

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration)

	)	<u>OPINION AND AWARD</u>
Between	)	
	)	
DEPARTMENT OF HIGHWAY SAFETY	)	Grievance No. G86-11
	)	
STATE HIGHWAY PATROL	)	
	)	[Grievant] Grievant
- and -	)	
	)	
FRATERNAL ORDER OF POLICE	)	
OHIO LABOR COUNCIL	)	

Samuel S. Perry, Impartial Arbitrator

File No. P 05 03102

The Impartial Arbitrator, Samuel S. Perry, was mutually selected and appointed by the Parties to hear and decide this matter.

The oral hearing was held on Tuesday, October 14, 1986 in a Conference Room at the Offices of Collective Bargaining, 375 South High Street, 17th Floor, Columbus, Ohio 43266-0585.

The following appearances were made for each of the parties:

FOR THE PATROL:

<u>NAME</u>	<u>POSITION</u>
James R. Alexander	Assistant Attorney General
John Demaree	Captain - O.S.P.
Thomas W. Rice	Major - Personnel Commander
Darryl Anderson	Lieutenant - Personnel
Richard A. Curtis	Captain - District 6 Commander

FOR THE UNION:

<u>NAME</u>	<u>POSITION</u>
Paul L. Cox	Executive Director
Edward F. Bukin	
[Grievant]	Trooper

The Parties agreed that the matter was properly before the Arbitrator for a decision on the merits. The Parties waived a separation of witnesses and requested that the oath be administered to each person called to testify.

The Patrol and the Union, each requested one (1) copy of this Opinion and Award.

At the conclusion of the oral hearing, each Party stated they would file a post-hearing brief.

The oral proceedings in this matter were concluded on October 14, 1986.

The Arbitrator received two (2) copies of the post-hearing brief for the Ohio State Highway Patrol on November 14, 1986.

The Arbitrator received one (1) copy of the Union's post-hearing brief on November 17, 1986. A second copy of the Union's post-hearing brief was received on November 24, 1986.

Therefore, the Arbitrator declared the hearing closed as of November 24, 1986, and pursuant to Article 20.07-5 of the Agreement existing between the Parties, the Arbitrator shall have thirty (30) days from November 24, 1986 within which to render his Opinion and Award.

THE GRIEVANCE:

The grievance (Joint Exhibit #2) and related documents, consisting of ten (10) pages, were offered and admitted into evidence and state as follows:

SEE NEXT TEN (10) PAGES

Joint Exhibit #2



**\* STEP TWO REVIEW (CONTINUED) \***

22. REVIEW BY EMPLOYEE: DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_ AGREE: YES NO REQ. STEP 3 REVIEW: YES NO

23. COMMENTS BY GRIEVANT: \_\_\_\_\_

GRIEVANT'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_

24. STEP TWO HOURS REP. HRS: \_\_\_\_ GRIEVANT HRS: \_\_\_\_ DIST. CMDR HRS: \_\_\_\_

**\* STEP THREE REVIEW \***

25. DATE GRIEVANCE RECEIVED 6/11/86 RECEIVED BY Major T. W. Rice

26. STEP THREE MEETING DATE 7/1/86 TIME: \_\_\_\_ M. PLACE: Columbus Ohio

27. MEETING OFFICER: Major T. W. Rice

28. REPRESENTATIVE AND/OR COUNSEL AT MEETING: \_\_\_\_\_

29. DATE OF REPLY: 7/3/86 REPLY: (See attached)

DIRECTOR/SUPERINTENDENT OR DESIGNEE'S SIGNATURE: Major T. W. Rice

30. REVIEW BY EMPLOYEE AND/OR REPRESENTATIVE: DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_ AGREE: YES NO  
REQ. STEP 4 REVIEW: YES NO

31. COMMENTS BY GRIEVANT OR REPRESENTATIVE: \_\_\_\_\_

GRIEVANT'S OR REPRESENTATIVE'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_

32. STEP THREE HOURS REP. HRS: \_\_\_\_ GRIEVANT HRS: \_\_\_\_ DESIGNEE HRS: \_\_\_\_

**\* STEP THREE DISCIPLINARY GRIEVANCE REVIEW \***

33. REVIEW BY O.L.C. REPRESENTATIVE: DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_ AGREE: YES NO

REQ. STEP 5 (ARBITRATION) REVIEW: YES NO

34. DATE REQUEST FOR ARBITRATION FILED: \_\_\_\_/\_\_\_\_/\_\_\_\_

35. COMMENTS BY REPRESENTATIVE: \_\_\_\_\_

36. REPRESENTATIVE'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_

**\* STEP FOUR REVIEW \***

37. DATE GRIEVANCE MAILED TO THE OFFICE OF COLLECTIVE BARGAINING: \_\_\_\_/\_\_\_\_/\_\_\_\_

38. DATE GRIEVANCE RECEIVED AT THE OFFICE OF COLLECTIVE BARGAINING: \_\_\_\_/\_\_\_\_/\_\_\_\_

39. STEP FOUR REVIEW DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_ DIR. OF O.C.B. OR DESIGNEE: \_\_\_\_\_

40. DATE OF REPLY: \_\_\_\_/\_\_\_\_/\_\_\_\_ REPLY: \_\_\_\_\_

DIRECTOR OF O.C.B. OR DESIGNEE'S SIGNATURE: \_\_\_\_\_

41. DATE REVIEWED BY O.L.C. REPRESENTATIVE: DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_ AGREE: YES NO

REQUEST ARBITRATION: YES NO

42. DATE REQUEST FOR ARBITRATION FILED: \_\_\_\_/\_\_\_\_/\_\_\_\_

43. COMMENTS BY REPRESENTATIVE: \_\_\_\_\_

REPRESENTATIVE'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_

44. RESPONSE TIME EXTENSIONS: (INITIALED BY REPRESENTATIVES OF MANAGEMENT & OLC)

DATE FOP/OLC MANAGEMENT

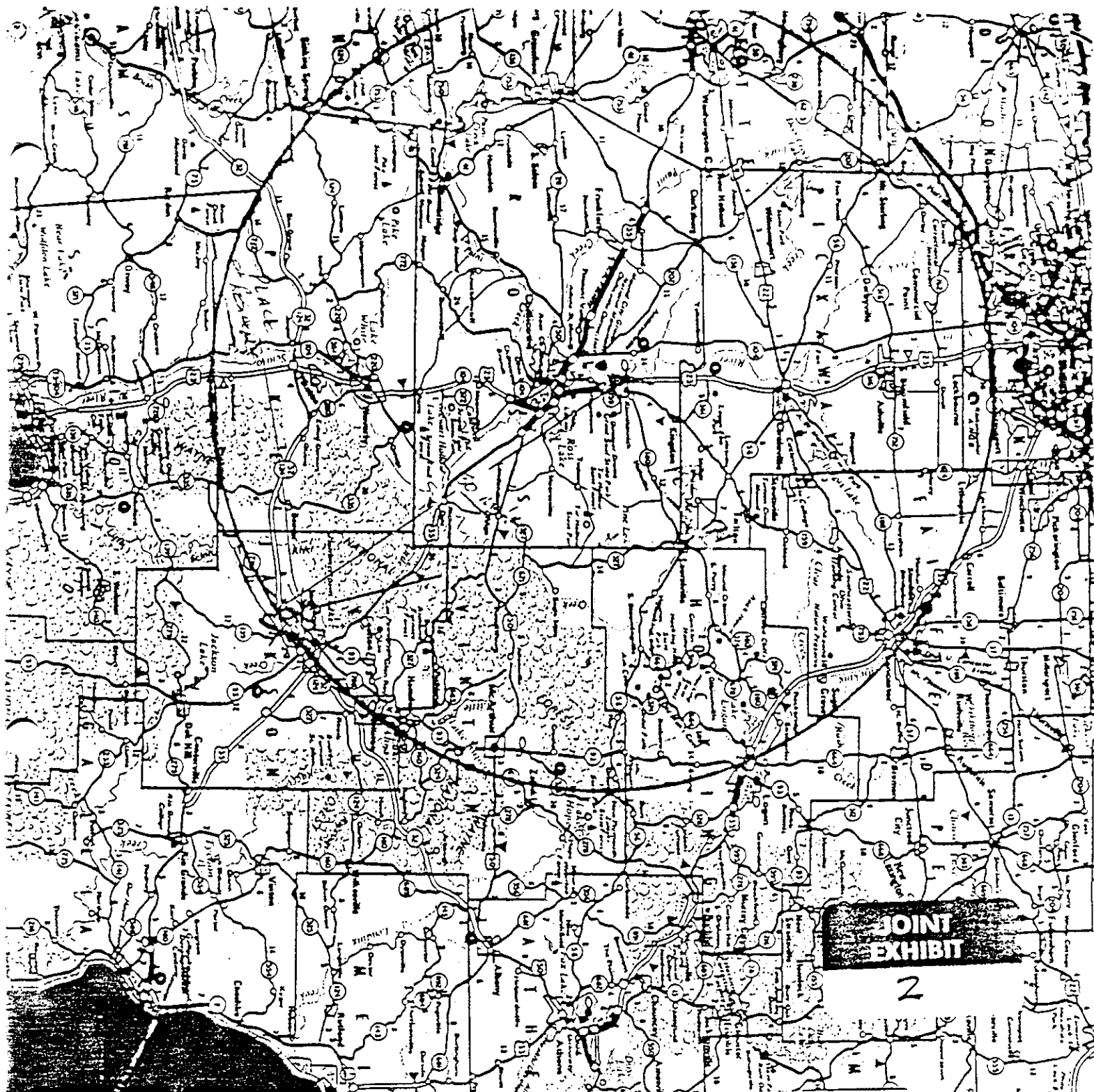
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# **LEGEND**

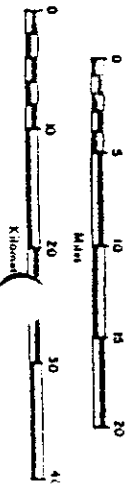
## **PRINCIPAL THROUGH HIGHWAYS**

- Freeway, Access Fully Controlled
- Multiple Divided, Access Partially Controlled
- Two or More Lane
- Multiple Toll Road, Access Fully Controlled
- Future Location

## **OTHER THROUGH HIGHWAYS**

- Multiple Divided
- Two or More Lane
- Good Connecting Road
- Future Location
- Incomplete Route
- United States Route
- State Route
- County Boundary
- Scenic Highways
- Interchange and Interchange Number
- Separation - No Access
- County Seat
- Incorporated Municipality
- Unincorporated Municipality
- Approximate Midge Between Centers of Incorporated Municipality and/or Intersections
- Aerial Railroad and Passenger Stations
- Ferry
- Toll Bridge
- Dam
- Point of Interest
- College or University
- State Hospital or Institutions
- State Forest
- Park or Reserve
- National Park
- Roadside Rest Area
- with Tourist Info. Center
- with Camping
- Highway Patrol Posts and Fuel and Air Stations
- Fairgrounds
- Military Airports
- Major Airports - Serving Airlines
- Business Airports - Over 3,000 ft. Paved

## **SCALE**



## Statement of the Case.

and justifies the actions of the welfare department. The board of review's finding on this matter was contrary to law and manifestly against the weight of the evidence.

There being no other basis for the board's order in case No. 79-495, we find that this decision too was an abuse of the board's discretion.

Accordingly, the judgments of the Court of Appeals denying the writs are affirmed.

*Judgments affirmed.*

HENBERT, W. BROWN, P. BROWN, SWENEY, LOCHER and HOLMES, JJ., concur.

THE STATE OF OHIO, APPELLANT, v.  
SHEPHERD ET AL., APPELLEES.

[Cite as State v. Shepherd (1980), 61 Ohio St. 2d 328.]

*Motor vehicles—Weight limits—Location of scales—R. C. 4513.33, construed.*

When the General Assembly enacted R. C. 4513.33, allowing police officers to direct a vehicle to proceed to the nearest available scales to be weighed "provided such scales are within three miles of the point where such vehicle is stopped," it intended to require the scales to be within a three-mile radius of the stopping point.

(No. 79-217—Decided March 19, 1980.)

APPEAL from the Court of Appeals for Wood County.

On September 19, 1977, Earl W. Click, a trooper with the Ohio Department of Highway Safety, stopped Walter L. Shepherd on State Route 26 in Portage Township, Wood County, in order to conduct a safety inspection of Shepherd's truck pursuant to R. C. 4513.02(B). No citation for a safety violation was issued, but on the basis of information gathered during the safety inspection, Shepherd was ordered to proceed to scales at a fixed location on Interstate 76, a limited-

Opinion, per CARAMANZIS, C.J.

were less than a mile away, but they were approximately seven road miles away from the stopping point. As a consequence of the weighing, Shepherd was charged with and convicted in Bowling Green Municipal Court for exceeding the load limits for his truck in violation of R. C. 6b77.04.

Shepherd appealed on various grounds, as did eight others who were convicted of the same offense based on facts similar to those in Shepherd's case. These eight, James L. Forney, Gerald E. Smith, Roy E. Sampson, James E. Rhoades, Terry L. Needham, Floyd Lamb, Jr., Thomas Flowers, and Kirk B. Shepherd, have stipulated, through agreement between defense counsel and the prosecuting attorney, that they will abide by the decision rendered in Walter Shepherd's case.

The Court of Appeals reversed, finding that the provision in R. C. 4513.33 that the scales be within three miles of the point where the truck is stopped requires that the scales be within three road miles of the point where the truck is stopped. The court held that the defendants had not received a fair trial. The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Warren J. Lutz, prosecuting attorney, for appellant. Messrs. Maurer & Kuns and Mr. Robert W. Maurer, for appellees.

~~GREENBERG, C.J.~~ Before deciding on the merits, we first must rule on a motion to dismiss this appeal filed by appellee. Appellee claims that because there is material contained in appellant's Appendix to its brief which is not among that enumerated in Section 14(B) of Rule V of the Rules of Practice of the Supreme Court of Ohio, the appeal must be dismissed. Although we have stated in *Drake v. Bucher* (1966), 6 Ohio St. 2d 37, 40, that a substantial disregard of the whole body of a court's rules cannot be tolerated, we find that the inclusion of a government report, a magazine article and a map in the instant case does not constitute a failure to comply with our Rules of Practice. Even considering Rule V as a strict limitation, appellant has not substantially disregarded the rules. The asserted violation of the rules by the inclusion of certain documents which appellee classifies as neither legal nor authority

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court is able to ignore any illegitimate materials in appellant's Appendix. The motion is overruled.

The sole issue before this court is whether R. C. 4513.33, in providing that sealed scales to which vehicles are ordered to proceed be within three miles of the original stopping point, requires that the scales be within a radius of three miles from the point where the vehicle is originally stopped or, instead, that they be at most three road miles from that point.

R. C. 4513.33 allows police officers, with reason to believe that the weight of a vehicle is unlawful, to require that the vehicle be weighed either by means of compact portable sealed scales or by certain types of sealed scales installed at a fixed location. The statute states that "[t]he driver of such vehicle shall, if necessary, be directed to proceed to the nearest available of such sealed scales to accomplish the weighing, provided such scales are within three miles of the point where such vehicle is stopped."

The legislative intent behind this distance limitation is to allow effective enforcement of vehicle load limitations for the purpose of controlling road damage and safety hazards, while at the same time avoiding unreasonable interference with vehicle operation. The General Assembly realized that requiring the distance limitation to be in road miles would unduly restrict enforcement due to the fact that most fixed-location scales are on limited-access highways. One of the reasons for allowing the police to direct the vehicle to be weighed to fixed-location scales is to aid in the apprehension of violators who attempt to avoid the scales on limited-access highways by exiting from these roads and taking side roads around the scales. Consequently, the General Assembly chose the language in the statute to require that the scales be within a radius of three miles from the point where the vehicle is stopped, rather than use an inflexible road mileage limitation. Use of the radius limitation, along with the further limitation in R. C. 4513.33 that "[a]ny vehicle stopped in accordance with this section may be held by the police officer for a reasonable time only to accomplish the weighing as prescribed by this section," sufficiently protects drivers from unreasonable interference with the operation of their vehicles, while allowing the police to ef-

fectively enforce load limitations for the protection of the public.

The General Assembly expressed this intent by using the phrase, "within three miles of the point where such vehicle is stopped." Webster's Third New International Dictionary (1961) defines "within" as "in the limits or compass of." If the General Assembly had intended to require the use of road miles, it would have surely used a phrase more explicitly indicating that intent. The common understanding of the phrase "within three miles" is that it refers to straight-line distance.

We hold that, when the General Assembly enacted R. C. 4513.33, allowing police officers to direct a vehicle to proceed to the nearest available scales to be weighed, "provided such scales are within three miles of the point where such vehicle is stopped," it intended to require the scales to be within a three-mile radius of the stopping point.

Accordingly, the judgment of the Court of Appeals is reversed, and the judgment of the Municipal Court is reinstated.

*Judgment reversed.*

HENBERT, P. BROWN, SWEENEY, JACKSON and HOLMES, JJ., concur.

W. BROWN, J., dissents. I dissent for the reason that in my opinion the statutory reference is to road miles.

JACKSON, J., of the Eighth Appellate District, sitting for LOCHER, J.

JOINT  
EXHIBIT





STATE OF OHIO  
Richard F. Celeste  
Governor

STATE HIGHWAY PATROL  
Colonel Jack Walsh  
Superintendent

DEPARTMENT OF HIGHWAY SAFETY  
William M. Denihan  
Director



FILE NO 00-5-10

Columbus, Ohio 43266-0562  
July 3, 1986

Trooper [Grevant]

RE: Grievance No. 30

Dear Trooper [Grevant]

Attached you will find my Level III decision regarding the above numbered grievance.

Very truly yours,

*MAD. T.W. Rice*

T. W. Rice  
Major, Personnel  
Ohio State Highway Patrol

TWR/slb

Attachment

cc: Ed Seidler, Director the Office of Collective Bargaining  
Peter Coccia, ODHS Labor Relations  
Ed Baker, FOP/OLC, Inc., Staff Representative  
Paul Cox, FOP/OLC, Attorney  
File

JOINT  
EXHIBIT

A Level III Grievance Hearing was held on July 1, 1986, in Columbus, Ohio regarding grievance number 31, Trooper [Grievant] with the following persons present:

MANAGEMENT

LABOR

T. W. Rice, Major/Personnel/  
Labor Relations/Hearing Officer  
Capt. John Demaree

Tpr. [Grievant] Griev.  
Mr. Ed Baker, Staff Repres.

The parties agreed we were properly constituted and there were no procedural objections.

The Union stated the remedy sought was that stated on the grievance. That the grievant(s) was a member of FOP/OLC at the time of the alleged incident giving rise to the grievance and further, that the grievant's home address is correctly stated on the grievance form.

UNION CONTENTION

Trooper [Grievant] will be moving within 30 miles (by radius) of his assigned post in compliance with Section 31.01 of the labor agreement. He has been told by Lieutenant Baker that his request has been denied due to his not using road miles in the calculation of distance.

It is requested that he be permitted to move to a new residence which is within a 30 mile radius of his post, in compliance with Section 31.01.

MANAGEMENT CONTENTION

It was the intent of the language contained in Article 31.01 of the labor agreement between the F.O.P./Ohio Labor Council, Inc., and the Ohio State Highway Patrol to establish a reasonable response time to the officers work location. This reasonable response time was intended to be determined through the use of actual land miles.

It would be unreasonable to use radius in determining mileage since the means by which this would be determined could only be accomplished through the use of nautical miles.

Troopers respond to work assignments and other incidents, i.e. accidents etc., by using established road or land miles and not nautical miles.

If radius was used to calculate miles we could have an incident, in extreme cases, whereby an individual could be stationed in Sandusky and live on either Kelley or Bass Island off Lake Erie.

JOINT  
EXHIBIT

# FINDING

The hearing officer finds that the employer is in compliance with Article 31, Section 31.01 of the labor agreement, by requiring individuals to live within 30 miles of their work assignment and in calculating this distance using road or land miles is in keeping with the intent of the language in Article 31, Section 31.01 of the labor agreement. Therefore, the grievants request to use radius in calculating miles from his residence to his work assignment is denied, since this distance would be 35 land miles from his work assignment.

MAJ. T.W. Rice  
Thomas W. Rice, Major  
Personnel Commander

July 3, 1986  
Date

JOINT  
EXHIBIT

2

GRIEVANCE SIGN-IN FORM  
STEP III HEARING

Grievance Number #30

Grievant Name Trooper [Grievant]

Date July 1, 1986

Location GHQ-Columbus

	NAME	AGENCY
1.	<u>E. J. [unclear]</u>	<u>I.C.P. 1110 Rep.</u>
2.	<u>[Grievant]</u>	<u>C.S.P.</u>
3.	<u>Capt. J. [unclear]</u>	<u>O.S.P. Pres.</u>
4.	<u></u>	<u></u>
5.	<u></u>	<u></u>
6.	<u></u>	<u></u>
7.	<u></u>	<u></u>
8.	<u></u>	<u></u>
9.	<u></u>	<u></u>
10.	<u></u>	<u></u>

JOINT  
EXHIBIT

2

## THE ISSUE:

The Issue as framed by the Patrol:

In requiring a member of the bargaining unit who relocates to "live within thirty (30) miles of their assigned post" in compliance with Article 31 of the collective bargaining agreement of the parties, should the employer utilize road miles to calculate the distance? If not, what method shall be used, and what shall the remedy be?

The Issue as framed by the Union:

The real issue here is the attempt by the Highway Patrol to rewrite the agreement. They failed to win their position that a thirty (30) minute standard ought to be used to determine residence location. Now they are asking the arbitrator to reinstitute the time standard. "Within thirty (30) miles" means exactly what it says. Take a compass and draw a circle around each Patrol post thirty (30) miles in diameter.

## PERTINENT PROVISIONS OF THE AGREEMENT (Joint Exhibit #1):

### ARTICLE 31 - RESIDENCY

#### 31.01

Members of the bargaining unit are required to abide by all statutory residency mandates provided for all State employees.

Members of the bargaining unit may be required to live within thirty (30) miles of their assigned post.

31.02

Those employees subject to Section 31.01 of this Article who were assigned to work locations prior to the effective date of the Agreement will not be required to relocate to comply with this requirement. After the effective date of the Agreement, any employee who either moves his/her residence or is assigned to a new work location will comply with Section 31.01 of this Article.

FACTS AND BACKGROUND:

Officer [Grisant], the Grievant, is an Ohio State Trooper employed by the Ohio State Patrol (hereinafter referred to as the Patrol). He, and others similarly situated, is a member of the Fraternal Order of Police/Ohio Labor Council which will be hereinafter referred to as the Union.

The sole subject of this arbitration hearing is the interpretation of Article 31 in the collective bargaining contract signed by the parties in April, 1986 and effective until December 1988. That contract will hereinafter be referred to as the Agreement. Article 31 is entitled Residency and reads as follows:

31.01 - Members of the bargaining unit are required to abide by all statutory residency mandates provided for all State employees.

Members of the bargaining unit may be required to live within thirty (30) miles of their assigned post.

31.02 - Those employees subject to Section 31.01 of this Article who are assigned to work locations prior to the effective date of the Agreement will not be required to relocate to comply with this requirement. After the effective date of the Agreement any employee who either moves his/her residence or is assigned to a new work location will comply with Section 31.01 of this Article. (emphasis added)

The Grievant presently resides five (5) road miles from his assigned post. He is engaged to be married and his wife to be lives in a house that is larger and more suitably located for the education and care of the five teenage children that will be members of the new combined household created by the marriage.



Her house is located thirty-five (35) road miles from his post, but it is within the required thirty (30) miles of the post if measured by a compass.

Evidence at the hearing included testimony about the history of this Article and the professed intentions of the parties in negotiating this clause.

Other relevant Articles of the Agreement and Applicable laws are outlined below:

Article 2 - "This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. No verbal statements shall supersede any provisions of this Agreement."

Article 3 - "This Agreement is meant to conform to and should be interpreted in conformance with the Constitution of the United States, the Constitution of the State of Ohio, all applicable federal laws, and Chapter 4117, Ohio Revised Code.

Article 20.7 - Paragraph #6 - "The Arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the Arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

Article 25.02 - ..."Such (departmental) vehicle assignments are based upon the responsibilities of the employee and in part, on an employee's availability to return to duty in a timely fashion when an emergency situation arises...

No employee will lose the opportunity to drive a marked motor vehicle to and from his or her residence as a result of the location of that residence...

No employee who is married to another employee of the Employer shall be denied the right to drive a marked motor vehicle to and from his or her residence when one or the other spouse involved has been transferred or is assigned to another patrol car.

Ohio Revised Code Section 5503.01 - ... at the time of appointment, Patrolmen shall not be less than twenty-one years of age, nor have reached thirty-five years of age, and shall have been legal residents of Ohio for at least one year, except that the residence requirement may be waived by the superintendent." Ohio Revised Code Section 5503.02 (A) - The State Highway Patrol shall enforce the laws of the State relating to the titling, registration, and licensing of motor vehicles; enforce on all roads and highways...the laws relating to the operation and use of vehicles on the highways...enforce regulations relating to the size and weight limitations on commercial vehicles;...investigate and report motor vehicle accidents on all roads and highways outside of municipal corporations...

Joint Exhibit #3 - In applying for examination as a potential State Trooper, the applicant must be a resident of the State of Ohio or signify in writing his intention to become one upon appointment.

#### PATROL POSITION:

The Patrol, as employer, contends that the words in the Agreement stating that "members of the bargaining unit may be required to live within thirty (30) miles of their assigned post" should be interpreted to mean that the Grievant shall be required to live no further than thirty road miles from his assigned post as measured by an automobile odometer.

#### UNION POSITION:

The Union contends that the above-listed wording in the Agreement should be construed to mean that the Grievant shall be required to live no further than thirty miles from his assigned post as measured by a straight line radius method.

## DISCUSSION AND OPINION

The sole issue of this arbitration hearing as expressed by the parties is the interpretation of Article 31 which is the Residency clause of the Agreement. In particular, the parties need to know the meaning of the words "may be required to live within thirty (30) miles of their assigned post" in light of the language used, the history of the clause and the intentions of the parties as expressed in the testimony offered at the hearing.

When an Arbitrator is asked to interpret contract language, he or she first examines the plain (layman) meanings of the words. Then, the expressed, precontract intentions of the Parties are examined to ascertain whether there was a meeting of the minds on the subject. Next, the words are considered in light of their context and the wording of the Agreement as a whole.

This case involves word omission. The parties failed to specify the preferred method to be used in determining mileage in this clause. This is a relatively new contract so there are no customs or prior practices to act as precedents to help the Arbitrator in this decision. The fact that this is the first test of this clause also means that the Decision must be as clear as possible so that the parties will be able to use it throughout the duration of the Agreement.

The Patrol contends that road mileage is the only sensible way to fill out this unforeseen gap in the contract. The Patrol says that troopers mostly use automobiles for transportation so the clause could make sense only if measured on the ground using established road routes. They also argue that the reason for imposing a thirty mile limit on the trooper residences was to increase the emergency response time of the troopers.

The Union and the Grievant contend that the use of the straight line radius method is the only fair way to determine mileage for residency purposes.

Article 31 in relevant parts states that members of the bargaining unit are required to abide by all statutory residency requirements mandated for State employees; that members of the bargaining unit may be required to live within thirty miles of their post and any employees moving after the effective date of the Agreement will comply with Section 31.01 of this Article. (emphasis added)

The statutory requirement is that troopers must be a resident of the State of Ohio as mandated by Ohio Revised Code in Section 5503.01 and as exposed in the examination criteria which states that an applicant must either be a resident of the State or signify one's intentions to become one upon appointment. The Grievant at all times relevant to this hearing has been a resident of the State of Ohio.

Any employees moving or reassigned during the life of this Agreement will comply with the beginning sections of Article 31. The Grievant, as stated in the facts, has not yet moved but his proposed new residence is too many road miles from his assigned post to suit his employer, the Patrol.

Testimony by witnesses for the Patrol implied that the language in Article 31 should be interpreted to mean road miles because mileage is a bona fide occupational differentiation needed because of the nature of a Trooper's duties. The Patrol argued that troopers must be readily available for emergencies.

First of all, a Trooper's primary duties revolve around enforcement of the road laws of the State. A Trooper's job is not accident prevention but accident investigation and reporting. In an emergency, the Trooper would be dispatched from wherever he

was at that time. That could be at the post or at home or somewhere in between.

There is no way to predict where or when an accident would occur or where that Trooper would physically be at that time. The Trooper would be contacted and given instructions and directions from his location at that time.

Furthermore, the Agreement at Section 66.04 defines an emergency as any situation declared by the Governor of Ohio or the Superintendant of the Highway Patrol, which jeopardizes the health, safety and/or welfare of the State or its property or its residents.

Nothing in the Agreement says that a Trooper is subject to emergency calls at any time. In fact, the Agreement at Section 26.01 states that permanent shifts will be established and that the normal work week consists of forty hours. It does, however, state at Section 26.03 that employees will receive a meal break and be subject to emergency calls during that paid meal break.

The issues of split shifts and double-backs are likewise expressly dealt with in the Agreement. Every contingency including starting times seems to be covered. Section 26.02 says that employees must be and shall be at their assigned work site promptly. Such specificity of language clearly indicates the intentions of the parties that employees would generally be expected to work a standardized workload and be subject to possible emergency duty during their "on shift" meals.

Throughout the Agreement, the Parties use the words "may", "shall", "must" and "will". A careful reading of the whole contract reveals the use of "shall" and "will" when the desired action is mandatory and the use of the word "may" when the desired action is permissive. Most of the times "shall" and "will" are accompanied by instructions for implementation of that particular clause. For example, Article Seven states that neither Party

will discriminate and spouses shall not supervise nor evaluate their spouses. Likewise, Article Eleven states that the Union shall be provided a bulletin board and goes on to describe its purposes and permitted uses. The same with Article 12. On the other hand, at Article 13 of the Agreement, the contract states that Labor Council Staff Representatives may ride with Troopers, with the permission of Supervisors and the execution of a liability waiver. Article 20 states at Section 20.04 that an aggrieved person may bring an action under this section then it uses "shall" and "will" to notate the specific procedures for doing so.

According to the dictionaries available to this Arbitrator, the word "MAY" means possibility; opportunity; permission or chance; ability or power; wish, hope or prayer or contingency as in a clause of purpose, result, concession or condition.

"WITHIN" is defined in those dictionaries as an adverb meaning on the inside or into the interior and as a preposition meaning in the inner part of; not beyond in distance, time, degree, range, scope as in within a certain number of miles, and it is defined as being inside limits as in within the law.

Accordingly, this Arbitrator rules that the word "may" in this Agreement is used in the sense of possibility. The Parties failed to outline the procedures for enforcement of the possibility that a Trooper who moved his home would definitely be made to live within the thirty mile range of his assigned post. Consistent with the use of the word "MAY" in the rest of the Agreement, the clause means that some unknown person could make a decision that a certain Trooper would have to live within the proscribed distance from the post.

Now is the time to discuss the word "Within". You can not measure within, without setting boundaries or limits in order to determine what is included inside of the outer perimeters.

Unfortunately, highway roads are seldom straight. Even the Patrol witnesses testified that they expected a Trooper to measure his mileage by the most direct route to his destination. A person who lived on a winding road that zigzagged across the land could actually live too many road miles away while being accessible by foot within the boundaries set by the use of a radius type method.

To this Arbitrator, the only way to measure straight distance and include the term "within" is by using a radius method to set the boundaries. Use of radius allows a trooper to live in any direction from the post as long as it is within or inside the thirty mile limit.

Neither the Trooper nor the Patrol have any control over the manner in which the Highway Department determines road layouts. In the discussion of Article Thirty-One's history, it was noted that the Patrol originally desired a time limitation on residence locations. That stance was rejected by the Union. If response time had been a crucial element of this agreement, it should have been expressly stated.

An additional reason that demands the use of the radius system to measure mileage in this Agreement is the language in Article 25.02 stating that no employee will lose the opportunity to drive a marked motor vehicle to and from his or her residence as a result of the location of that residence.

Article 3 of the Agreement says that this contract should be interpreted in conformance with the Constitutions of the United States and the State of Ohio. Although neither addresses residency requirements as opposed to citizenship determinations, both forbid the denial of equal protection under the law (U.S. Constitution Article 14 and Ohio Constitution Article I Sec. 2). In this case, the proposed restrictions on a Trooper's residence construed in the most punitive way would unfairly inhibit the



Grievant's freedom of choice of associations and it unfairly restricts his pursuit of happiness and liberty.

Article 2 says that this is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. No verbal statements shall supercede any provisions of this Agreement. Interpretation of this contract as a whole requires this Arbitrator to consider, but not use, the testimony and evidence showing that oral statements between the Parties indicated that the word "may" in Article 31 would not have its natural plain meaning.

The language chosen for the final draft of the Agreement was the word "may". There is parol evidence that the word chosen would, in fact, be construed as shall. The Parties had the opportunity to reprint the contract to say exactly what they meant. When an oral agreement has been reduced to writing, it becomes binding on the Parties to that agreement. An Arbitrator cannot change or vary the terms of that Agreement, and, in this instance, the Arbitrator cannot impose limitations or obligations on the parties that are not specified by the chosen language in this Agreement. Consistent with the spirit of the Agreement, the parties should have specified the guidelines or rules for requiring a Trooper to live within the thirty mile boundaries of the post. In most other instances in which an action was expected to be definite, this Agreement includes instructions on implementation. The word "may require" are themselves of an arbitrary import signifying that it will be up to some unknown person to decide which Trooper will be required to abide by this clause in Article 31. There is no procedural due process here. A fair and equitable way to enforce the clause is mandatory.

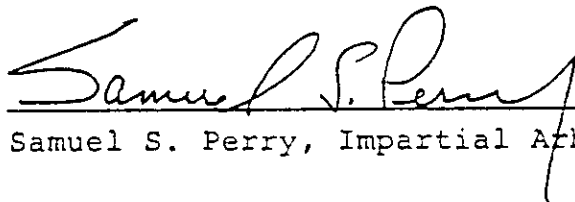
In light of the terrain and locations of the patrol stations, the fairest, most non-discriminatory manner to measure thirty miles in any direction from a particular post is to use a map that is ordinarily used to determine official locations and directions.

The use of the radius method leaves it up to the Trooper to be responsible enough to get to his job on time and the unpredictability of an emergency or its location in uncontrollable regardless of the Trooper's residence. A Trooper can not be penalized for the road layout by the Highway Department. A Trooper's job is to enforce the road laws wherever he is.

In summary, the plain meaning and contract usage of the words "may require" in Article 31 must be construed as a possibility and the use of the word "within" in this context must be construed to mean inside of specified boundaries as best measured by a circle. In this Arbitrator's opinion, the pre-contract negotiations were very involved and detailed to the extent that this loophole in the Agreement should have been closed as well.

As stated before, the newness of this contract demands a decision that is non-discriminatory and easy to apply. It is therefore the ruling of this Arbitrator that the clause "may be required to live within thirty miles of his assigned post" means that a Trooper's residence must be inside of thirty miles from his work site as measured by the radius method.

Accordingly, this grievance is upheld. The remedy is to measure the distance from the Grievant's home to his assigned post on a map. This method is recommended for usage in determinations of mileage throughout the life of the Agreement.

  
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Samuel S. Perry, Impartial Arbitrator

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration)

	)	<u>OPINION AND AWARD</u>
Between	)	
	)	
DEPARTMENT OF HIGHWAY SAFETY	)	Grievance No. G86-11
	)	
STATE HIGHWAY PATROL	)	
	)	
- and -	)	[Grievant] , Grievant
	)	
FRATERNAL ORDER OF POLICE	)	
OHIO LABOR COUNCIL	)	

AWARD OF ARBITRATION


File No. P 05 03102

The undersigned Arbitrator having been duly appointed by the Parties, in accordance with the Agreement entered into by and between the Parties, effective April 24, 1986, and having duly heard the allegations and proofs of the Parties, Awards as follows:

The Grievance filed herein by Trooper [Grievant] , is SUSTAINED.

Distance shall be measured by the radius method.

Opinion rendered, Award signed, Issued and Dated at Cleveland, Cuyahoga County, Ohio, this 15<sup>th</sup> day of December, 1986.

  
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Samuel S. Perry  
Impartial Arbitrator  
Four Commerce Park Square #600  
23200 Chagrin Boulevard  
Beachwood, Ohio 44122  
216/292-8220