

A R B I T R A T I O N
O P I N I O N A N D A W A R D

STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING
STATE HIGHWAY PATROL

and

November 3, 1987

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

ARBITRATOR: DONALD B. LEACH, appointed by the Office of
Collective Bargaining, Department of Administrative
Services, State of Ohio

APPEARANCES: FOR THE FRATERNAL ORDER OF POLICE, OHIO LABOR
COUNCIL: Paul L. Cox, Esq., Executive Director,
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FOR THE STATE OF OHIO, OHIO HIGHWAY PATROL:
Major Thomas W. Rice, Ohio Highway Patrol,
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G E N E R A L B A C K G R O U N D

Approximately a year ago, a dispute arose between the parties on payment for lunch period. Two grievances were filed relating to different classifications of employees, which were submitted for resolution to the arbitrator after being processed through the grievance procedure. Opinion and Award was issued on February 13, 1987, disposing of them.

After that decision was issued, the Employer proceeded immediately to implement its prospective provisions.

Several grievances apparently were filed, however, relating to payment for lunch periods prior to the decision. By agreement of the parties the issues presented by those grievances have been presented by stipulation to the arbitrator for resolution here.

The stipulated issues relate to two basic areas, (1) the rate of pay to be applied to lunch periods from the approximate date of the grievances in the earlier cases to the date of the February decision and (2) the types of employees to whom the retroactive aspects of the decision were applicable.

As to the first issue, the Employer had paid for lunch periods during the retroactive period at straight time. The FOP now argues that it should be paid at time and a half in those weeks when an individual was in active pay status, including the paid lunch period. As to the second basic issue, many employees claimed retroactive lunch time pay which the Employer denied, making such payments to certain of them only.

The problems or issues appear to arise from the conditions under which the two grievances were heard and which resulted in the decision of February 13. As noted, two grievances were submitted, pertaining generally to District investigators and to Radio Technicians. The parties then stipulated that other employees, referred to generally as staff officers, should be covered in the decision, on the same basic facts. That stipulation, of course, implied a problem on retroactivity.

The division between the Grievied classes and the others was set out in the forefront of the original Opinion and Award as follows:

"Two class Grievances were filed concerning separately the plainclothes District investigating officers and the Radio Technicians. Those Grievances were duly scheduled for hearing. At the hearing, the parties stipulated two other matters, (1) that evidence on sworn officers of the Employer who are assigned to staff duties would be submitted and (2) that the decision should apply to such officers. The stipulation does not include the Employer's officers in line duties, i. e., those on the road, on which there is no dispute. In addition, there

are classifications of employees who are not sworn officers and not specifically included in the Radio Technician Grievance and thus not involved here. It should be noted that Radio Technicians are not sworn officers nor are the Communications Technicians or the Dispatchers. No grievance or stipulation covers Communications Technicians or Dispatchers.

The officers who may reasonably be included in the stipulation are all those classified as Troopers and assigned to special duties, often characterized as those in the Crime Laboratory, State House Security, Planning and Research, Cleveland Operations (Driver's License Examination Service) and Investigations at General Headquarters.

In all, there are twenty-eight officers assigned to the types of duty included in the first class Grievance and in the stipulation.

There are three classifications of Radio Technician, the three reflecting different degrees of knowledge and skill with greater responsibilities attaching as knowledge and skill warrant promotion to a higher classification or warrant hiring at such higher classification. All appear to work under similar circumstances. While the named Grievant was a Class 3 Radio Technician, no evidence or view emerged indicating that a distinction as to lunch eligibility existed among the three grades. Thus, it must be concluded that all Radio Technicians are included in this matter. There are twenty-eight such Technicians."

The formulation of an award in the matter created certain problems. Remedy on the Grievances themselves obviously could be retroactive but the question arose as to those positions included in the case by stipulation. That was discussed at page 13 of the Opinion and Award as follows:

"It must be concluded that the plainclothes investigators and the Radio Technicians employed by the Employer are entitled to a paid one-hour lunch period. Under the stipulation of the parties, the sworn troopers assigned to staff positions within the Employer's employ are also entitled to one-half hour paid lunch period.

The question was also raised at the hearing as to the application of this decision prior to the effective

date of it. There seems to be no question but that, under the Agreement and the general principles applicable to arbitrators' decisions, retroactivity is almost automatic to some date consistent with the Agreement respecting grievances. Arbitrator decisions come after the grievances. The grievance complains of a contractual violation. The decision, therefore, has to speak as of the time of the grievance and correct a violation as of the date authorized by the Agreement on which the violation occurred. As to the District investigators and the Radio Technicians, the decision can be applied retroactively as noted since Grievances were filed.

The issue regarding other sworn officers in staff positions, however, is different. The stipulation did not provide necessarily for retroactivity or that the decision here should be applied retroactively as to them. No grievance was included expressly covering them. In this case, it is impossible to require any retroactive effect of this decision to any staff officers covered by the stipulation alone.

Substantial sums of so-called back pay become involved if the decision is applied to groups other than those included in the class Grievances. An arbitrator cannot order a retroactive liability against one party in the absence of a grievance, unless it clearly permits that to happen by express language. Care in that respect is clearly required in that public money is involved here and may not reasonably be ordered paid without clear authority of law and action by those with authority therefor, expressly undertaken by such delegate. The Employer's representative had authority but it is not clear that he exercised it expressly. In those circumstances, such liability can not be ordered.

As to the two class Grievances, Article 20.04 provides for such type. One here applies by its terms to "members of the Investigative Units"; the other refers to a policy directive of May 27, 1986 which pertains only to Radio Technicians. No problem has been raised respecting the proper filing and processing of either. At most, however, they can relate only to the two types of employees mentioned.

Article 20.04 also requires that a class grievance of this type be filed "within fourteen (14) days of the date on which any of the like affected grievants knew or reasonably should have knowledge of the event giving rise to the class grievance". The authority to determine grievances, which is delegated to the arbitrator under the Agreement, carries with it by necessary implication the power to determine and to order remedy to the date the cause of the grievance arose. (If that is more than fourteen days before the filing, the grievance may be subject to question procedurally.) No procedural issue having arisen, it follows that the Award must order pay to be made for unpaid lunch periods of the two classes from the date on which the Employer first failed to pay therefor, provided that such date may not precede the dates of the respective Grievances by more than fourteen days.

It follows from all the foregoing, of course, that days off with pay, such as vacation, sick leave, etc., do not involve a lunch period and thus do not require any payment for lunch breaks, either retroactively or prospectively."

The Award was as follows:

- "1. Class Grievances filed by John P. Lonier and Roger Emmet are hereby upheld.
2. By stipulation, sworn troopers assigned to staff positions within the State Highway Patrol shall be paid in the future in accordance with the employees in the two class Grievances.
3. Employees included in the two class Grievances and in the stipulated group, after the date of this Opinion and Award, shall be paid for one-half hour of lunch time each full working day, or, in the event one is absent for part of a day, then for the half-hour normally observed for his or her lunch period, provided that it falls within his or her period of work that day.
4. The employees included in paragraph 1 of this Award shall be paid one half-hour for each full work day he or she worked in the period during which no such payment was made, provided that no such payment need be made for any period prior to fourteen days before the class Grievance was filed for the class in which such person falls and provided further that where any such person

worked less than one full day, the same principle shall apply as is provided in paragraph 3 of this Award.

5. No payment for periods prior to the date of this Opinion and Award need be made to employees who are covered by the stipulation outlined in paragraph 2 of this Opinion and Award."

The parties stipulate for current decision four issues arising from the original Opinion and Award. They are as follows:

ISSUE #1: Should the members of the class awarded "back pay" as mentioned in paragraphs #1 and # 4 of the February 13, 1987 award, be paid at the overtime rate of time-and-one-half if the awarded hours placed them in "active pay status" for over forty (40) hours during the time in question?

ISSUE #2: Should the three troopers assigned to the General Headquarters Investigation Section be provided back pay under the award as outlined in paragraphs #1 and #4?

ISSUE #3: Should troopers who were temporarily assigned to various District Headquarters Investigation duties during the time in question be included in the group receiving back pay?

ISSUE #4: Should troopers who were temporarily assigned to the General Headquarters Investigation Section during the time in question be included in the group receiving back pay?

They will be dealt with hereafter.

The parties made a General Stipulation of Facts in this matter as follows:

"The Employer implemented the non-disputed portions of the Award in a timely fashion. The eleven (11) troopers assigned to the ten (10) Districts as full-time plain clothes investigators were awarded back pay, at straight time, within a short time after the award was published.

There is no dispute among the parties concerning the class of employees known as "radio technicians" except for the fact they were also awarded back pay based on straight time.

There is no dispute among the parties that the following employees are included as in the stipulated group as "staff positions", and therefore not subject to back pay of any kind, as indicated in paragraphs 2, 3 and 5 of the February 13 award. These employees are pointed out in the Employer's brief at page 2:

Assignment	# of Troopers Assigned
State House Security	1
Planning and Research	2
Highway Patrol Academy	5
Crime Laboratory	2*
	(*at the time of the grievance)
Cleveland Operations	2**
	(**the uniformed troopers assigned)

The parties agree the following specific positions are the only positions in question:

GHQ Investigation	3
District Headquarters Investigation	***
	(*** - exact number to be determined, only those troopers temporarily assigned to District Headquarters investigation during the time in question)

Finally, the parties agree that all plainclothes investigators, whether assigned to General Headquarters or to the various District Headquarters, perform the same basic duties, consisting primarily of investigating crimes which occur on state owned or leased property, and auto theft and related crimes."

I S S U E #1

Specific facts pertaining to this issue were stipulated as follows:

"The Employer has awarded back pay to those employees clearly in the classes included in the award. This back pay was paid at the individual's normal rate of pay, with the maximum pay awarded in one week being two and one-half hours. No overtime pay was awarded.

The applicable contractual language is:

ARTICLE 61 - OVERTIME

61.01 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 or 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. Such compensatory time shall be granted on a time and one-half (1-1/2) basis.***

61.02 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, sick leave and personal leave.

C O N T E N T I O N S

The Lodge points to the contractual language as basis for argument that, had the lunch time been paid for correctly, as ordered by the arbitrator, the employees involved would have been paid time and a half for hours in excess of forty in a week. Thus, if forty were worked in addition to the lunch period, the total time to be compensated would be forty-two and a half, the hours over forty being compensable at time and a half.

The Employer argues that the Arbitrator was precise in detail about the disposition of the matter and it follows that had he intended the retroactive amount to be paid at time and a half, he would have so ordered in specific language. Certainly, it says, the Arbitrator was aware that inclusion of the lunch period as paid time would cause time and a half for overtime in most weeks. On the other hand, he made specific direction on all other matters but omitted mention of that item. Without specific mention, the only reasonable view is that straight time was to be paid only. The contractual language requires time and a half when one is on active pay status for over forty hours in a week. Active pay status, however, does not

include retroactive awards for hours not worked. Finally, the evidence was that the two grievants in that case did not do any work during their lunch periods or, if one did, he had already been paid for it. Thus, there was no need to award premium pay. Finally, the FOP specifically asked for "back pay" to be included in the award. In short, the FOP didn't ask for anything more than pay. It did not ask for premium pay.

D I S C U S S I O N

Paragraph 4 of the Award ordered retroactive payment of one-half hour a day for lunch period to those in certain jobs, subject to stated restrictions.

How time on "active pay status" was to be paid was not an issue presented to the arbitrator. The only question was whether or not the lunch time was compensable. It was found to be so.

How it was to be compensated obviously depended on other provisions of the collective bargaining agreement. Not having had a question or questions presented there which pertained to rate of pay, the arbitrator could not reasonably deal with that potential question.

Two problems in addition to compensability were actually dealt with, one having to do with contractual limitations on retroactivity, a provision specifically referred to in the hearing, and the other a general description of days on which lunch time would not be compensable. The former was necessary to limit the scope of retroactivity in conformity with pertinent items in the Agreement which were also discussed in the hearing. The latter was necessary to avoid possible ambiguity under which claim for paid lunch period might be made when work did not take place at all or did not take place during an appropriate period. In other words, the latter restriction was included for clarity, not as an independent provision respecting substantive rights.

Ordinarily, parties to an arbitration proceeding consider the principles decided and, where ordered, apply them retroactively as if they had pertained throughout the retroactive period. That was the underlying assumption of the discussion in the Opinion. The Opinion was issued on the basis of generally accepted principles respecting retroactivity of awards, i. e., that the grievance alleged breach of contract and where that is found to be valid, the remedy must go back to the date of the breach, unless prevented by other provisions of a document or of the law. Thus, the retroactive part of the order established the contractual principles as of the approximate dates

of the grievances. The principles having been established, they had to be applied throughout the retroactive period as if they had been understood originally.

An order respecting the application of the altered principles could not be attempted realistically. The characteristics of work weeks vary in every conceivable respect. An individual might work at one rate of pay part of a week and at another in the rest, for example, a move from one shift to another with shift differential involved.

By way of further example, a question can arise where one is on leave of absence part of a week (hypothetically twenty-four hours) and then is on active duty for eight hours each of two days with a paid lunch period each such day in addition.

Fundamentally, the number of hours of pay status of each affected individual each week varies and is a matter of fact related to the contractual requirements, to be determined for each week separately.

Only an arbitrator who is omniscient respecting every possible work week eventuality could provide for all possible contingencies in an award.

More importantly, the arbitrator attempting such task would effect rulings on matters not presented or argued by the parties. That probably would violate the arbitration provisions of the Agreement in that his jurisdiction is actually that which is conferred on him by the parties.

Thus the parties apply the principles of the award retroactively, apply the applicable provisions of the Agreement to those principles and determine the amount of back pay after analysing each work week in the retroactive period.

In light of the foregoing, it follows here that the lunch time pay during the retroactive period depends on the hours in active pay status under Article 61 that each employee spent each week plus the lunch period time, where applicable under the Award.

The two together yield the amount of additional pay due for a particular week. The total may or may not exceed forty. If it doesn't, the pay due is at straight time. If it does, the pay is at time and a half for such time as exceeds forty. In short, the amount to be paid is determinable by assuming the lunch time to have been compensated at the time in the light of the facts of that week and the total hours on pay status. Lunch time is paid status time when compensable under the original Opinion.

A W A R D

1. Payment for lunch time in the retroactive period shall be determined by adding together all pay status in a week, including lunch period time, where applicable under the Award of February 13, 1987, and when the sum exceeds forty, the excess shall be paid at time and one-half.
2. Jurisdiction is retained to carry this Award into effect.

I S S U E S #2, 3 and 4

These three issues present the same fundamental question, i. e., the scope of the retroactive provisions of the Opinion and Award of February 13, 1987 and the employees included in the stipulations.

The stipulations respecting the three issues are:

"Presently, and at the time of the award, three (3) troopers work in the Investigation Section of General Headquarters.

The Employer, in its good faith compliance with the Award, did not provide these three employees with back pay as outlined in paragraphs 1 and 3 of the award."

"During the time in question, April 28, 1986 through February 13, 1987 (the date of the award) several troopers normally assigned to patrol duties were temporarily assigned to various District Headquarters to conduct investigations.

During the time these troopers were temporarily assigned to the District Headquarters, they performed similar duties as the permanently assigned District Headquarters, and worked a nine-hour shift with an hour unpaid lunch period.

The troopers who were temporarily assigned as investigators were not awarded back pay as outlined in paragraphs 1 and 3 of the February 13 award."

"The Employer routinely assigns field troopers to work as plainclothes investigators at the General Headquarters Investigation Section for a period of ninety (90) working days. During the time in question, several troopers worked in this capacity. While assigned to this temporary duty, these troopers performed duties similar to those of the permanently assigned investigators, and worked a nine hour shift with an hour unpaid lunch."

The contentions of the parties are covered in the Discussion below and are not repeated here.

D I S C U S S I O N

It must be reiterated that the retroactive parts of the order could only apply legally to those classes of employees reflected in the two grievances in that case and that the other so-called staff officers could not be awarded retroactive remedy because the stipulation of the parties at that time was not precise enough to warrant conclusion that the State of Ohio intended to be bound to retroactive compensation for those who were brought into the case by stipulation only.

That distinction arose because a government is not easily obligated to pay out public funds, which each custodian must handle as trust funds. What might be possible with private employers is not automatically true of the State. Since clear authority to order payment by the State was not expressly given in the stipulation, the Arbitrator was constrained to restrict the Award in that case to the categories covered by the Grievances.

The classes of Grievants were described as (1) the plainclothes District investigating officers and (2) the Radio Technicians. While some of the subsequent language used as to the first category did not specify the District investigators, that had to be understood because the stipulated group included Investigators at the Central Office. That excluded them from the Grievance group.

No doubt the Central Office investigators do the same type of work as the District ones, but the Grievance applicable to the latter was supported by detailed evidence from one such investigator who was deemed representative of the class. At the same time, the evidence respecting the General Headquarters investigators was quite general and offered in connection with the other staff officers.

Thus, there was no reason to include Central Office investigators in the grievant class and, in fact, every reason to include that job in the stipulated class, as was done.

It follows that the three troopers assigned to the General Headquarters Staff should not be awarded back or retroactive pay.

It follows also that those on temporary assignment as General Headquarters investigators would not be entitled to retroactive pay for lunch period. The class of such investigators was not included and those on temporary assignment cannot receive more than those who were regularly so assigned.

The same principle but with the opposite result applies to those on temporary assignment as District Headquarters investigators. That class was represented in the grievance and they were not in the stipulated group. The class naturally includes all those who held that assignment while they held it. A person transferred into that group temporarily or permanently became one of the class for the time he occupied that assignment. As such, he was represented in the class grievance and is entitled to the same retroactive benefits as the others in the class.

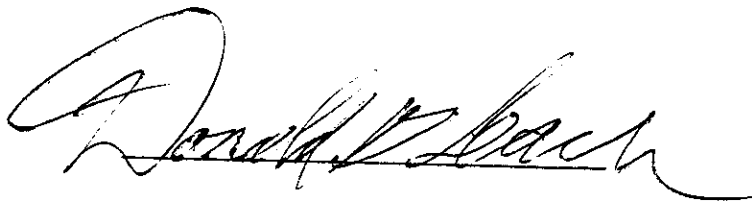
In summary, the answers to Issues #2 and #4 are no and the answer to Issue #3 is yes.

A W A R D U N D E R I S S U E S #2, #3 and #4

1. The three troopers assigned to the General Headquarters Investigation Section should not be provided back pay under the Award of February 13, 1987.

2. The troopers who were temporarily assigned to the various District Headquarters Investigation duties during the retroactive period prescribed in the Award of February 13, 1987 should be included in the group receiving back pay as District investigators.

3. The troopers who were temporarily assigned to the General Headquarters Investigation Section during the retroactive period as prescribed in the Award of February 13, 1987 should not be included in the group receiving back pay.

A handwritten signature in cursive script, appearing to read "Donald B. Leach", written in dark ink.

Donald B. Leach