#320

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF TRANSPORTATION

-and-

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

GRIEVANCE: Gerald Evans (Call Back Pay)

CASE NUMBERS: G-87-0285

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: September 18, 1989

APPEARANCES

For the Employer

Daniel Smith	General Counsel
Russell Murray	Executive Director

For the Union

Richard Noel	Labor Relations Officer
Michael Duco	Advocate
Tim Wagner	Director of Arbitration Services
N. Eugene Brundige	Director of the Office of Collective Bargaining

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Transportation, 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 9, 1989 at the office of OCSEA, Columbus, Ohio. The Parties had selected 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/would not submit briefs.

ISSUE

Did the Employer violate Section 13.08 of the Collective Bargaining Agreement when it failed to pay the Grievant four (4) hours of call-back pay for coming to work one (1) hour prior to the beginning of his shift?

PERTINENT CONTRACT PROVISIONS

ARTICLE 13 - WORKWEEK, 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 who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

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

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

(Joint Exhibit 1, Pgs. 20-21)

Section 13.08 - Call-Back Pay

Employees who are called to report to work and do report outside their regularly-scheduled shift will be paid a minimum of four (4) hours at the straight rate of pay or actual hours worked at the overtime rate, whichever is greater. Call-back pay at straight time is excluded from the overtime calculation.

An employee called back to take care of an emergency shall not be required to work for the entire four (4) hour period by being assigned non-emergency work.

Section 13.09 - Report Pay

Employees who report to work as scheduled and are then informed that they are not needed will receive their full day's pay.

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, Pg. 21)

ARTICLE 43 - DURATION

Section 43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

...

(Joint Exhibit 1, Pg. 62)

STIPULATED FACTS

1. Gerald Evans (Grievant) was a Highway Worker I on December 2, 1986.
2. Grievant was called into and reported to work at 6:00 a.m. on 12/2/86 because of Highwater on State Route 73.
3. Grievant worked from 6:00 a.m. until 4:00 p.m.
4. Grievant's regularly scheduled shift was from 7:00 a.m. to 4:00 p.m. at the time of the incident.
5. Grievant received time and one-half for all hours worked in excess of forty (40) hours for the week which included 12/2/86.
6. Grievant did not receive four (4) hours call-back pay for the hour worked on 12/2/86.

CASE HISTORY

Gerald Evans, the Grievant, was employed as a Highway Worker I and was regularly scheduled to work from 7:00 a.m. to 4:00 p.m.

This schedule was somewhat disrupted on December 2, 1986. The Grievant was informed that emergency work needed his attention; and as a consequence he was asked to report at 6:00 a.m.

A controversy surrounding the payment of consideration for the above mentioned emergency work ensued shortly after the payment period. The Employer, more specifically, paid the Grievant for all hours worked in excess of forty hours at the rate of time and one-half. It should be noted that one (1) hour associated with the emergency work was paid at the overtime rate.

The Grievant challenged the Employer's payment practice because he felt that he should have received four (4) hours of call-back pay for the one (1) hour worked on December 2, 1986. He formalized his contention by filing a grievance on December 10, 1986; it contained the following relevant particulars:

"...

> What happened? (State the facts that prompted you to write this grievance.) I was called back to work on an emergency, high water on 72. I began work at 6:00 a.m. and worked until 4:00 p.m. My supervisor refused the four hours of call-back pay.

..."

(Joint Exhibit 2, Pg. 1)

A Level II hearing was held on December 22, 1986. The Employer denied the grievance, however, because it felt that Section 13.08 did not apply to the particular circumstances in dispute. This Section was thought to be applicable when employees have been called in and subsequently sent home with less pay than provided for in Section 13.08.

A Level III hearing was held on January 15, 1987. Once again the grievance was denied because the Employer asserted that Section 13.08 applied when two conditions exist: an employee is called into work outside of his/her normal shift, and is then sent home before his/her normal shift begins. The Employer asserted that this Section did not apply when an employee reports to work prior to his/her regular shift, and then proceeds to work directly from the overtime period to the regular shift. It was also alleged that Section 13.08 did not apply when an employee went directly from the regular shift to the overtime period (Joint Exhibit 2).

The Parties were unable to resolve the grievance at the subsequent stages of the grievance procedure. Since the Parties failed to raise any objections on either substantive or procedural grounds, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

It is the position of the Union that the Employer did violate Section 13.08 when it failed to pay the Grievant four hours of call-back pay for coming to work one hour prior to the beginning of the shift. The Union's interpretation of the above mentioned section indicated that four hours of straight time pay

exceeded the overtime rate and should have guided the transaction.

The above interpretation was based on a number of contract interpretation theories. First, the Union argued that Section 13.08 contains clear and unambiguous language which specifies two requirements which condition any potential disbursement of call-back funds. These two requirements necessitate that an employee must be called and have to report to work outside a regularly scheduled shift. In the Union's opinion, the Grievant established his compliance with these two conditions. Also, emphasis was placed on the phrase "regularly scheduled shift." The Union contended that the Employer is bound to the negotiated language and a concept such as extending the shift was never negotiated by the Union.

Common usage arguments proposed by the Employer were also refuted by the Union. The Union, more specifically, contended that it should not be penalized for negotiating progressive and unique contract language. This particular negotiated outcome was viewed as a consequence of collective bargaining strengths and other dynamics.

The Employer's Ohio Revised Code Section 4117.10(a) arguments were also viewed as inapplicable. In other words, the Union emphasized that relevant sections of the Ohio Administrative Code (Joint Exhibit 3) do not apply because the Agreement (Joint Exhibit 1) is not silent, and that the Employer misinterpreted Section 4117.10(a). The Parties negotiated

Section 13.08 with the understanding that they intended to incorporate all of call-back pay qualifiers. The Union also argued that an agreement does not have to specifically list exclusions in order to supersede provisions that are a matter of law.

Since the language was viewed as unambiguous and clear, it was asserted that the Arbitrator's authority was somewhat constrained. The Arbitrator, more specifically, had the scope of his authority limited by the specificity of the language contained in Section 13.08.

Third, the Union contended that Sections 13.07 and 13.08 do not conflict, and thus, its interpretation should stand. An employee can be called in to work overtime for a full shift or a half shift without any conflicting consequence in the application of Section 13.08. Also, the Union alleged that the overtime rate only becomes applicable if an employee works for more than two and a half hours because it exceeds the four hours of straight pay. This example purportedly bolstered its non-conflict claim.

Fourth, the Union attempted to bolster its interpretation by focusing on the bargaining history surrounding Section 13.08. Russel Murray, the Executive Director, testified that the Union originally proposed the language; and it fashioned the language so that it reflected or applied to circumstances identical to the present matter. Murray noted that the discussion surrounding this section centered on two primary issues. The first issue dealt with the number of hours that a person had to work before

he/she achieved overtime rather than call-back status. The second issue concerned the nature of the work performed once an employee is called in to work.

Murray also contested the Employer's intent argument dealing with this provision. He, more specifically, alleged that the particular circumstance reflected a major inconvenience to the Grievant. An inconvenience which fell within the domain of circumstances anticipated by the Parties when they negotiated the provision.

Fifth, the Employer's reliance on the Ohio Administrative Code provision (Joint Exhibit 3) and an Ohio Department of Transportation Members Only Agreement (Joint Exhibit 4) was also refuted by the Union. Neither of these documents were viewed as similar in terms of content nor intent. Murray noted that Section 13.08 was never developed with the understanding that it would paraphrase these other provisions. The Union, moreover, emphasized that Section 13.08 contains language which is significantly different from these other two documents. Also, the Code provision (Joint Exhibit 3) contains a paragraph which modifies another portion of the provision which provides for the general right associated with the reception of four hours of call-back pay. Murray maintained that the Employer failed to propose any language during negotiations which closely approximated the previously mentioned modification. The Union argued that if the Employer desired the inclusion of such

limiting language it should have attempted to incorporate such language.

Similar arguments were proposed in response to the Employer's reliance on the Members Only Agreement (Joint Exhibit 4). Murray stated that the Employer noted that they were not going to negotiate from a standard that had already been negotiated in agency contracts. Rather, the Employer asserted that it was starting from scratch while the Union refuted to discount sixteen years of negotiating experience.

Last, the Union expressed a great deal of interest in the 1989 negotiations with special attention placed on the bargaining history surrounding the call-back pay provision. The Union contended that this information was extremely relevant because it goes to the conduct of the Parties in administering the Agreement (Joint Exhibit 1). The proposed language (Union Exhibit 1) was viewed as an admission that the 1986 Agreement (Joint Exhibit 1) did not contain language which accurately portrayed the Employer's desires concerning this matter. The proposal, more specifically, was a direct attempt to mirror the Code (Joint Exhibit 3) by eliminating call-back pay for situations which abutted an employee's regularly scheduled shift.

The Position of the Employer

It is the position of the Employer that it did not violate Section 13.08 because the circumstances did not constitute a

call-back situation. Rather, the situation required the mere payment of overtime in accordance with Section 13.10.

Contrary to the Union's contention, the Employer maintained that Section 13.08 is fraught with ambiguity. Attention was placed on the lack of specificity concerning an eligibility criterion. Without such a requirement it was allegedly difficult to determine whether one could equate outside of a regularly scheduled shift with extending a regularly scheduled shift.

As a consequence of the above ambiguity, the Employer argued that past practice could serve to give meaning to Section 13.08. The Employer, more specifically, maintained that the Parties' practice under the previous Members Only Agreement (Joint Exhibit 4) and Section 123:1-37-05 of the Ohio Administrative Code (Joint Exhibit 3) adequately supported its contention.

The Employer maintained that since the inception of the Civil Service Law it has treated hours abutting the shift as an extension of the shift rather than hours reported outside of the regular shift. Both Tim Wagner, Director of Arbitration Services, and Gene Brundige, Director of the Office of Collective Bargaining, testified that the Code (Joint Exhibit 3) was utilized prior to the Members Only Agreement (Joint Exhibit 4); and that the Code served as the guideline once the Members Only Agreement (Joint Exhibit 4) was enacted.

The void created by the above ambiguity should also be filled by relevant portions of Section 123:1-37-05 of the Ohio Administrative Code (Joint Exhibit 3). An incorporation of this

sort was purportedly in accordance with Ohio Revised Code Section 4117.10; which allegedly applies when there is no conflict between the contractual language and existing laws and ordinances, and the contract is unclear and silent on the matter. In this particular instance, the Employer argued that the Code applied because Section 13.08 was silent as to whether the phrase outside of the regularly scheduled shift encompassed hours that abut the shift.

The Employer asserted that a number of critical aspects of the bargaining history surrounding the 1986 negotiations reinforced its interpretation. First, Wagner noted that the language negotiated by the Parties closely approximates the language contained in the Code (Joint Exhibit 3) and the Members Only Agreement (Joint Exhibit 4). Second, Brundige testified that it was the Parties' intent to incorporate the concept and guidelines in existence under the Ohio Administrative Code (Joint Exhibit 3). He did, however, admit that the Parties never discussed Paragraph B of Section 123:1-37-05 (Joint Exhibit 3) nor did the Parties equate the outside of the regularly scheduled shift with hours abutting the beginning and/or the end of any given shift. Third, since Section 13.08 did not dramatically change the prior practice, the Union should have expected the continuance of the practice and the incorporation of the Parties' prior understanding and intentions regarding the call-back language.

The Union's reliance on a call-back pay proposal (Union Exhibit 1) offered during the 1989 negotiations was also contested by the Employer. It was asserted that this proposal was not relevant in terms of accurately portraying the Parties' intent concerning Section 13.08. This language was not offered during 1986 negotiations, and thus, does not reflect the intent of the Parties at the time that the 1986 Agreement (Joint Exhibit 1). Rather, the most recent language (Union Exhibit 1) reflects actions or concerns engaged in subsequent to the 1986 negotiations. These concerns cannot accurately portray the Parties' intent as of the original signing date.

The Employer discounted the Union's interpretation because it defied common labor relations usage. Traditionally, call-back pay has been negotiated to compensate employees for an inconvenience engendered by a reporting requirement between regularly scheduled shifts. This interpretation was not viewed as applicable when applied to the circumstances surrounding the present matter. The Grievant was not inconvenienced because he did not have to report to work, work for a relatively short period of time, and then return home. Rather, the Grievant arrived one hour earlier than his normal schedule which required the payment of overtime pay for pre-shift work.

If the Union's interpretation was upheld by the Arbitrator, the Employer contended that a number of absurd results would follow. By merely extending their shift without any obvious inconvenience employees would be compensated at a rate higher

than the overtime rate discussed in Section 13.10. Employees falling within this circumstance, would be compensated for hours which they did not work, but hours which may abut their normally scheduled shift.

By comparison, the Employer asserted that its interpretation should be upheld because its application led to just and equitable outcomes. For example, its interpretation provides for the compensation for obvious explicit inconveniences, while not reinforcing the pyramiding of pay. Regularly scheduled shifts, moreover, could be extended. But a penalty would be attached in the form of mandated premium payment made in accordance with Section 13.10.

The Union's interpretation was also rebuffed because it would render another provision, Section 13.07, meaningless and ineffective. The Union's interpretation, more specifically, would force the application of the call-back provision to all overtime situations.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing and a critical review of the pertinent contract language, it is this Arbitrator's judgement that the Employer did violate Section 13.08 by failing to pay the Grievant four hours of call-back pay. This conclusion was also based on a full review and application of relevant contract construction principles.

In my judgement, Section 13.08 contains language which is clear and unambiguous, and thus, this Arbitrator is unable to concur with the Employer's view. This provision is not laden with two types of ambiguities normally considered by the law. The first type has been labeled "patent ambiguity" where the language is unclear on its face and a reading of the disputed provision readily surfaces the confusion. The second type has been characterized as "latent ambiguity" where the language appears clear on its face but becomes unclear when an effort is made to apply it to a given situation.1 When an arbitrator is able to ascertain with certainty the intention of the parties from the writing itself, it would be improper to go outside of the four corners of the agreement.2 This task may be extremely difficult for an arbitrator when the parties have agreed to language which may be outside the domain of common usage. Yet, this Arbitrator, like others engaged in similar activities, does not have the right nor the authority to substitute his own brand of industrial jurisprudence under the guise of interpretation.3

The Employer's major premise dealt with the ambiguity surrounding the phrase "outside their regularly-scheduled shift" and whether it encompassed the concept of hours that abut the shift. The phrase in dispute, however, is not ambiguous even though it may not be as specifically detailed as desired by the

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1Midwest Rubber Reclaiming Co., 69 LA 198 (Bernstein, 1977).

2Andrew Williams Meat Co., 8 LA 518 (Cheney, 1947).

3National Tube Co., 11 LA 378 (Seward, 1948).

Employer. It does indeed contain a specification as to eligibility for call-back pay. The Employer had an opportunity to negotiate more specific language which could have narrowed the scope of Section 13.08; it failed to do so and cannot at this late date attempt to gain a concession via the arbitration process.

It is extremely difficult to support a past practice argument when the terms and conditions have been altered over a period of time. The Employer argued that the Parties had a practice of excluding certain hours from call-back pay computation. This interpretation placed a great deal of reliance on the similarities between Section 123:1-37-05 (B) of the Ohio Administrative Code (Joint Exhibit 3), Section 12.11 of the Members Only Agreement (Joint Exhibit 4), and Section 13.08. Even if the Parties enjoyed a prior practice which led to the incorporation of the Code's Paragraph B (Joint Exhibit 3) into the Members Only Agreement (Joint Exhibit 4), support for an additional incorporation becomes somewhat suspect when the language in Section 13.08 is not identical to the prior Agreement.

The past practice and ambiguity arguments are also viewed as tenuous when the bargaining history is reviewed. Both Employer and Union witnesses testified that no discussion concerning Paragraph B nor the past practice were raised during negotiations. Other items, however, were discussed and incorporated into Section 13.08 dealing with the type of work

that shall take place during the four hour call-back period. It, therefore, becomes difficult to accept the Employer's intent argument when faced with the clear and concise language contained in Section 13.08, and the language changes negotiated by the Parties.

Brundige's testimony about carry overs from prior Members Only Agreements also somewhat reduces the strength of the Employer's arguments. He noted that these prior contracts did not constitute a foundation for everyone, and that they did not automatically carry over. He also testified that he uttered these statements throughout the negotiations. On other occasions, such as the discussions surrounding subpoenas, the Parties inserted Code-related provisions rather than their own language. These circumstances raise considerable doubt concerning the Parties' bilateral intent perceptions.

Testimony failed to support the Employer's absurd result theory because it was never fully established that Section 13.08, as interpreted by the Union, would conflict with Section 13.07. Wagner maintained that "if the person was told to come in for a specific reason, it doesn't necessarily mean its call-back." In a like fashion, Brundige testified that these two sections did not necessarily conflict but were applicable under varying circumstances. This Arbitrator agrees with this conclusion. In addition, the Union's interpretation does not require one to equate all overtime as call-back situations.

A recent Ohio Supreme Court decision provides guidelines which conflict with the Employer's Ohio Revised Code arguments.4 Finding that the Ohio Collective Bargaining Law means what it says, the Ohio Supreme Court held that the terms of negotiated agreements entered into after April 1, 1984 prevail over conflicting provisions in Ohio statutes, with limited exceptions listed in Ohio Revised Code Section 4117.10 (A). According to the Court, Ohio Revised Code Section 4117.10 (A) was promulgated to free public employees from conflicting laws which may act to interfere with the newly-established right to collective bargaining.

Rollins also provides useful clues as to the extent a collective bargaining agreement modifies a related Ohio statute. Rollins argued that certain tenure requirements in the collective bargaining agreement were guidelines which were unintended to waive her statutory rights under Ohio Revised Code Section 3319.11. She also argued that the tenure requirements were initially negotiated in 1982, and were vested because the parties were not allowed to supersede state law via a negotiated agreement. By rejecting these arguments, the Court has limited an employee's right to attempt to supplement his negotiated contract with favorable statutory terms not negotiated in the parties' agreement.

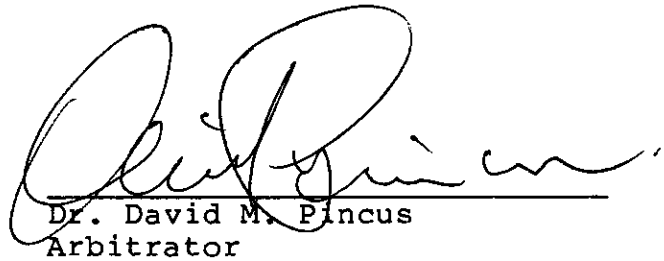
4State, ex rel, Rollins v. Cleveland Hts. - University Hts. Board of Education, 40 Ohio St. 3d, 123, 532 NE 2nd 139 (1988).

The present matter closely approximates Rollins but here the Employer is attempting to supplement the Agreement by supplementing Section 13.08 with Ohio Administrative Code Section 123:1-37-05 (B) (Joint Exhibit 3). This situation cannot be equated with one where the Parties fail to negotiate any language, and thus, Ohio Revised Code Section 41107.10 (A) might be used to fill contractual voids via statutory means. Here, the Parties did negotiate language dealing with call-back pay. Even though Section 13.08 does not mirror Ohio Administrative Code Section 123:1-37-05 (Joint Exhibit 3) the Code cannot be used to supplement and indirectly usurp provisions negotiated by the Parties.

Finally, some weight was placed on call-back language proposed by the Employer during the 1989 negotiations (Union Exhibit 1). Granted, this exhibit does not reach the intent of the Parties during the 1986 negotiations but it does evidence certain administrative or implementation difficulties arising after the language was mutually agreed to by the Parties. It, therefore, lends some support to the Union's interpretation.

AWARD

The grievance is upheld in its entirety. The Employer is ordered to compensate the Grievant in accordance with the language specifically and unambiguously negotiated by the Parties in Section 13.08.



September 18, 1989

Dr. David M. Pincus
Arbitrator