STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF HUMAN SERVICES, CINCINNATI DISTRICT OFFICE (Cincinnati, Ohio)

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE: Stan Tyirich

CASE NUMBER: G-86-0497

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: September 28, 1988

APPEARANCES

For the Employer

Tim Wagner	Observer
Jack Burgerss	Observer
Egdilio Morales	Labor Relations Specialist
Terry Piwnicki	Labor Relations Specialist
Margaret L. Pipes	Quality Assurance Supervisor
Barbara Kleefeld	District Director
Rodney Sampson	Advocate

For the Union

Michael Temple	Staff Representative
Stan Tyirich	Grievant
John T. Porter	Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Human Services, Cincinnati District Office, Cincinnati, Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit #1).

The arbitration hearing was held on August 3, 1988 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUE

The stipulated issue in this grievance: Did the Employer violate Article 13 of the Agreement by not paying the Grievant overtime?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the

inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."
(Joint Exhibit 1, Pg. 7)

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME.

"...

Section 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designee has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designee shall have the right to require the least senior employee(s) who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable time, if so requested.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute rest period between the shift and the overtime or as soon as operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the employee will be credited as if he/she had

refused the overtime.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime. Emergency Overtime. (sic)

In the event of an emergency as defined in Section 13.15 nothwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency requirements, regardless of the overtime distribution.

...

Section 13.10 - Payment for Overtime

All employees except those in current Schedule C shall be compensated for overtime work as follows:

1. Hours in an active pay status more than forty (40) hours in any calendar week shall be compensated at the rate of one and one-half (1 1/2) times the regular rate of pay for each hour of such time over forty (40) hours;

2. 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.

..."

(Joint Exhibit 1, Pgs. 20-21).

ARTICLE 42 - SAVINGS

"Should any part of this Agreement be declared invalid by operation of law or by a tribunal of competent jurisdiction, the remainder of the Agreement will not be affected thereby but will remain in full force and effect. In the event any provision is thus rendered invalid, upon written request of either party, the Employer and Union will meet promptly and negotiate a mutually satisfactory modification withing thirty (30) days."

(Joint Exhibit 1, Pg. 62)

JOINT STIPULATIONS OF FACT

The Parties stipulate that if the FLSA is found to be applicable, the overtime hours worked by the employee, totaled 54.5 hours. This total was calculated by taking the employee's beginning and ending times and deducting the amount of time taken by the employee as a lunch period if the lunch period was at least one-half hour in length. If the employee's lunch period was less than one-half hour, then the portion of the period which the employee did not work was also included in the total. Overtime was only calculated when the employee actually

worked over 40 hours in one week. Working through the Grievant's two 15-minute breaks was not counted by the Union in calculating the Grievant's overtime pursuant to the FLSA procedures. The Employer does not necessarily agree that the FLSA applies to the instant case. Further, even if the Arbitrator finds that the FLSA is applicable, the Employer does not necessarily agree with the Union's interpretation of the FLSA and the calculations discussed in the preceeding paragraphs.

Rodney Sampson

John Porter

CASE HISTORY

Stan Tyirich, the Grievant, has been employed by the Ohio Department of Human Services, Cincinnati District Office for approximately eight (8) years. At the time of the grievance, the Grievant was classified as a Case Control Reviewer. In this capacity, he examined the eligibility of public assistance cases by traveling to County Welfare Offices. He also interviewed welfare recipients to determine eligibility, evaluated the data, and filed final reports.

Barbara Kleefeld, District Director, testified that prior to August, 1986, the Employer utilized a timekeeping method laden with reporting accuracy deficiencies. The existing process consisted of a number of stages. First, the employees filed a weekly itinerary with their supervisors as to where they expected to be during the recording period. Employees were also required to submit leave slips. Second, adjustments were typically necessary to correct lags and differences in the time reports that were submitted by employees. A series of payroll

deduction documents were introduced at the hearing supporting the existence of timekeeping deficiencies (Employer Exhibit 3).

On or about August 4, 1986, the Employer initiated a new Time Report Form. This Form, and the procedures used to enter the data, provided more accurate information concerning an employee's work schedule. Employees, more specifically, were asked to designate their assignments when they were out of the office. Kleefeld stated that the policies underlying the new Form were not any different than those in effect prior to the implementation. She emphasized that the Form merely modified the way time was reported by employees.

A number of meetings were held to inform the office managers about the new system; these managers held subsequent meetings with the staff. Approximately two (2) weeks after the initial implementation, a number of questions arose concerning the Form. As a consequence, Kleefeld authorized a memorandum on August 18, 1986 which dealt with Office Work Schedules and the Time Report Form (Joint Exhibit 5) in an attempt to answer some of the most frequently raised questions. The following statement concerning overtime is of particular import:

"...

All district staff overtime must be prior authorized by the supervisor and the district director except for emergency situations.

..."

(Joint Exhibit 5, Pg. 2)

On September 10, 1986, the Grievant authorized the following Compromise Proposal (Employer Exhibit 5) and sent it

to Kleefeld for her consideration.

"...

For the pay period ending 8-16-86, I submitted a time accountability form on which I reported over 5 hours overtime. However, in my paycheck for that pay period, I did not receive the overtime pay. I, therefore, have the basis for a grievance on the issue of overtime. In lieu of a grievance on the issue of overtime, though, I would like to propose the following compromise:

I, and most of the others I have talked to, don't really want overtime but we do want flextime. If you'll agree to work out with us a flextime policy for this office, I'll agree not to file a grievance on the issue of overtime. If an acceptable flextime policy is worked out between us, Richard Reigel will withdraw his grievance on the time accountability requirement. In other words, if you'll give us flextime, we'll not press the overtime issue.

We believe that flextime and time accountability are compatible concepts. However, we also believe that your current time accountability policy is aimed at preventing overtime. If that belief is correct, you will have achieved your goal through the above compromise.

I see no reason why flextime could not be implemented in this office immediately. If it were implemented, it might serve as the role model for a state-wide flextime policy.

May I please have your written response by Friday 9-12-86 as that is my last day to file a grievance on the overtime issue.

Thanks for your consideration."
(Joint Exhibit 5, Pgs. 1-2).

It should be noted that even though the Grievant labeled the above document a "Compromise," a formal grievance had not been filed. Thus, it is not viewed by this Arbitrator as a formal settlement attempt.

Margaret L. Pipes, the Grievant's Quality Assurance Supervisor, testified that she had several meetings with the Grievant concerning the overtime issue. The first meeting allegedly took place on September 12, 1986 (Joint Exhibit 2,

Pgs. 2-3). The Grievant notified Pipes that the purpose of the meeting was to file a grievance. He indicated that for the pay periods ending 8-16 and 8-30 he worked more than forty (40) hours during the pay period, noted this information on his time sheet, yet did not receive any compensation for the overtime. Pipes contended that the Grievant was told that overtime compensation could not take place unless it was prior approved. The second meeting took place on September 17, 1986 where Pipes and the Grievant allegedly discussed the same issues, with Pipes denying the contentions on similar grounds (Joint Exhibit 2, Pg. 5).

On September 22, 1986 the Grievant submitted the following "formal" grievance:

"...

STATEMENT OF GRIEVANCE

List applicable violation: AFSCME/OCSEA and Stan Tyirich grieve Management is in violation of Article 13, Section 13.10 and all other pertinent articles and sections of the Contract. AFSCME/OCSEA and Stan Tyirich make such claim when on August 15, 1986 and August 29, 1986 Stan Tyirich reported having worked overtime, but did not receive compensation or payment as outlined in Section 13.10.

Adjustment required: AFSCME/OCSEA and Stan Tyirich request that Stan Tyirich be paid as outlined in Section 13.10 and that AFSCME/OCSEA and Stan Tyirich be made whole.

..."

(Joint Exhibit 2, Pg. 1)

On September 30, 1986 a Step 2 meeting took place. Kleefeld issued the following denial on October 6, 1986:

"...

The issue of the grievance is Article 13.10, overtime payment provisions, of the contract. Mr. Tyirich states he is entitled to overtime for the 8/3/86 - 8/16/86 to 8/17/86 - 8/30/86 pay

periods based on time logs submitted by him. Further, he states that Article 13.10 contains no provision for prior management approval of overtime. The immediate supervisor, Margaret Pipes, stated that she had neither determined any need for overtime as referenced in Article 13.07 nor prior approved such time for the periods in question.

Article 13.10, overtime payment, is dependent upon Article 13.07, overtime. Therefore, the provisions for overtime payment have not been met. Also, it is noted that part of the overtime claimed for the 8/3/86 - 8/16/86 period includes break periods not taken by the employee. As the employee is paid for break periods within the work day, no additional payment for break periods can be made.

..."

(Joint Exhibit 2, Pg. 4)

The Grievant, in his capacity as Union Steward, asked the Employer to schedule a Step 3 discussion (Joint Exhibit 2, Pg. 6). On October 23, 1986, the Employer denied this request for a Step 3 discussion (Joint Exhibit 2, Pg. 7). The denial, moreover, was based on the Employer's Step 1 response. The Parties were unable to resolve the dispute in subsequent steps of the grievance procedure (Joint Exhibit 2, Pgs. 8-10). The grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

A procedural defect was raised by the Union during its opening statement. The Union argued that the Employer violated Step 3 of the grievance procedure (Joint Exhibit 1, Article 25 - Grievance Procedure, Section 25.02 - Grievance Steps, Step 3 - Agency Head or Designee, Pg. 39) because the Employer refused to hold a Step 3 meeting. The Union maintained that the Parties never mutually agreed to waive the meeting requirements, and

thus, the Employer violated this provision.

It is the position of the Union that the Employer violated Section 13.10 of the Collective Bargaining Agreement (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.10 - Payment for Overtime). This provision requires that all employees, except those in current Schedule C, must be compensated at the rate of one and one-half (1 1/2) times the regular rate of pay, when they are in active pay status for each hour in excess of forty (40) hours per week. The Union also maintained that active pay status includes hours worked as well as vacation leave, sick leave, and personal leave. The Union contended that the Grievant worked more than forty (40) hours per week and was on active pay status when he requested his overtime pay (Union Exhibit 1). The Union emphasized that the Agreement (Joint Exhibit 1) does not contain any specific language dealing with prior approval for overtime worked by an employee. Furthermore, the Parties failed to introduce any bargaining history which indicated that prior approval is required.

Two (2) related but distinct arguments were raised by the Union regarding the need for prior approval of overtime requests. First, since the language regarding active pay status was viewed as ambiguous, the Fair Labor Standards Act must be used to provide this ambiguous provision with meaning. The Union referenced Interpretive Bulletin, Part 7852, Section 785.11 as the appropriate guideline to determine whether prior approval is necessary. Work not requested by an employer but

which is suffered or permitted is deemed to be work time under this provision. The Union maintained that the Grievant voluntarily agreed to work at the end of his shift, was permitted to do so by the Employer, and thus, must be paid for all time worked in excess of forty (40) hours. When an employee works unrequested hours the Union viewed the Employer's remedy as quite limited. The remedy, more specifically, requires the Employer to discipline the Grievant, but the Fair Labor Standards Act also requires the Employer to pay the Grievant for the hours he has worked.

Second, an alternative argument raised by the Union is that if arguendo there is a conflict between Section 13.10 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.10 - Payment for Overtime) and the Fair Labor Standards Act, then the Act should control. The Act is a federal law which overrides the provisions of the Agreement (Joint Exhibit 1). External law, more specifically, must be considered when an arbitrator interprets a collective bargaining agreement and should be read into the contract if a conflict exists. The Union contended that the Parties anticipated such an occurrence when they negotiated Article 42 (See Pg. 4 of this Award for Article 42 - Savings). This provision recognizes the possibility that the operation of law, such as the Fair Labor Standards Act, can invalidate sections of the Agreement (Joint Exhibit 1) or change their interpretation.

The Union countered the Employer's claim that the Grievant intentionally manipulated his hours of work to position himself

for overtime status. Even if the Grievant did manipulate his hours of work by failing to take lunch breaks of at least thirty (30) minutes and working through his breaks, these actions proved ineffective. By working through his breaks, more specifically, the Grievant did not realize any additional compensation because he was already being paid for these breaks. Similarly, the Grievant was unaware of the Fair Labor Standards Act's rule that if less than thirty (30) minutes is taken for lunch, the entire period is considered hours of work.

The Union maintained that the Grievant should be compensated for the entire amount of overtime earned during the period from August 1986 through June 1988. The amount requested by the Union consisted of the fifty four and one-half (54 1/2) hours earned under the rules of the Fair Labor Standards Act (Union Exhibit 1). The Union asserted that the Employer failed to rebut the accuracy of this calculation.

The Union contended that the Grievant did not need to file a new grievance each pay period. Two (2) primary considerations were offered by the Union in support of this argument. First, the Employer was placed on notice of the alleged overtime violation when the initial grievance was filed. Second, the grievance process should not be weighted down with duplicate grievances.

The Position of the Employer

It is the position of the Employer that it did not violate Article 13 of the Agreement by not paying the Grievant overtime. This position was based on a series of contract interpretation

arguments, an explanation of the new timekeeping process, and the Fair Labor Standards Act applicability.

The Employer argued that it was an inherent right of management to direct the workforce and determine the need for overtime. This management right was allegedly contained in the Management Rights Clause (See Pg. 2 of his Award for Article 5 - Management Rights), Ohio Revised Code Section 4117.08 (c) which was contractually incorporated into the previous provision, and the overtime provision (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 Overtime). The Employer emphasized that the Agreement (Joint Exhibit 1) does not contain any restrictions on the Employer's right to require prior approval. As a consequence, the Employer asserted that any overtime worked without prior approval is not compensable.

A ruling in the Union's favor would dramatically impact the Employer's ability to manage its operation. Without prior approval, employees would be able to unilaterally determine their hours of work and compensation levels. This situation, moreover, would stress the budgets of some small agencies.

The Employer noted that the new timekeeping method was implemented to ensure more efficient operations and to improve the accountability of its employees. Kleefeld testified that even though the accounting practices had been modified by the policy, the underlying guidelines were equivalent to those utilized prior to the implmentation. Both Kleefeld and Pipes maintained that the policy was not implemented for the purpose

of limiting overtime. Rather, it was developed to assist in the accurate and timely completion of payroll records.

The Employer maintained that the Grievant was properly notified that prior authorization was required. Since the guidelines requiring prior approval for all overtime had not changed prior to the implementation of the new time report form, the Employer maintained that the Grievant's previous adherence to the policy indirectly placed him on notice. In fact, documents introduced by the Employer summarizing overtime requests and prior approval for the period 1985 through 1988 indicated that no overtime was worked without prior approval, and that very little overtime was worked by the employees in the Cincinnati District Office (Employer Exhibit 4).

Direct notification regarding the prior approval requirement was also provided by the Employer via a number of methods. First, Kleefeld testified that staff meetings were held at the time of implementation. Second, problems arose necessitating additional clarification which led to the August 18, 1986 memo. This document contained the following information concerning the need for prior approval:

"...

2. Office Work Hours

The standard work week for employees is 40 hours within a calendar week. The public hours for the Cincinnati district office remain 8 A.M. to 5 P.M. The office will be open for employees between the hours of 7 A.M. and 5:30 P.M. Employees will continue to select a usual work schedule within these hours. With the approval of the supervisor, employees can adjust the work day and week to meet unexpected occurrences such as early or late appointments, field assignments, and meetings.

All district office staff overtime must be prior authorized by the supervisor and the district director except for emergency situations.

..."

(Joint Exhibit 5, Pg. 2)

Last, Pipes and Kleefeld testified that they had several discussions with the Grievant notifying him that they did not deem that the overtime was warranted; and that all overtime had to be prior authorized by the immediate supervisor and District Director. The Grievant, moreover, acknowledged that he received copies of the timekeeping form with Pipes' notations designating that the overtime noted by the Grievant was unauthorized.

The Employer distinguished between an employee's ability to adjust his schedule, and an employee's ability to schedule overtime without prior approval. Pipes and Kleefeld noted that employees are given the latitude of working more than eight (8) hours a day to allow them to finish up a field project. They are then allowed to compensate for this situation by working less than eight (8) hours the subsequent day. This latitude prevents extra trips and travel time to a residence or office. The Employer emphasized that the above procedure does not allow an employee to schedule unapproved overtime. The Employer, moreover, emphasized that the overtime provision (See Pg. 3 of this Award Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime) does not serve as a "work incentive program." Thus, it viewed the Grievant's interpretation of claim load and specialized work assignment provisions as totally unfounded.

For a number of reasons, the Employer asserted that the Arbitrator should not incorporate the Fair Labor Standards Act's guidelines into the Agreement (Joint Exhibit 1). First, the Employer contended that the Union was attempting to obtain something in arbitration which it could not attain during contract negotiations. Second, one could not conclude that the Fair Labor Standards Act is implied because the Union failed to introduce bargaining history dealing with intent. Third, if the Arbitrator agreed to the incorporation hypothesis, he would be violating the Agreement by adding to or modifying the Agreement (Joint Exhibit 1, Article 25 - Grievance Procedure, Section 25.03 - Arbibration Procedures). Last, if the Grievant has a Fair Labor Standards Act claim, then the Grievant should seek a resolution by the Department of Labor Wage and Hour Division.

The Employer charged that the Grievant's remedy should be limited to the one contained in his original grievance. The Employer, therefore, did not view the grievance as ongoing. The Employer argued that once the Grievant was placed on notice that overtime had to be prior approved, he was barred from any further remedy.

THE ARBITRATOR'S OPINION AND AWARD

This Arbitrator is unable to rule upon the Union's procedural defect argument. General statements made during the opening statement phase of the hearing are not viewed as evidence; they are attempts to acquaint the Arbitrator with what the Party expects to prove by its evidence. Thus, these

statements do not become a part of the formal record until they are formally bolstered by evidence and testimony. The Union discussed the Employer's denial of a Step 3 meeting, but such assertions do not fulfill the previously discussed requirements.

From the evidence and testimony introduced at the hearing, it is the opinion of this Arbitrator that the Employer did not violate Article 13 of the Agreement (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime, Section 13.10 - Payment for Overtime) by failing to pay the Grievant overtime. Payment for unapproved overtime is not mandated by the Agreement (Joint Exhibit 1) and would run counter to existing policy and provisions contained in the Agreement (Joint Exhibit 1).

The Management Rights Article (See Pg. 2 of this Award for Article 5 - Management Rights) and the incorporated rights and responsibilities contained in Ohio Revised Code Section 4117.08(c) , clearly allow the Employer the inherent authority to effectively manage its facilities; direct its employees; and maintain and improve the efficiency and effectiveness of its operations. The policy and procedures promulgated before the effective date of the Agreement, and the new timekeeping form promulgated on or about August 4, 1986, fall within the above mentioned provisions. This Arbitrator is also convinced that the new format did not deviate in terms of the prior authorization requirement. The record keeping aspects were modified but the underlying principles were not altered.

The Grievant was fully cognizant that prior approval was

required by the Employer. For a number of years he failed to request overtime with the understanding that he could adjust his schedule if he exceeded eight (8) hours of work on any given day. It seems that the entire work force operated under a similar understanding because of the limited amount of overtime requests and prior approval for the period 1985 through 1988. If the newly negotiated Contract (Joint Exhibit 1) engendered any ambiguity regarding the need for prior authorization, the notification provided by the Employer should have diffused any reasonable person's expectations. Informational meetings were held and a specific memorandum was authorized in an attempt to further clarify the purpose of the new timekeeping system. The memorandum, moreover, reinforced the existing prior approval policy (Joint Exhibit 5, Pg. 2). Pipes and Kleefeld also held a series of meetings with the Grievant which should have further underscored the status quo.

It is axiomatic in cases dealing with contract interpretation matters that an arbitrator must review, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the Parties (Riley Stoker Corp., 7 LA 764, Platt, 1947). An analysis of several provisions dealing with overtime, clearly indicate to this Arbitrator that the Parties did not anticipate an unfettered overtime policy. The Payment for Overtime provision (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.10 - Payment for Overtime) defines active pay status "as the conditions under which an employee is eligible to receive pay."

In this Arbitrator's opinion, these "conditions" were properly specified in the Employer's policy (Joint Exhibit 5). Further support for this analysis is contained in the Overtime provision (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime). This provision deals with two (2) overtime situations. The first situation deals with the equalization of overtime in traditional work settings, while the second deals with overtime specific to a particular employee's claim load, specialized work assignment, or when the incumbent is required to finish an assignment. Clearly, the type of work and the related overtime opportunities discussed in the second situation fall within the worksite characteristics of the District Office. This provision, however, allows the implementation of overtime arrangements by the Employer, and equally anticipates an authorization requirement. Both of these conditions were not merely negotiated for the traditional overtime equalization situation. They, more specifically, are contained in the paragraph dealing with both overtime situations, and therefore, must be applied consistently whether one operates under the traditional or non-traditional paradigm.

The Arbitrator is sensitive to the Union's Fair Labor Standards Act arguments, but the cases introduced in support of its incorporation hypothesis are not universally supported by all arbitrators. This Arbitrator has previously used portions of the Fair Labor Standards Act to interpret specific language contained in the Agreement (Joint Exhibit 1) when it relates to

specific provisions contained in the Act (See David Cutlip, et. al., G-86-0249). The case presently under review, however, deals directly with an authorization requirement, it deals indirectly with suffered or permitted work time; a construct never negotiated or anticipated by the Parties. This Arbitrator has also concluded that the complexity of the suffered or permitted issue requires a more complete analysis by the Wage and Hour Division of the Department of Labor; if in fact the Grievant wishes to pursue this alternative. Discussions with a number of Wage and Hour officials, in a number of different regions, indicate that the issue may not be clear cut. Under these circumstances, it would be inappropriate to fashion a potential remedy under the guidelines of the Fair Labor Standards Act.

AWARD

The grievance is denied and dismissed.

September 28, 1988

Dr. David M. Rinaus
Arbitrator