil defense training template. Although not dated, it must be assumed that Joint 10 is the most current civil defense instructional template used annually. Is it the Employer's position that the training program had been 'updated' since the last annual

training and thus those assigned to the Kent State Detail had attended the 'updated' program, whereas other troopers (those not assigned to Kent State) had not yet been to the 'updated' training program? Regardless of the exact nature of the Employer's argument it is not supported with documentary evidence. Missing from the record is pertinent information documenting when each of the Grievants most recently attended the annual civil defense training refresher program. This missing evidence renders the assertion of little value in assessing whether the Grievants' training in anyway constitutes a reasonable operational necessity for selecting them for assignment to the Kent State Detail.

As for the fundamental matter of whether the Kent State Detail was a mandatory overtime assignment governed by Article 27.03, the Union relies on two facts. First, the Grievants are three among a multitude of troopers assigned to the Detail. Second, the Grievants along with all of those assigned to the Detail worked overtime on the day. These case facts are stipulated by the parties and supported with documentary evidence. The Union argues that the operative contract language is as follows:

*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.** (emphasis added)*

This provision provides no explanatory or exemplary wording as to how or when "multiple overtime assignments" might occur. Furthermore, there is no information in the record explaining how or when the parties have operationalized this language in the past; and how this instant case compares to other occasions when multiple overtime assignments required the use of reverse seniority.

Significantly, the Employer explains in its brief that the Grievants were each normally scheduled to work on September 29, 2018 – the day of the Kent State Detail. Their normal work schedules would have put them on duty during all, or a portion of, the Detail's operative hours of 10:00AM to 6:00PM. This is consistent with Major Swindell's IOC to the Districts which states, "This should be considered a normal workday with schedule changes occurring at the post and district level." Assigning work is a right retained by the Employer in Article 4 as follows:

*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.*

*6) determine the work assignments of its Employees.*

The Employer acted within its managerial rights to assign the Grievants to work the Kent State Detail rather than have them remain at their normal post(s) and undertake their normal assignment(s) on September 29, 2018. For this not to be the case, there would have to be explicit contract language curtailing the Employer's right to make work assignments. No such language has been referenced by either party; nor has such language been found upon a general review of the labor agreement. The fact that it was a large detail to which multiple troopers were assigned does not directly lead to the conclusion that seniority, or reverse seniority, should have been a factor in assigning troopers to it.

Assignment to the Kent State Detail resulted in overtime hours for all three Grievants as well as for the multitude of other OSHP personnel assigned to the Detail. A review of Joint 11, Payroll Code Usage Detail for 9/29/2018, shows that there was a wide range of overtime worked by the personnel assigned to the Kent State Detail. Among troopers, there was as little as 1.5 hours of overtime earned and as much as 10 hours earned. The Grievants earned between 5.5 hours and 7.5 hours of overtime on the day of the Detail. There is no evidence in the record that establishes that earning overtime in association with a work assignment makes the entire work assignment an 'overtime assignment' as referenced in Article 27.03. The Employer has reserved the right to require employees to extend their workday or work assignment into overtime should it be necessary to complete duties. This authority is found in Article 27.01 as follows:

*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.*

The Employer's overtime rights are reiterated in 27.03 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 prospect that a given work assignment within the context of the employee's normal work schedule may entail some overtime does not then require the Employer to designate the assignment as an overtime assignment and invoke the reverse seniority method of staffing the assignment. To impose such a burden on the Employer without clearer, more explicit contract language to support such a finding would be contrary to the express limitations of Article 20.08(5) as follows:

*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.*

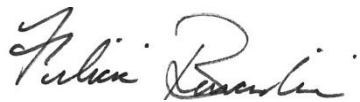
Given the case record, there is insufficient evidence to prove that the Grievants' assignment to work the Kent State Detail, which was within the general parameters of their normal work schedules,

was anything other than a work assignment governed by the Employer's right to make assignments under Article 4. The fact that the day's work assignment ran into overtime for each of the three Grievants does not lead to the conclusion that the Kent State Detail was an overtime assignment as contemplated by Article 27.03. It is operationally consistent with the overall reading of the labor agreement to conclude that such an assignment (i.e., one that is made consistent with the employee's normal work day and shift), whether made to one trooper or multiple troopers, is within the managerial rights of the Employer and any resulting overtime is simply overtime the assigned employees are required to fulfill.

**AWARD**

For the reasons herein stated the grievance is denied.

Respectfully submitted at Columbus, Ohio, June 30, 2020.

A handwritten signature in cursive script that reads "Felicia Bernardini".

Felicia Bernardini, Arbitrator