| | | |
|---|---|---|
| In the Matter of Arbitration | * | |
| Between | * | |
| Fraternal Order of Police-Ohio Labor Council | * | Before: Harry Graham |
| and | * | |
| The State of Ohio, Department of Liquor Control | * | |

Appearances: For Fraternal Order of Police:

Deborah L. Bukovan
General Counsel
Fraternal Order of Police-Ohio Labor Council
3360 East Livingston Ave.
Columbus, OH. 43227

For Department of Liquor Control:

Rachel L. Livengood
Ohio Department of Liquor Control
2323 West Fifth Ave.
Columbus, OH. 43266-0701

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on February 21, 1990 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on April 3, 1990 and the record was closed on that date.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Whether Management's denial of the Grievants requests

for overtime in the form of compensatory time or payment violated sections 21.01, 22.01, 22.07 or 22.10 of the Agreement? If so, what shall the remedy be?

Background: The facts that give rise to this proceeding are not a matter of dispute. There are two Grievants involved in this controversy; Paula Waid and Tim Snyder. Both are Investigators employed by the Ohio Department of Liquor Control.

In November, 1986 Ms. Waid submitted a request for overtime compensation to her supervisor, Norm Mack. She had worked 3.5 hours beyond her scheduled 8 hour day on November 25, 1986 and felt compensation was due. Mr. Mack denied her request for compensation. He acted on his understanding of Departmental policy concerning "travel time." As Mr. Mack understood the policy employees were not permitted to count as part of their hours travel to and from work.

Similarly, Investigator Snyder applied for overtime compensation in December, 1986. As was the case with Investigator Waid, Snyder's application was denied by Mr. Mack. The circumstances of that denial were similar to those which operated in Ms. Waid's case.

In order to protest what they regarded as an improper denial of overtime compensation Investigators Waid and Snyder grieved. Their grievances were processed through the procedure of the parties without resolution. There is agreement that they are properly before the Arbitrator for

determination on their merits.

Position of the Union: At Article 21 the Agreement deals with work rules. Section .01 requires the State provide the Union with copies of new rules two weeks in advance of their implementation. The Union is given an opportunity to present its views on such rules. If it desires to do so, the implementation of the rules is stayed pending discussion at the meeting of the Labor-Management Committee. According to the Chief Negotiator for the Union who represented the Grievants the Union never received a copy of changes made by the Employer to its travel time policy until 1987 during the course of discussions over these grievances.

The Bargaining Unit to which these Grievants belong is known as Bargaining Unit 2. It is a heterogeneous group of people who work in many State departments. In structuring itself for negotiations the Union committee had representatives of various departments on it in order to reflect their diverse interests. The representative from Liquor Control, Gary Jones, indicated he did not receive a copy of the 1986 travel policy in his capacity as a representative of the Union. At the hearing the State did not dispute this sequence of events. As it failed to meet its obligation to the Union to supply the new policy the Union urges the grievance be sustained.

Article 22, Section .10 the Agreement provides that an

employee "who must begin work at some location other than his/her actual work location or headquarters county shall be compensated according to Department/Agency practices." The history of negotiations indicates that the Union deliberately used the word "practices" in the Agreement to protect employees of the Department of Liquor Control. Prior to November 1986 "practice" in the Department provided that an employee was on pay status upon leaving home. That is, when an employee got behind the wheel of a State vehicle the clock began running for pay purposes. In 1986 the State effected a change in its pay policy. It provided travel time only to employees working in Liquor Control Districts other than their home district. Those employees were permitted travel time at the start and end of their work week. There was an exception to that policy. It allowed travel time to people assigned in their home districts but far from their residence. The application of the policy was not consistent throughout the State. Union witnesses at the hearing indicated that while the State may have believed it had effected a change in travel policy in 1986 no change was apparent to them. They continued to claim travel time and were paid as they had been in prior years. Consequently Grievants Waid and Snyder were improperly denied pay in the Union's view.

In fact, evidence introduced at the hearing indicates

that other Liquor Control Investigators were paid at the same time the Grievants were denied pay in identical circumstances. For instance, Investigator Ziton was paid in June, 1988 in a manner the Union regards as being correct. Unlike Ziton, when in 1987 Investigator Snyder claimed pay he was denied. This inconsistent and incorrect application of the Agreement must not be permitted to occur according to the Union.

Ms. Waid resides in Ashtabula County. She works in the Cleveland District of the Department which is located in Cuyahoga County. Her normal routine indicates that she would not work in her home county, Ashtabula. Under these circumstances, travel pay is due in the Union's view. The "practice" called for such pay to be made. In similar circumstances other Districts of the Department of Liquor Control made such payments. In the Cleveland District those payments were not made to the Grievants. There was, in fact, no uniformity to the travel policy of the State with respect to Liquor Control Investigators. In the Cleveland District the norm was to make travel pay available to people situated as were Waid and Snyder. As they did not receive it, a violation occurred in the opinion of the Union.

As the Union interprets the testimony of the State's principal witness at the hearing, Deputy Chief Mike Dodd, it supports its contention. Dodd indicated that revisions made

in 1986 to the 1982 policy were for purposes of clarification. No change was made in 1986. Similarly, when in 1987 the travel policy was again rewritten and promulgated anew substantive change did not occur. Rather, semantic alterations of no import were made. Given these circumstances the Union asserts that Waid and Snyder were improperly denied pay.

According to the Union, any testimony of Chief Dodd should be given minimal weight. He was not serving in his present capacity when the travel pay controversy arose. He was not a party to it. He has no expertise to offer except that which supports the position of the Union in its opinion.

When this dispute began Chief Dodd was Officer-in-Charge of the Akron District. His familiarity with payroll practices is limited. He does not bring to bear expert knowledge of the pay practices in the Cleveland District. Consequently, his testimony should not carry the day. It is significant in the Union's view that the State did not offer payroll documentation into evidence. Rather, it produced its worksheets which generated the payroll. This is not the best evidence and should not be relied upon by the Arbitrator in determining this dispute in the Union's view.

Chief Dodd's testimony indicated that in some instances employees received 80 hours pay in the pay period. In fact, they did not work 80 hours. They actually worked less. The

difference between work time and the 80 hours pay made to these people was made up in travel time. Furthermore, some people, for instance Investigator Ziton, received overtime pay. That pay was substantial in his case, almost 22 hours. This could not be an "error" as claimed by Chief Dodd. Rather, it represents an accurate payment to him and the same sort of payment should be made to the Grievants the Union asserts.

At Section 22.01 and 07 the Agreement deals with the work day and the work week. They set forth the circumstances in which overtime pay is due. The Grievants meet the conditions. Consequently, pay as computed by the Grievants should be made according to the Union.

Position of the Employer: The State presents a substantially different version of the internal operations of the Department with respect to payroll preparation than does the Union. In its view, it is conceptually incorrect to examine the daily activity reports in order to arrive at a correct figure for payroll purposes. Rather, claims for overtime pay are made on a separate form. This is known as the attendance interruption report. In order to secure overtime pay it is necessary that an Investigator submit a request. If the request is approved the appropriate entry is made on the attendance interruption report which is used to generate pay for Investigators. Only the attendance interruption report

reflects the actual number of hours to be used for pay purposes.

In preparation for this hearing the Department detailed seven people to examine daily activity reports. Over a three week period the full-time efforts of this staff enabled approximately 7,000 reports to be reviewed. The reports were reconciled to the attendance interruption reports and the pay actually made to Investigators. This copious review indicated that the Department had made two (2) errors in payment. Two Investigators received pay for 80 hours when they had actually worked less than that number of hours in the pay period. The eighty hours of pay was made because those Investigators were scheduled to work ten days in the payroll period. The State did not count travel time for those investigators in order to generate the 80 hours of pay it made to them. Rather, it erroneously paid on the basis of their work schedule, not the number of hours they actually worked. As this is so and payment was not made for travel time the State urges that no such payment be made to the Grievants.

In the course of the hearing Deputy Chief Dodd examined the daily activity reports filed by a number of Investigators. Comparison of those reports with and the pay made to them indicated they had properly not been paid for travel time. There were minor errors in the pay made to those

Investigators. However, there was no evidence that regular travel time pay was made to them. Such payments would be improper under Departmental regulations according to Chief Dodd.

According to the State at no time was there a "change" in the travel pay policy. Various memo's were issued over the years in an attempt to clarify and make more understandable the policy. However, the policy has not changed. Thus, there has not been a need to notify the Union under the provisions of Article 21, Section .01 of the Agreement. In fact, the parties discussed travel time in meetings of the Labor-Management Committee. In the State's view there has never been a policy or practice of making the sort of travel payments requested in this grievance. As this is the case it urges the Grievances be denied.

Discussion: Union reliance upon Article 21, Section .01 in support of its position in this dispute is misplaced. The language in that Section provides that if the Union desires to present its views on any new rules it may do so in the Labor/Management Committee meetings. In fact, the Union did just that. The record made at the hearing demonstrates with abundant clarity that the Union knew about any modifications in the travel policy as were made by the Employer and discussed them at the Labor/Management meeting. If the Department failed to notify the Union two weeks in advance of

any changes there was no adverse effect upon members of the bargaining unit by that action. The proverb associated with basketball applies in this situation, "no harm, no foul." This dispute cannot be resolved on the basis of the Employer's failure to notify. While there may have occurred a technical lapse in the State's compliance with the Agreement on this matter, it is clear that such changes as were made in the travel policy were made known to the Union in timely fashion and the Union was provided an opportunity for discussion with the State.

Article 22, Section .10 provides that employees who begin work at a location other than their actual work location or headquarter (s) county shall be paid in accord with "current" Departmental practices. While the Union is of the view that "practice" in the Department called for travel time of the sort it is seeking in this proceeding to be paid, the record does not support that conclusion. A multitude of documents were introduced by the State which indicate to the contrary. The clear record indicates beyond dispute that to the extent some Investigators received the sort of travel time at issue in this proceeding it represents an aberration and an error in the State's pay procedures. Only an infinitesimal fraction of the payments made to Investigators were paid as the Grievants assert they should be. This record fails to establish the existence of the sort of "practice"

required by the Agreement at Article 22.10. To the contrary, the well established "practice" concerning the payment of travel time supports the position of the State without reservation.

Examination of the various travel policies in effect (Joint Exhibits 3, 4, and 5) shows that they are basically the same. They provide that Investigators will receive travel pay to their districts at the start of their work week and at the end of their work week. This pay is made under specific circumstances. It occurs only when Investigators reside outside of their home districts. With respect to travel time the policies have remained fundamentally unchanged from 1982 to date. In their application, the State has been consistent. It cannot be concluded that the violation of the Agreement claimed by the Union has occurred in this instance.

The Agreement is instructive in this situation by its omission. Article 22, Section .10 deals with "Reporting to Work." It does not deal with travel time. More specifically, it does not provide for the type of payments being sought by the Union in this proceeding which are accurately characterized as "portal-to-portal pay." Agreements which contain provisions for portal-to-portal pay provide that employees are paid from the time they leave home to the time they return. For instance, in the bituminous coal industry such pay is made. No reference is made to that pay being due

is found in the Agreement. If the Union desires that portal-to-portal pay be made it must secure that benefit through the mechanism of bargaining, not the arbitration forum. The record in this case demonstrates that the State has been consistent in its payment of travel pay. The sort of payments urged upon the Arbitrator have not been made with any consistency whatsoever. Consequently, the claim of the Union in this instance is rejected.

Award: The grievance is DENIED.

Signed and dated this 21st day of April, 1990 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator