ARBITRATION AWARD SUMMARY

OCB Award Number: 238

OCB Grievance Number: 14-00-880503-0036-02-11

Union: 1199 Russell, Greg

Department: Health

Arbitrator: James C. Paradise

Management Advocate: Sue Wolfe

Union Advocate: Bob Callahan

Arbitration Date: 11-7-88

Decision Date: 11-30-88

Decision: Denied

In the Matter of Arbitration
Between:

THE STATE of OHIO,
DEPARTMENT of HEALTH
and
OHIO HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199

Gr: #14-00-(88-05-03)-036-02-11

ARBITRATOR'S DECISION and AWARD

Appearances:

For the Union: Bob Callahan, Secretary-Treasurer
For the Employer: Sue A, Wolfe, Labor Relations Specialist

This matter came on for hearing on November 7, 1988. The parties were afforded full opportunity to adduce evidence, to cross-examine and to argue orally. The filing of post-hearing briefs was waived.

On April 26, 1988 the Union filed a class grievance alleging that the Employer had violated Article 19.04 of the collective bargaining agreement by changing its long-standing interpretation of the travel expense allowances provided for in that article. The parties stipulated that the Department of Health paid meal reimbursement until about March, 1988 to employees who left home before 7 A.M. even if they had not driven 60 miles from their homes. However, the Employer asserted that such payments had been made through clerical error and that the practice was properly discontinued when the error was detected.

The issue as stipulated by the parties is: "Is the Ohio Department of Health's change in the reimbursment for meals within 60 miles of an employee's home or headquarters a violation of Article 19.04? If so, what should the remedy be?" It was also

stipulated that the issue is properly before the arbitrator.

The contract provision which requires interpretation is, of course, Article 19.04 whichreads as follows:

19.04 Expense Allowances

> Per diem reimbursement rates for full day in-state travel shall be actual cost up to the following maximum rates:
> Meals $14.50
> Lodging $40.00 plus tax
> Full day travel is defined as departure prior to 7:00 A.M. and return after 7:00 P.M.
> Reimbursement rates for partial day in-state travel shall be the actual cost up to the following maximum rates:
> Reimbursement rates for partial day in-state travel shall be the actual cost up to the following maximum rates:
> Four dollars ($4.00) if departure from home or headquarters is prior to 7:00 A.M. and return to home or headquarters is prior to 7:00 P.M.
> Ten and a half dollars ($10.50) if departure from home or headquarters is after 7:00 A.M. and return to home or headquarters is after 7:00 P.M.
> Additional provisions of Office of Budget and Management Rule 126-01-02, Rates and Requirements for Reimbursement of Travel Expenses Within the State of Ohio, effective March 2, 1986, shall apply.

O.B.M. Rule 126-01-02, which is referred to in Article 19.04, became effective on March 2,1986 and covers all requirements for reimbursement of travel expenses within the State of Ohio including authority to travel, the approval of travel expense reports, transportation expenses whether by state-owned or privately owned automobiles, motorcycles or common carriers, living expenses, meals, lodgings, miscellaneous living and business expenses, required receipts for living expenses, conference fees and meals, and the reimbursement of agency consultants and persons interviewing for positions. Section D, (1). dealing with reimbursements for meals states:

> Except as provided in paragraph (E) of this rule, meals will be reimbursed only when overnight lodging is required ---.

Section D,(4), entitled "Prohibitions" states:

> No reimbursements shall be made for lodging or meals under the following circumstances: (a) within the county of the state agent's headquarters; and (b) within sixty miles or less of the state agent's residence or headquarters."

Following the effective date of the collective bargaining agreement, June 12, 1986, and until March, 1988, the Department of Health authorized the reimbursement of its employees for meals strictly in accordance with thelanguage of Section 19.04, without regard to whether or not they had required overnight lodging or had traveled at least 60 miles from home. Reimbursement of travel expenses was requested through Travel Expense Reports showing the times of departure and return, the number of miles traveled and the amount requested as reimbursement for mileage and meals. The reports were regularly approved by supervision, forwarded to the Accounting Department for approval for payment and were routinely paid over a period of twenty-two months. Newly hired employees, when instructed about the requirements for reimbursement for travel, were provided with sample Travel Expense Report forms, completely filled out. These sample forms indicated that employees were entitled to meal reimbursement depending solely on their time of departure and time of return as specified in Section 19.04, without regard to distance traveled. The precise origin of the sample report forms was not established, but it would be unreasonable to assume that their use in the orientation of employees over twenty-two months was without the knowledge and approval of management. The testimony of the Health Department's Chief of Personnel that the sample report form had been prepared by a mere typist, as though she had not been instructed and her work approved

by supervision was disingenuous. Moreover, his testimony clearly showed, despite his equivocation, that he himself interpreted Article 19.04 as authorizing reimbursement for meals without regard to the sixty mile requirement.

The record requires the conclusion, and I find, that it was not because of a clerical error that the Department of Health authorized meal allowances for almost two years without regard to distance traveled, but because the department interpreted Article 19.04 of the collective bargaining agreement as requiring such payments.

This grievance arose when a substitute clerk in the Accounting Department read "Administrative Services Operational Memo 86-27A", dated September 9, 1986, issued by the Bureau of Administrative Services and addressed to bureau, division and office chiefs. That memo, which set out the Department of Health in-state travel policy and procedures states, as did Rule 126-01-02, issued by the O.B.M. effective March 2, 1986, that there shall be no reimbursement for meals for travel within 60 miles of the traveler's residence or headquarters. The clerk rejected a meal allowance claim by an employee who had traveled less than 60 miles from home on the basis of Operational Memo 86-27A. The Chief of the Accounting Unit of the Department of Health testified that her two regular clerks, who processed about 700 travel expense reports a month, had paid no attention to the 60 mile requirement contained in Memo 86-27A. and obviously, the Chief herself had been similarly inattentive. The fact that the Travel Expense reports had been duly approved by supervision

was evidently considered sufficient to authorize payment by the Accounting Department. Memo 86-27A states:

> The Travel Unit will only process travel expense reports submitted with authorized management signatures.

The Employer's claim that its practice over a periof of twenty-two months was due to a clerical error is not supported by the record.

The sixth paragraph of Article 19.04 creates an ambiguity in that Article that must be resolved. The essential question is, which "additional provisions" of Rule 126-01-02 were intended to remain applicable?

The testimony concerning the negotiation of that article was provided by two Union witnesses and an Employer witness. The Union witnesses, Joan Lewis and Greg Russell, both Health Facilities Standards representatives, testified that they were the principal Union negotiators of Article 19.04 because the Health Department was more heavily affected by the issue of travel and travel allowances than any other agency covered by the collective bargaining agreement. Moreover, they and their colleagues in Health Facilities Standards were especially affected since the nature of their jobs required travel to the various facilities which were recipients of Medicaid funds and to survey their operations to insure their compliance with state and federal standards. They testified that after a number of meetings of the full negotiating teams, the discussions of the issues which were of special concern to particular departments were carried on by small subcommittees and that the Health

Department subcommittee consisted of Lewis and Russell and two Department management representatives. This article was a major concern of the Union and the emphasis of its representatives was on the time of departure and the time of return as the only factors controlling entitlement to meal allowances. They argued that this would give the employees who are on a flex time basis an incentive to remain at facilities as long as needed to complete their surveys, thereby avoiding an additional trip and completing their assignments more expeditiously and economically. But no mention was made of the 60 mile requirement. It was their understanding that the article, as finally agreed to, embodied their objective and conditioned meal allowances solely on the time of departure and time of return. When they reported the contract to the Union membership they told them that that was what Article 19.04 meant.

The testimony of the Union witnesses gains additional weight from the fact that the Department of Health proceeded to interpret and implement the contract by authorizing payment of meal allowances for travel of less than 60 miles, in agreement with the Union's interpretation of Article 19.04. Although management told the Union at the Agency Professional Meeting on April 12, 1988 that "the agency was not aware that we had paid for meals within the 60 mile limit" until the Accounting office rejected some claims at the Step 3 meeting on June 9 Mr. D'Arcy, according to the minutes,

> "informed the Union that the Department of Health was incorrectly interpreting and implementing Article 19.04---".

When the Union asserted that the Department was the only agency that was correctly interpreting Article 19.04, D'Arcy replied:

"Normally, we would agree with the Union's position in this matter; however, in this particular instance we cannot.

I construe this to mean that if he were in a position to act independently he would agree with the Union. That the Union and Department negotiators agreed on the article's interpretation is strong evidence of its intent, but other evidence must be considered.

David Norris, Assistant Chief of Contract Compliance for O.C.B., testified that he was the official note-taker for the State and that he had reviewed his notes. He did not produce them at the hearing nor did the Union ask him to do so. He testified that management made it clear that Rule 126-01-02 was to remain in effect except that the requirement of an overnight stay as a condition for a meal allowance would be dropped. In this connection it is to be noted that when the Union made its initial proposal it requested that the overnight stay requirement be dropped, according to the testimony of Lewis.

There was at least one departure from the Health Department's practice of ignoring the 60 mile requirement. In October, 1987 it asked the Office of Budget and Management to grant a waiver of the 60 mile requirement for members of its Bureau of Medical Services Staff who were attending a conference at a site which was less than 60 miles from their homes. The request stated (State Ex.5):

"This is to request an exemption from the travel rule, that no reimbursements shall be made for lodging or meals--- within 60 miles or less of the traveler's residence or headquarters".

Provision is made for such exceptions in Section (H) of Rule 126-01-02, and the Department's request was granted. No explanation

was offered for the Department's recognition of the continued vitality of the 60 mile rule in this instance while it continued to ignore it in authorizing reimbursement for routine travel.

In its initial written proposal during the contract negotiations the Union asked for a number of changes in the travel rules including lunch reimbursement when traveling and increased expense allowances. There was no mention of the 60 mile requirement or of the requirement of an overnight stay as a condition for meal reinbursement although as noted above, Lewis testified that the Union requested the elimination of the latter requirement. If any other written proposals dealing with travel expenses were made by the Union they were not produced or mentioned at the hearing. In the state's first written proposal on travel, the section on Expense Allowances was a revision of Section (D)(1) and (2), of Rule 126-01-02. It deleted the requirement of an overnight stay as a condition for meal reimbursement, increased the meal allowances for a full day's travel and changed the definition of full and partial days travel. Like Rule 126-01-02, Sec. (D)(1) and (2), it made no specific mention of the 60 mile requirement but stated that "all other" provisions of Rule 126-01-02 shall apply. This proposal, with the insignificant substitution of "additional" for "all other" was adopted.

Thus, it appears that in all of the negotiations and subcommittee discussions of travel expenses there was never any mention of Section (D)(4) of Rule 126-01-02 which contains the 60 mile rule. Since, according to the union witnesses, the Union attached much importance to the meal reimbursement issue, and since the 60 mile requirement has a major impact on entitlement to meal reimbursement,

it is unreasonable to assume that the Union would not have asked for or that the State would have agreed to its elimination without the subject ever having been mentioned or discussed.

As bearing on the intent of the parties it is also significant that of the seven or eight agencies within the bargaining units covered by the contract, only the Health Department authorized the payment of meal allowances without regard to the 60 mile requirement. The Union was aware of this, as indicated by its statement at the Step 3 meeting that the Health Department was the only agency that was correctly interpreting Article 19.04. Yet, the Union never grieved in any other agency. Nor did it offer an explanation of its failure to do so. It is plain that the Union has acquiesced in the application of the Article 19.04 in all of the other agencies.

The Employer argues correctly that the contract covers all of the agencies that are signatories to it and that there may not be different interpretations of its provisions that are of general application, Article 19.04 being such a provision. It is, of course, possible that all of the other agencies could be wrong and the Department of Health right; that they could "all be out of step but Jim". On the evidence in this record I am unable to reach that conclusion.

Although the first five paragraphs appear on their face to be clear and to completely spell out the conditions governing entitlement to meal allowances, the preponderance of the evidence does not support the claim that the parties intended to eliminate the 60 mile requirement. In Rule 126-01-02 that requirement is contained in a paragraph entitled "Prohibitions" and it applies to reimbursement

for both lodging and meals. The Union never asked that that prohibition be dropped, nor was it ever discussed at the bargaining table. I am satisfied that in framing its travel expense proposal the State was proposing revisions in (D)(1) and (2) of Rule 126-01-02 and left (d)(4) undisturbed. I find that the 60 mile requirement was one of the many "additional provision" of Rule 126-01-02 which remained applicable.

The Union contends that a ruling in favor of management negates the flexible hours concept and requires employees to "pay to do their own jobs"; that is, to pay for their meals when they have to put in extra hours to perform their duties as efficiently as possible. That may be true, but it is a matter that should be dealt with in collective bargaining. The collective bargaining agreement is due to terminate in about eight months and negotiations have probably commenced by now since the agreement calls for their commencement by October, 1988.

AWARD

The Department of Health's change in the reimbursement for meals within 60 miles of an employee's home or headquarters is not a violation of Article 19.04. The grievance is denied.

Dated at Cincinnati, Ohio
November 30, 1988

James C. Paradise
Arbitrator