#1120

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**STATE OF OHIO,**
**ADJUTANT GENERAL'S DEPARTMENT**

**AND**

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION**
**LOCAL 11**
**AFSCME. AFL-CIO**

---

Arbitration Date: July 9, 2013

Grievant Kenneth Finch: # 01-00-(031912)-001-01-07

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Robert W. Patchen
Adjutant General's Department
2825 W Dublin-Granville Road
Columbus, Ohio 43235-2789

Advocate for the Union:

Thomas B. Cochrane
Associate Counsel
OCSEA, AFSCME Local 11
390 Worthington Rd., Suite A
Westerville, OH 43082

RECEIVED / REVIEWED
AUG 2 8 2013
OCSEA-OFFICE OF
GENERAL COUNSEL

## I. HEARING

The hearing was held was held July 9, 2013 at the OCSEA office.

The joint issue before the Arbitrator is: "Is this matter substantively arbitrable?" "If it is, does TAG's practice of not granting paid military leave for travel and rest time, as articulated in Rhonda L. Briningers' e-mail of March 9, 2012, 12:32 P.M. violate the parties CBA?"

Testifying for the Ohio Civil Service Employee's Association, Local 11 AFSCME ("the Union") were Frank Montgomery, Lt. Firefighter; Kenneth Finch, Firefighter, the Grievant; Wesley Blair, Firefighter; and John Klaus, Firefighter.

Testifying for the Adjutant General's Department "the Employer" were Rhonda Brininger, Human Capital Management Manager; Eric Slaback, Administrative Assistant in the Policy Section, Office of Collective Bargaining; and Colonel Duncan D. Aukland, State Judge Advocate and Chief Legal Counsel.

The Union rebuttal witness was John Klaus, Firefighter.

## II. STATEMENT OF THE CASE

Prior to the Firefighters joining the Union in 2003 and continuing thereafter until March 9, 2012 the Firefighters were paid military leave for travel to monthly National Guard training duty known as "Drill". In addition they were paid Military Leave if they elected to take rest periods after Drill.

On March 9, 2012 Rhonda Brininger of the Adjutant General's Department sent an E-mail that Firefighters would no longer be paid Military Leave for travel or rest time.

The Union timely filed a grievance and the case is properly before the Arbitrator.

## III. THE UNION'S CASE

The Union's first witness was Frank Montgomery. Mr. Montgomery is a Lt. Firefighter. Mr. Montgomery works at Rickenbacker. Mr. Montgomery started with the State in December 1989. He was not in the Union and joined in 1999-2000. Mr. Montgomery started at Springfield and went to Rickenbacker in 1994. He testified that he joined the National Guard in 1980 and retired from the National Guard in 2006.

Mr. Montgomery testified that he is a Steward and Secretary of the Assembly. Mr. Montgomery testified that he could be deployed by the President or the Governor. He testified that as a member of the National Guard he attends a two week camp and Drills one weekend a month.

Mr. Montgomery testified that he had two Federal deployments, Iraq in 2006 and Kuwait in 2001. He said he had two State deployments for flood duty at Shadyside and Manchester.

Mr. Montgomery testified that in the 1990s his National Guard Duty was with the 216th at Chillicothe. He testified that he was working in Springfield and it was an hour and a half drive to Drill. Mr. Montgomery said he got paid for travel time both ways. He testified that he filled out a leave slip and turned it in. He never took "rest" time.

Mr. Montgomery testified that the process continued until he retired. He said there was no change in 2003 when he joined the Union.

Mr. Montgomery testified that he went to Rickenbacker in 2001 and did not need travel time then. He said his pay request was never denied.

There was no Cross- Examination.

The Union's next witness was Kenneth Finch, the Grievant. Mr. Finch is a Firefighter. He started in December 2000 at Rickenbacker and is still there. Mr. Finch joined the Air Force Reserves in August 1998 and his duty station is Wright-Patterson Air force Base in Dayton, Ohio the entire time. He said the Employer receives a letter once a year showing the Drill dates for the year.

Mr. Finch testified that in 2002-2003 it took him an hour and fifteen minutes to get to Wright-Patterson. He said he got paid for travel time. Mr. Finch testified that he asked for "this time" and "this date" and didn't say travel time.

Mr. Finch then testified that the Firefighters joined the Union in 2003 and there was no change in the travel time policy. The policy changed in 2012. He testified that he still has weekend Drill and has to use vacation time to leave work for Drill.

Mr. Finch testified that his work schedule changes. He said years ago he went to Drill, then back to work and then back to Drill in order to save Military Leave. Trying to work and Drill was too dangerous. Mr. Finch testified that prior to the Collective Bargaining Agreement giving him 408 hours of Military Leave he ran out of Military Leave in June or July. Mr. Finch said when he got 408 hours he does not have to use personal leave or vacation. He said he got paid for Travel Time.

Mr. Finch testified he is now a Senior NCO, a Master Sergeant. He said this job takes more time because there is more paperwork. Mr. Finch testified that Management says Military Leave is for only eight (8) hours a day so he has to use vacation for Military Duty.

On Cross-Examination Mr. Finch testified that his last Drill Weekend was June 4,

Saturday and Sunday. He said on Saturday he reported at 0630 and did have Fire Training until 2 P.M. and then cleaned trucks. Mr. Finch testified he stayed to do paperwork until around eight P.M. He said he stayed on base but is not required to do so.

Mr. Finch testified he went to Drill at 0630 on Sunday and left around 5 P.M. to go back to work. Mr. Finch testified he never submitted to the Employer for his extra hours at Drill. He said he has to catch the Colonel at the last minute to get paperwork signed and the Colonel is busy.

Mr. Finch said it is his choice to use personal leave and rushing back on Sunday is his choice. Drill is usually on a weekend and the Schedule is set per Fiscal Year - October to September.

On Re-Direct Examination Mr. Finch testified that when he is released from Drill for the day he can do what ever he wants. He said the Colonel and the Fire Chief can keep him behind. Mr. Finch then testified that "Unpaid Military Leave" affects the accrual rate of vacation.

On Re-Cross Examination he was asked "Did you ever talk to anyone in Human Resources at the Adjutant General's Office about extended Drill hours?" He answered "No sir".

The Union's next witness was Wesley Blair. Mr. Blair started as a Firefighter in August 2004. He is a member of the Union. Mr. Blair was a member of the Air National Guard when he hired in with the State. Mr. Blair works at Rickenbacker and it is also his Drill station. He said his Work Schedule is four 24 hour shifts and one eight hour day per two weeks. Shift assignments are by seniority. He said he does work weekends.

Mr. Blair testified that prior to March 2012 he was paid Military Leave for a Drill

weekend. He took eight hours Military Leave even when his shift was 24 hours, he just went back to work. After March 2012 he never changed his request for leave.

Mr. Blair testified that Drill is sometimes more than eight hours. He said if he was not working he would take Military Leave for the extra hours. After March 2012 he had to take vacation.

On Cross-Examination Mr. Blair testified that on a Non Scheduled Drill Weekend he started at 0700. He had Drill preparation and a lunch break and he was still on Duty. He had training in the afternoon. Mr. Blair said he was released at 1600.

Mr. Blair was asked if he talked to the Adjutant General's Human Resource Department about leave, he answered "No". He said he would go to work and Drill. He would change clothes and go to work for the Adjutant General.

The Union's last witness was John Klaus. Mr. Klaus was present at the 3rd step. Mr. Klaus is the Assembly President and the Steward of Record in this Case. He started August 7, 1994. Mr. Klaus is a Firefighter and a member of the Air Guard.

Mr. Klaus testified that Military Leave was discussed in Assembly with Firefighters from all the Adjutant General Bases. He said Springfield did theirs separately and kept the Air Guard 24 hours to work. He said at Rickenbacker you can work and Drill. Mr. Klaus said the problem is not unique to the Grievant.

Mr. Klaus testified that having leave up to 408 hours helped him. The prior allowance of 176 hours never got him through the Calender Year. He had to take vacation to cover time. Mr. Klaus testified he was deployed over seas three times.

Mr. Klaus testified that unpaid Military Leave status has no vacation accrual. He works now Monday and Thursday and Tuesday night. This doesn't conflict with Drill.

Mr. Klaus testified his last Drill was in June. He reported at 7 A.M. and off at 4:30 P.M. On Sunday he reported at 0700 and was released at 1630.

Mr. Klaus was asked if he talked to State Human Resources about Military Leave. He said "Yes". Mr. Klaus said back when you had 176 hours it was used for Drill and Summer Camp.

On Re-Direct Examination Mr. Klaus testified that on Drill Days the Commander can recall you at any time. He is a Senior NCO and has longer Drill Days.

On Re-Cross Examination Mr. Klaus testified that he sometimes gets Military Leave in advance if he knows he needs it. He said he Drills where he works. Mr. Klaus testified that if he stays over on Drill he is there at work if he needs to go and they know where he is.

## IV. THE EMPLOYER'S CASE

The Employer's first witness was Rhonda Brininger. Ms. Brininger is the Human Capital Management Manager. She over sees Human Resources which includes hiring Worker's Compensation, and FMLA. Ms. Brininger is the EEO Officer and the Assistant Labor Relations Officer.

Ms. Brininger testified that early in 2012 it was brought to her attention that Military Leave may be improperly administered. She said she researched the Ohio Revised Code and talked to Legal Counsel. Ms. Brininger found inconsistent requests for time. Some employees asked for eight hours, some for twenty-four hours.

Ms. Brininger sent an E-mail to Staff and Management that there would not be Military Leave payments for rest and travel.

Ms. Brininger was given Joint Exhibit 3 and said it was her E-mail about the new way to handle Military Leave. The E-mail is dated March 9, 2012. The Union then filed a Grievance.

Ms. Brininger testified there are 107 Firefighters statewide and 51 are in the Guard or Reserves. She testified that the money comes from the National Guard Bureau and is all Federal funds. There are no State funds.

Ms. Brininger testified that unauthorized payment may cause issues with the United States Property and Fiscal Officer "USP&FO" and the federal government may not pay. She said the USP&FO oversees the expenditure of Federal funds. Ms. Brininger testified that the USP&FO is at Beightler Armory as is the Adjutant General.

Ms. Brininger testified that the USP&FO did an audit for May, June and July 2012 and that the audit was inconclusive. She said the Auditor couldn't verify Military Time. Ms. Brininger testified that the Co-op Agreement Appendix 24 deals with Firefighters. There is a deficit on leave to be paid and the Adjutant General is questioning this. Ms. Brininger testified there could be up to $345,000.00 cost to the State for the shortfall.

Ms. Brininger then testified that prior to March 2012 employees submitted time and attendance sheets to show request. The employees submitted orders or letters from their Commander. The request for leave did not specify "exactly". Ms. Brininger testified the request for leave should indicate time spent and the employee could be paid for more than eight hours. If the employee went out of State "on orders" they would be paid for time they couldn't work.

Ms. Brininger testified that typical issues were about Drill. She said she got the Training Schedule from the Commander showing time and Drill Dates. Ms. Brininger said she contacted Commanders about release time from Drill.

On Cross-Examination Ms. Brininger testified that orders showed the times of Day and Days of Drill. She said what she sees is where time shows 0730 on Saturday to 1630 on Sunday. Ms. Brininger said she would grant leave for all the time the employee was on Military Duties. She said if the employee was on duty more than eight hours it was paid for.

Ms. Brininger then read Joint Exhibit 3 and said it refers to DAS guidelines at the time. There was a period of time it was not accessible on the Internet. Ms. Brininger said she was concerned about a lack of federal money. Ms. Brininger was asked "When the State Legislature agreed to go to 408 hours didn't they expect to pay?" She said "I don't know. I can't answer that".

Ms. Brininger then read Joint Exhibit 4 and said this is the document referred to in Joint Exhibit 3. She was advised that witnesses had testified that prior to March 2012 employees got time and rest approved. Ms. Brininger said they were paid for what they claimed as Military Leave. She said there was no question prior to March 2012, if Military Leave was requested it was paid.

The Employer's next witness was Eric Slaback. Mr. Slaback is an Administrative Assistant in the Policy Section of OCB. He has been there 6 years. Mr. Slaback works on surveys and Unfair Labor Practices. Mr. Slaback sent a survey about Military Leave to State agencies in 2013. The Survey was sent by E-mail to Human Resource Directors in the entire State. He used

survey monkey.

Mr. Slaback was shown Exhibit Management 1 which is the survey prepared by him. He said the Exhibit shows all responses to the survey. He testified that it has all the answers and the answers are not altered.

On Cross-Examination Mr. Slaback testified he doesn't know which State Agencies didn't get survey as he doesn't maintain the list. He said he doesn't know if everyone replied.

The Employer's last witness was Colonel Duncan D. Aukland. He is a full Colonel. Colonel Aukland is the State Judge Advocate and Chief Legal Counsel for the Adjutant General. Colonel Aukland graduated from Virginia Tech in 1978 and from Capital Law School in 1982.

Colonel Aukland testified that prior to coming to the Adjutant General's Office he worked for the EPA as a Staff Attorney. He did Administrative and Personnel work for the EPA.

Colonel Aukland was Commissioned July 24, 1984 and had six years in the Reserves. He went to the Adjutant General's Department as General Counsel and Assistant Judge Advocate. He was a Captain in the Reserves in 1993, a Major in the National Guard, a Lt. Colonel in 1998 and a full Colonel in 2012. He became the State Judge Advocate in 2012. Colonel Aukland is the longest serving National Guard Judge Advocate in the Country.

Colonel Aukland testified that he has helped amend Ohio Revised Code 5923.05. The Ohio Supreme Court made a decision in Snide v Columbus Bd. of Ed 66 Ohio ST 3d 626 which affected leave. Colonel Aukland helped the General Assembly to do away with the Case.

Colonel Aukland then testified about the 1994 Uniform Services and Re-Employment Act. Colonel Aukland was given Joint Exhibit 2 Ohio Revised Code 2593.05 A (2) (e) "Service

in Uniformed Services" and "Inactive Duty for Training". Colonel Aukland said the Army calls it Drill, the Air Force calls it Unit Training Assembly. He said he still goes to Drill.

Colonel Aukland says after Drill Day you are free. Firefighters are subject to being recalled. "Competent Authority" means Commanders. He then read Joint Exhibit 6 which is Pay and Allowances. Colonel Aukland read Page 58 concerning "Inactive Duty Training". He said a Drill Day is at least one Training Assembly. Usually the Members of the Reserve get two Calender days per Drill Day which is four days pay. Colonel Aukland testified that a Training Assembly is usually at least four hours and has to be at least two hours. He testified that Firefighters can be kept over.

Colonel Aukland then read Joint Exhibit 5 which is the Department of Defense Duty Status. He read Page 5 which is Procedures. The Federal Code says fifteen days a year for Annual Training. There are forty-eight Drills per year. Colonel Aukland testified that travel is not duty and rest is not Duty under a Competent Authority.

Colonel Aukland read Joint Exhibit 2 and testified that it was changed to add Public Safety Employees, Firefighters are included. He said Firefighters get 408 hours paid leave. Colonel Aukland testified that the Air National Guard can hold Firefighters over. If they are held over they should be paid. He says the Unit Commander publishes the Drill Schedule and it is sometimes changed.

On Cross-Examination Colonel Aukland testified that IOT is Drill Weekend. Colonel Aukland then testified that for Drill Weekend there is no pay for travel or rest. He then read implementation of DAS Policy. Colonel Aukland said the statute is the Military Re-Employment

Act. Colonel Aukland testified that he never had a chance to make an interpretation prior to 2012. He said two consecutive Human Resource Officers made the decision.

Colonel Aukland testified that he was present at Third Step but he wasn't responsible for providing Documents to the Union. He said he doesn't think they were provided. Ms. Brininger said a subordinate called the problems to her attention.

Colonel Aukland testified that he was contacted in January 2012 about the problem. He said the Federal Fiscal Law is very strict and that paying money without authority may be a crime. Colonel Aukland then testified that he also gives legal advice to the U.S. Property and Fiscal Officer. He said he had to advise the USP&FO that disbursements were wrong.

Colonel Aukland then testified that there are three kinds of agreements with the Federal Government; Procurement; Co-Operative Agreements and Grants. He then said The National Guard Bureau inserts itself into Co-Operative Agreements. The State of Ohio pays 8% of the Adjutant General's Department budget which goes for Salaries, Armory Maintenance, Matching Funds and other things.

On Re-Direct Colonel Aukland testified that of the 8% State Funding none of it is for Firefighters, that is all Federal Money.

Colonel Auckland then testified that the Human Resource Officers were not lawyers for the Adjutant General's Department. He then said the Federal Tort Claims Act concerns the scope of employment. He also said that employees are covered by Worker's Compensation going to and from Drill.

The Union then re-called John Klaus as its Rebuttal Witness. Mr. Klaus testified that he

was present at the third step hearing and some Documents were not provided to the Union.

The hearing concluded at 1:50 P.M. The parties agreed to file Written Briefs and the Briefs would be post marked no later than 5:00 P.M., August 9, 2013.

## V. OPINION OF THE ARBITRATOR

The Employer contended in the hearing that the issue was not arbitrable. The Arbitrator took the issue under advisement and the Employer has raised the question of arbitrability again in its Post Hearing Brief.

The Employer argues that Article 25 of the Collective Bargaining Agreement (CBA) says the arbitrator only has jurisdiction over disputes that involve the interpretation, application, or an alleged violation of a provision of the Collective Bargaining Agreement. The Employer says this grievance does not fall within this jurisdiction.

The employer asserts that Article 30, Section 30.02 is silent on when an employee is entitled to paid Military Leave. The Employer says the parties contemplated these types of situations when they negotiated Article 44 Section 44.02 - Operations of Rules and Laws.

The Employer argues that this Section of the CBA requires that when a State statute provides benefits to employees in areas where the contract is silent, the benefit shall be determined by the statute. The Employer argues that it is important to note that the parties did not choose to incorporate the statute into the Contract.

The Employer next argues the law controls if not superseded by the Contract. The Employer cites ORC 4117.10 and Article 44 Section 44.01 of the CBA. The Employer therefore argues that ORC 5923.05 (A)(!) Sets forth the specific criteria for payment.

The Employer argues that this matter is dealt with by a statute that is outside the four corners of the CBA. Therefore it is a matter of statutory interpretation not of contract interpretation and is not arbitrable.

The Union disputes that this matter is not arbitrable. The Union argues that a requirement of statutory interpretation is no bar to adjudication and secondly, the statutes the Employer claims determine the outcome defer to the CBA.

The Union contends that its Grievance claims a violation of Article 30.02 as amended by Appendix Q of the CBA. Article 30.02 fo the CBA titled Military Leave refers to Federal Duty, State Duty, and refers to the maximum allowable leave and what is evidence of Military Duty. The Union rephrases this Section as; "Any employee shall be allowed military leave for federal duty" and "Employees shall be allowed military leave when ordered to duty by the Governor".

The Union argues that the term "Military Leave" appears only in the CBA and is not linked to any State or Federal statute. Also that the phrases "for federal duty" and "when ordered to duty by the Governor" appear only in the CBA.

The Union has attached to its brief the Case OCSEA, Locale 11, AFSCME and Ohio Environmental Protection Agency Case No. 12-00-9108-26-000-9-01-13 (1992) in support of its arbitrability Claim. The Union argues this case is persuasive as this case has no language limiting the Union's right to grieve and arbitrate the question and it cannot use the potential outcome of a case to determine arbitrability.

The Union also argues that the statutes referred to by the Employer defer to CBA's ORC 5923.05 (G) says, in essence, that a CBA "with provision for the performance of service in the

Uniformed services shall abide by the terms of the CBA".

The Union also points out that USERRA Section 4302 (a) provides that the Chapter "shall not supersede ..... any contract ..... which establishes rights or benefits greater than .... those provided by this Chapter".

Based upon the evidence the issue is subject to arbitration. The arbitrator is primarily persuaded by Article 30.02 of the CBA and Appendix Q which have specific references to payment for Military Leave. The question is an interpretation of the CBA as to what form or kind of Military Leave requires payment.

## MERITS

This is an issue case. The Union contends that employees are entitled to military leave not only for the time spent at their duty station but also for travel time and rest time. The Union bases its argument upon a past practice.

The Union argues that the parties have stipulated that prior to Brininger's March 2012 E-mail, leave for federal duty and leave for duty ordered by the Governor included concomitant travel and rest time.

The Union argues that the parties have long accepted the prevailing view in labor arbitration that past practices can be used to assist in the interpretation of ambiguous contract language and "give life" to clear contract language.

The Union contends that the Employer's survey of other agencies proves nothing. The Union says the Grievance concerns only firefighters employed by the Adjutant General and therefore information from other agencies is irrelevant.

The Union also argues that the survey is not probative. The Union says there is no statistical analysis to establish its reliability.

The Union points out Mr. Slaback admitted he did nothing to ensure his survey reached all State Agencies and he listed 25 respondents and over 100 agencies were not on his list.

The Union also argues that the responses were flawed for a variety of reasons. Some of the arguments concerning the survey are that some respondents objected to the questions or indicated their answers were unreliable.

The Union points out that the Employer claims it is required by law to discontinue the practice of including travel and rest time in leave for federal duty and leave for duty ordered by the Governor.

The Union argues that the employer's argument that the law requires it to discontinue the practice of paying for travel and rest time is incorrect. The Union says the pertinent federal and state statutes say where a CBA grants greater leave benefits the CBA controls.

The Union argues that the Employer's position rests entirely on the testimony of Colonel Aukland. Colonel Aukland testified he became Chief Legal Counsel in June 2012. Colonel Aukland testified that prior to that date attorneys working for the Employer did not see a problem with how Article 30.02 military leave was administered. Colonel Aukland said he determined the agencies practices were out of compliance with state and federal law. Colonel Aukland gave his opinion that Inactive Duty Training (IDT) does not cover travel and rest periods.

Colonel Aukland had reviewed ORC 5923.05, the Uniformed Services Employment and Re-employment Rights Act (USERRA) 38 USC§ 4301¡ Ohio House Bill 449 (2010) Dept. of

Defense guide "Instruction, Uniform Reserve, Training and Retirement Categories and a Dept. of Defense regulation" "Financial Management Regulation".

The Union argues that the Employer's position that IDT and Article 30.02 of the CBA are the same is incorrect. The Union says Military Leave pursuant to Article 30.02 of the CBA is broader than IDT.

The Union argues that Article 30.02 of the CBA is for the purpose of covering employees time away for state or federal duty and thus covers travel and rest time. The Union also contends that the parties past practice supports this argument.

The Union also argues that the CBA and the law cited by the Employer do not use identical language. The Union asserts that if the parties wanted statutory language they would have used it in the CBA as they have done elsewhere in the CBA.

The Union also argues that the CBA provides a greater benefit than is provided by USERRA and pursuant to 38 USC§ 4302 (A) the benefit is not diminished by USERRA. The Union also argues that since USERRA authorizes a state to grant greater benefits per the CBA the Dept. of Defense will not penalize the Employer.

The Union also argues that Ms. Brininger testified that in May - June 2012 the U.S. Property and Fiscal Officer conducted an examination of leave pursuant to Article 30.02 of the CBA and did not object to the leave practice.

The Union also cites Streetsboro Education Assn. v Streetsboro City School District Board of Education 68 Ohio ST 3d 288, 291 (1994) which holds that ORC 4117.10 (A) gives CBAs precedence over conflicting state statutes unless there is a specific exclusion. There is no

statutory exclusion here.

The Employer argues that this is an issue case and the Union has failed to prove its case. The Employer argues the Union has no evidence of a contract violation and the only evidence of "federal duty" was presented by the Employer.

The Employer says the testimony of Colonel Aukland is very specific that travel time and rest periods associated with IDT/Drill are not federal duty.

The Employer argues that Colonel Aukland's testimony is supported by the Dept. of Defense Instruction Uniform Reserve, Training and Retirement Categories (December 14, 2008) and Dept. of Defense Financial Management Regulation DOD 7000 14-R (October 2012). The Employer argues the Union presented no evidence to rebut Colonel Aukland's testimony.

The Employer also argues that none of the Union's witnesses presented any testimony as to what it means to perform "Federal Duty". The Employer argues that the Union did not address any portion of the contract it Claimed applied and that no Union Exhibit defined "Federal Duty". The Employer argues there is no evidence the Grievant was engaged in "Federal Duty".

The Employer contends that the Union's evidence of a past practice is not dispositive of the grievance. The Employer argues that the CBA is silent as to when an employee is entitled to Paid Military Leave. Therefore Article 44, Section 44.02 requires that the statute control. The Employer then argues that ORC 5923.05 applies and it is clear and unambiguous. The Employer then argues that evidence of a past practice is irrelevant.

The Employer then argues that a mixed practice does not constitute a past practice. The past practice must be 1.) Unequivocal 2.) Clearly enunciated and 3.) Readily ascertainable over

a period of time. The Employer argues the Union has failed to prove these elements.

The Employer next argues that for purposes of a past practice all agencies of the State of Ohio, should be considered. To that end the Employer introduced a Military Leave Survey with responses from some State Agencies. The Employer argues that the Union only presented evidence of the practice of the Adjutant General's Office and the actions of a single Agency are not dispositive.

The Employer then argues that even if there was a past practice Article 44, Section 44.03 allows the Employer to modify or discontinue a past practice at the Employer's discretion.

This case has been well presented by the Parties.

The Arbitrator finds there is sufficient evidence to establish that the Grievant was engaged in "federal duty". The evidence from both witnesses for the Union and the Employer was that documentation for IDT/Drill days was provided by the Military in writing by annual letter, orders, or letters from the Employees Commanding Officers.

It is clear there is no dispute over paying Military leave for IDT/Drill but only paying for travel and rest time.

The evidence is clear that Ohio law permits a CBA to grant greater benefits to an employee than may be found in existing statutes. Appendix Q grants Firefighters 408 hours of Military Leave as opposed to Article 30.02 which grants other employees 176 hours. The Contract is not silent concerning the payment of Military Leave.

The Employer says a past practice must be unequivocal, clearly enunciated, and readily ascertainable over a period of time. The Arbitrator agrees that this is the test. The Arbitrator does

not agree that a past practice must be common to Multiple State Agencies. The State of Ohio is a large employer with employees working in a conventional Office setting to Corrections Officers in Prisons; Ohio State Highway Patrol and Firefighters. The operations of these diverse agencies with their differing skills, hours of operation and sometimes hazardous duty means that their practices both past and present are often times Unique to the Agency.

This case is a prime example; Wesley Blair testified that his work schedule is 4 24 hour shifts and one 18 hour day per two weeks. The CBA also recognizes Firefighters as Unique by giving them 408 hours of Military Leave.

The evidence is undisputed that there was a long standing practice of paying for travel and rest as a Military Leave benefit.

I grant the grievance. The current Military Leave Policy is reversed. Individuals who were forced to take vacation, compensatory or personal time shall have their leave balances restored.

The Arbitrator will retain jurisdiction for 60 days.

Issued at Ironton, Ohio this 26th day of August, 2013.

Craig A. Allen
Arbitrator