

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:)

STATE OF OHIO, DEPARTMENT OF HIGHWAY)
SAFETY, STATE HIGHWAY PATROL)

-and-)

FRATERNAL ORDER OF POLICE,)
OHIO LABOR COUNCIL, INC.)

HARRY J. DWORKIN,
ARBITRATOR

RE: OCB GRIEVANCE NO. 86-717
REPORT BACK PAY GRIEVANCE

A P P E A R A N C E S

On Behalf of Employer

LT. DARRYL L. ANDERSON
SGT. RICHARD CORBIN
CAPT. DON GOODMAN
RODNEY SAMPSON

Advocate
Personnel/Labor Relations
Cambridge Post
Observer

On Behalf of Union

PAUL L. COX, ESQUIRE
ED BAKER
CATHY PERRY

Chief Counsel
Staff Representative
Legal Assistant

PRELIMINARY STATEMENT AND BACKGROUND:

The grievant is a member of the State Highway Patrol, and seeks four hours of report back pay for time spent in appearing for proficiency testing (alcohol test) on September 18, 1986,

following completion of his regular eight hour tour of duty. As a threshold observation, the grievant did receive 47 minutes pay at the overtime rate for "portal-to-portal pay" which consisted of travel time from the grievant's home to the Ironton Post, and return, and time involved in testing. However, the F.O.P. contends that the grievant was contractually entitled to four hours of pay, at the overtime rate, under the "report back" provisions of the Agreement. The issue to be resolved by the Arbitrator is whether the time involved qualified for report back pay. The parties have stipulated the issue before the Arbitrator, in the following form:

"Was the Employer correct in paying the grievant portal-to-portal overtime for B.A.C. proficiency testing, rather than Report Back Pay, on September 18, 1986? If not, what shall the remedy be?"

There is no dispute but that, the grievant received 47 minutes overtime pay for time spent in traveling from his home to the post, participating in the test, and returning to his home. The F.O.P. claims that such payment fell short of the Employer's contractual obligation, and that the grievant was entitled to four hours of report back pay. The Union has indicated that, in event the Arbitrator should rule in its favor, and uphold the grievance, that the award need not encompass a determination as to whether such time should be paid at straight time, or at the overtime rate.

The grievant was assigned to the New Philadelphia Post. On September 18, 1986, the grievant was scheduled for a B.A.C. Proficiency Test. This test is conducted annually, its purpose

being to assure that each officer is observing the regulations, and is proficient in the use of testing instruments. A schedule was affixed to the bulletin board at the patrol post ten days in advance of the scheduled test. The date coincided with the time the representative of the Ohio Department of Health would appear at the post for the purpose of proficiency testing. The testing procedure involved both the B.A.C., and Intoxylizer.

The grievant was scheduled to report for the purpose of testing, which he dutifully complied with. He was paid 47 minutes at the overtime rate; however, the F.O.P. claims that he was entitled to four hours of pay for the time involved. As a matter of practice notice of the proficiency testing is posted on the bulletin board at least ten days in advance. This circumstance is advanced by the Union as indicating that the occurrence was not unforeseen, was not of an emergency nature, and was not unscheduled work.

Article 61 - Overtime, provides for "report-back pay", as follows:

§61.04 Report-Back Pay

1. "Report-Back" occurs when a member of the bargaining unit is called to return to work to do unscheduled, unforeseen or emergency work after the member has left work upon the completion of the regular day's work, but before he or she is scheduled to return to work.
2. When a member reports back, he or she shall be paid a minimum of four (4) hours pay at his or her regular rate, including shift differential if ordinarily paid.
3. Regularly scheduled shift hours following report back are to be paid at straight time.

Article 26 is entitled Hours of Work and Work Schedules, and requires, in part, as follows:

§26.01 Permanent Shifts

Permanent shifts shall be established. Shift assignments will be made by the facility administrator on the basis of seniority on March 1st and September 1st of each year. The assignments made on March 1st will be for the period from September 1st to February 28th, and the assignments made on September 1st will be for the period from March 1st to August 31st. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur. The normal work week shall be forty (40) hours.

POSITION OF FRATERAL ORDER OF POLICE:

The F.O.P. points out that Article 26 mandates that employees be assigned to permanent shifts, and, assignments made at each facility or post, "on the basis of seniority". Assignments continue for periods as designated in Section 26.01. The contract language requires that, "shift assignments will be permanent and no rotation of shifts will occur." Accordingly, a master schedule applies to each facility, which prescribes the work and hours for each unit on a six month interval basis.

In the judgment of the F.O.P., the contract language, and manifest intent of the parties require that, any work outside of the posted schedule must be regarded as "unscheduled" work, and subject to report-back pay. As regard the circumstances relating to the occurrence that gave rise to the grievance, in the judgment of the Union, the B.A.C. proficiency testing procedure must be

characterized as "unscheduled work". This reasoning is substantiated by the language of Article 26, which deals with permanent work schedules to which each unit, or officer is subject. Accordingly, the work and time required in submitting to proficiency testing was "unscheduled" work, inasmuch as it was outside the grievant's permanent shift assignment. Therefore, the time involved reasonably falls within the "report-back pay" provision (Section 61.04), since, the grievant was required to "return to work to do unscheduled, unforeseen work", after completion of his regular day's work.

The F.O.P. reasons further that to uphold the position of the State Highway Patrol would substantially dilute the contractual recognition of "scheduled" vis-a-vis "unscheduled" work. The F.O.P. urges that, any work outside of the permanent, posted work schedule of an officer "must be deemed unscheduled work and subject to report-back pay." Any work performed outside of the individual's permanent schedule constitutes unscheduled work, and qualifies for "report-back" pay. Accordingly, the State Highway Patrol violated the Agreement by limiting compensation for time spent in reporting and submitting to the proficiency test to 47 minutes, at overtime. The Union maintains that pursuant to Section 61.04, the grievant was entitled to payment of four hours irrespective of the time involved, inasmuch as it involved "unscheduled" work after the officer had completed his regular day's work.

POSITION OF STATE HIGHWAY PATROL:

The Employer focuses on the language of Section 61.04, and reasons that, the clear and manifest intent of the parties was to provide for report-back pay in situations where an employee is called to return to work "to do unscheduled, unforeseen, or emergency work" after completion of his regular day's work. However, the grievant was not involved in either unscheduled, unforeseen, or emergency work. His appearance for proficiency testing had been scheduled, and notice nailed to the bulletin board at the post at least ten days prior to his appearance on September 18, 1986.

The State Highway Patrol points out that, Section 61.04 dealing with "report-back pay" was recommended by Dr. Harry F. Graham, Fact-Finder; however, in his discussion he dealt generally with the subject of report-back pay in overtime situations. Dr. Graham recommended that overtime be paid at 1-1/2 after 40 hours, and that four hours call-in pay, or "stand-by pay" be paid. Included in Dr. Graham's recommendations in issue 23, is the following:

"The proposal of the Union contemplates there be paid call in pay. Such pay is so common as to be unremarkable in any way. Call in is commonly paid at the rate of four (4) hours pay. It is recommended that B of the Union proposal in R67, Overtime be included in the Agreement. It is recommended that Section B 2 read 'When a member is called in, he or she shall be paid a minimum of four hours pay at his regular rate.'"

As is noted, however, Dr. Graham did not delineate, or specify the situations that would require implementation of the report-back pay provision as distinguished from overtime.

The position of the State Highway Patrol is essentially as set forth by Major Rice at Level III of the grievance procedure:

"First, the proficiency testing required by the Ohio Department of Health was a scheduled detail, it was not unforeseen and was certainly not an emergency.

Consequently, clear contractual language indicates this situation does not qualify for report-back pay.

Secondly, the Department of Health specifies that their annual contract with all breath testing permit holders consists of training, both for updating and refreshing, as well as testing. The contract clearly states that 'employees will adopt the schedule of the program', as it applies to training programs.

For the above reasons, management was correct in paying the grievant overtime for the training session and denying him report-back pay for an incident that was neither unscheduled, unforeseen nor an emergency."

ARBITRATOR'S FINDINGS AND OPINION:

The grievant was required to appear for proficiency testing, outside of his working hours, which involved a total time of 47 minutes, and for which he was paid at the overtime rate. There is no issue here presented as regards the grievant's obligation to submit to the proficiency testing which is conducted

annually by a representative of the Ohio Department of Health. The Union has maintained that, in effect, the grievant was "called to return to work to do unscheduled, unforeseen work" after he had left work, and after completion of regularly scheduled day's work. Under these circumstances the F.O.P. reasons that Section 61.04 was applicable, and required payment of four hours "report-back pay".

Management, however, disputes the claim of the Union that there is here presented a "report-back" situation; that, "report-back" occurs when a member of the bargaining unit is required to "return to work" to do unscheduled, unforeseen, or emergency work after completion of his scheduled tour of duty. In the instant case, the proficiency testing, which involved a total of 47 minutes, did not qualify as either "unscheduled, unforeseen or emergency" work, and therefore, did not qualify for report-back pay. In support of its contention, the Employer notes that, the grievant had been "scheduled" for the proficiency testing required by the Ohio Department of Health some ten days prior to September 18, and he was so informed by a notice posted on the post bulletin board. Accordingly, his appearance for proficiency testing constituted a "scheduled detail" and did not qualify for "report-back" pay. Moreover, the proficiency testing constituted training for holders of breath testing licenses and, "the contract clearly states that 'employees will adopt the schedule of the program', as it applies to training programs." Inasmuch as the grievant was a participant in the proficiency

testing procedure, he was subject to overtime payment for the time involved; he did not qualify for report-back pay. The State Highway Patrol requires that officers take the B.A.C. Proficiency Test (alcohol testing) twice each year, in order to assure that officers are proficient in operating the alcohol testing equipment.

It appears to the Arbitrator from an examination of the evidence, testimony of witnesses, and documentary exhibits that, the parties are chiefly in disagreement as to whether the appearance of the grievant on September 18, to participate in the proficiency testing procedure, was "scheduled" or, "unscheduled" assignment so as to be subject to report-back pay. In support of its position, the F.O.P. reasons that:

"...There is only one schedule, the master schedule. The duty assignments such as Joint Exhibit 4 are prepared from the master schedule. When troopers are bidding on their schedules pursuant to Article 26, Hours of Work and Work Schedules, they have no way of knowing when the B.A.C. testing will occur." (F.O.P. Post Hearing Brief, page 2).

Reasoning further, the F.O.P. contends that the terms "unscheduled, unforeseen or emergency" are not interchangeable, and must be applied separately to factual situations that fall within the context of such terms. Moreover, appearance for the B.A.C. proficiency testing must be deemed as "unforeseen" because the employees do not know when it will occur. It is also "unscheduled." The Union reasons that;

"...The contract is not ambiguous, in fact it is very clear. The employer is attempting to use

intent as a means to avoid the clear language of the contract. Their argument is without merit." (F.O.P. Post Hearing Brief, page 3).

The Employer has countered that, the proficiency testing which the grievant appeared for on September 18, 1986, was "scheduled" as distinguished from "unscheduled" work. Moreover, the attendance was not "unforeseen"; therefore, the report-back provision did not apply, and payment of 47 minutes "portal-to-portal" pay at the overtime rate was appropriate. The State Highway Patrol states that, "neither party intended for report-back pay to apply in this situation."

The Arbitrator has carefully considered, and evaluated the circumstances including the positions of the parties as set forth in the evidence, and well reasoned post hearing briefs. As is frequently the case, the contract language does not set forth with specificity the myriad of factual situations which may bring into play the contract language, and particularly, Section 61.04, governing "report-back pay". The Arbitrator must therefore construe, interpret, and apply the contract language negotiated by the parties in a manner consistent with its manifest intent, and the context of the parties' relationship. A further guideline that should be observed is, that, the terms and conditions of employment as set forth by the parties in their agreement, must be accorded logical, and reasonable effect.

Bearing in mind the foregoing principles of contract construction, and guidelines, the Arbitrator notes that, Section 26.01 clearly provides for "permanent shifts" and that, permanent shift assignments once established on the basis of

seniority, on a semi-annual basis, will constitute the permanent shift assignment of each unit (officer). The foregoing language was clearly designed to establish permanent shifts, and was so limited. A reading of the Section in its entirety fails to warrant a conclusion that the parties intended thereby to constitute any and all work performed outside of a permanent shift as qualifying for report-back pay.

The parties have dealt with the subject of report-back pay in Section 61.04, and have specifically provided that four hours shall be due and payable when a member of the bargaining unit is called out to perform "unscheduled, unforeseen or emergency work". The parties have not defined situations in which an employee would be considered as having performed "unscheduled, unforeseen or emergency work" so as to qualify for four hours of pay. In most situations, the determination of the category in which the after hours work falls is readily ascertainable; however, in other situations, as is here the case, an understandable dispute may arise as to whether the work falls within any of the three situations that qualify for report-back pay. Disputes of the type and character here presented must necessarily be decided on a case-by-case basis, dependent on the circumstances, and characteristics of the work assignment.

As regards the situation that gave rise to the grievance, the Arbitrator must conclude that, the appearance of the grievant for B.A.C. testing did not qualify for report-back pay. Although he performed work outside of his permanent work schedule, notice of the assignment was posted some ten days prior to the date of

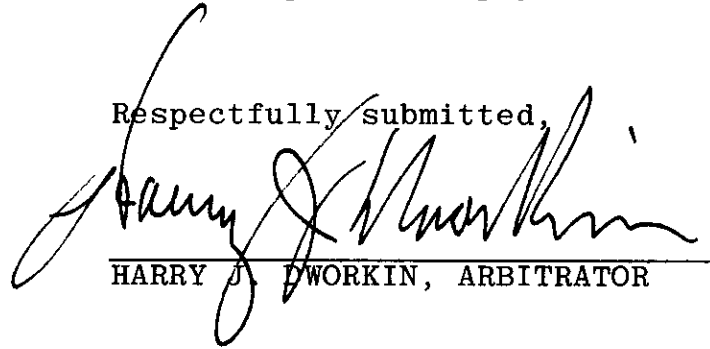
his appearance. Under the circumstances, his appearance cannot be considered as "unscheduled", nor was it unforeseen, or of an emergency nature. The Arbitrator's decision is confined to a determination that, the event that gave rise to the grievance was not unscheduled or unforeseen, as contemplated by Article 61.04, and therefore did not qualify for report-back pay.

As pointed out by the Employer, a number of situations suggest themselves that would fall within the conditions contemplated by the parties so as to warrant "report-back pay" including, "accidents associated with adverse weather conditions, insurrections at correctional facilities, hazardous material spills, or other types of on-road emergencies" which would necessitate officers reporting outside of their work schedules, thereby qualifying for report-back pay. However, the B.A.C. proficiency testing does not fall within these situations.

A further factor that is here relevant, is past practice. The fact is, that, B.A.C. Proficiency testing procedures have been conducted for over the past 15 years, during which officers were scheduled outside of their normal work hours; however, there is no evidence of any prior grievances having been filed and none since the signing of the agreement. The language of Section 61.04 dealing with "report-back pay" does not warrant its extension to situations not within the plain meaning of the terms employed by the parties. The Arbitrator is not warranted in expanding the application of the report-back pay language to include a "scheduled" event; in this instance, the grievant was scheduled

some ten days prior to his appearance. The indisputable fact is, that, the B.A.C.'s Proficiency Testing procedure was "scheduled", it was not unforeseen, and neither party contends that it involved an emergency. The grievant was properly paid for 47 minutes at the overtime rate, and report-back pay was not warranted.

Respectfully submitted,



HARRY J. DWORKIN, ARBITRATOR

A W A R D

I.

The Employer was correct in paying the grievant portal-to-portal overtime for the 47 minutes required in attending the B.A.C. Proficiency Testing procedure on September 18, 1986, outside of his scheduled working hours, and, report-back pay was not warranted inasmuch as, the event was not "unscheduled, unforeseen, or emergency work" so as to qualify for report-back pay;

II.

The grievance is therefore denied.

AWARD, SIGNED, ISSUED, AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 26th DAY OF SEPTEMBER, 1988.


HARRY J. DWORKIN, ARBITRATOR