#4159

In the Matter of Arbitration	*	
Between	*	Case No.: G87-1380
OCSEA/AFSCME Local 11	*	
and	*	Before: Harry Graham
The State of Ohio, Department of Transportation	*	

Appearances: For OCSEA/AFSCME Local 11:

Yvonne Powers
John Porter
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Meril Price
Office of Collective Bargaining
65 East State St., 16th Floor
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on June 21, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing statements were filed in this dispute. Receipt of those statements was acknowledged by the Arbitrator on June 30, 1990 and the record closed on that date.

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

> Did the Employer violate Article 13.15 of the Contract between the parties when it refused to pay double time

to various Ohio Department of Transportation employees when no weather emergency was declared by the Department of Highway Safety for the counties in which these employees were assigned? If so, what should the remedy be?

Background: The parties agree upon the events that give rise to this controversy. On Friday, April 3, 1987 a snow storm began in south-central Ohio. That storm produced large amounts of snow in the area. Up to 18 inches of snow were recorded in Monroe and Noble counties. Sixteen inches of snow fell on Guernsey County and 15 in Coshocton County. Substantial snowfall was recorded in other counties in that area of the state as well. On April 4, 1987 at 12:30PM the Director of the Department of Highway Safety, William Denihan, declared a weather emergency. His declaration encompassed Jefferson, Harrison, Carroll, Belmont, Tuscarwaras, Guernsey and Muskingum Counties. Among that group of counties Muskingum and Guernsey are within the administrative area of the Department of Transportation known as District 5. The other counties within the weather emergency area fall within the boundaries of ODOT's District 11.

In fact, employees of the Department made extraordinary efforts to keep highways in the area open for passage. Long hours were worked in the course of that effort. With very few exceptions employees left their homes and reported to work to cope with the snowfall.

In due course the State declined to make double time pay to those employees who worked in Knox, Licking, Fairfield, Perry and Coshocton Counties. It was of the view that an emergency had not existed in those counties which warranted payment of double time to those who had worked during the snow storm of April 3 and 4, 1987. The State was willing to pay employees who worked in Guernsey and Muskingum counties double time for their efforts during the snow storm. It has not done so pending resolution of this dispute.

In order to protest what it regarded as a violation of the Agreement made when the State refused make premium pay to certain employees in ODOT District 5 grievances were filed. They were consolidated for purposes of this proceeding and the parties agree they are properly before the Arbitrator for determination on their merits.

Position of the Union: The Union points out that there exists no doubt that large amounts of snow fell within Knox, Licking, Fairfield, Perry and Coshocton counties. By any accepted usage of the term "emergency" such an event existed in those counties on April 4, 1987. In fact, an "emergency" was declared by proper officials of the Department of Transportation on April 4, 1987. The Deputy Director in charge of District 5, John Hagan, used the term "emergency" when he asked employees to report to work. He asked that provision be made to have food and sleeping accommodations

available in ODOT facilities in District 5. This was the first time such an event had occurred. Furthermore, he waived the rule prohibiting more than 16 hours of work without a break. That event would occur only when there exists an emergency according to the Union.

Independent corroboration that a state of emergency existed was provided by Trooper Danner of the Ohio State Highway Patrol. On April 4, 1984 he stopped at the Perry County ODOT garage. He informed employees at that facility that an "emergency" existed. He indicated to them he had heard it on AM radio. In order to confirm this was indeed the case he telephoned the Highway Patrol Post in Lancaster, OH. At the conclusion of his conversation with officials at Lancaster he reiterated that a weather emergency had been declared. The record indicates that an emergency was declared by the District Director and confirmed by Trooper Danner. Employees labored mightily to cope with the emergency. They are entitled to rely upon the representations of those in authority. Director Hagan was the supervisor in District 5. The representations of a Highway Patrol Trooper are entitled to be taken at face value. The employees were informed of a weather emergency and they responded. It is a violation of the Agreement for the State to deny pay under these circumstances the Union asserts.

Position of the Employer: The State is of the opinion that

the concept of "emergency" as used in the Agreement at Article 13.15 is more restrictive than the Union would have the Arbitrator believe. The Agreement provides that an "emergency" is considered to exist when declared by the Employer "for the county, area, or facility where an employee lives or works." The Director of Highway Safety did not declare an emergency for Knox, Licking, Fairfield, Perry or Coshocton counties. Muskingum and Guernsey counties of ODOT District 5 are specified as being within the "emergency" area included in Director Denihan's order. Hence, the State properly denied payment to people outside of those counties in spite of their substantial contributions on April 4, 1987.

Section 13.15 of the Agreement continues to provide that an emergency shall "not" be considered to have occurred if the occurrence is "normal or reasonable foreseeable." That is precisely the case in this situation. Admitting that the storm of April 3-4, 1987 fell after the normal snow season which is considered to end on March 30 of each year, the State insists that it was certainly a normal situation. The amount of snow was extraordinary but it is the job of the grievants to deal with it. They do that each winter. Nothing unusual existed in this situation, albeit the great amount of snow.

Employees of the Department were identified as "essential" or "nonessential" for purposes of coping with

snow. Essential employees, among whom are the grievants, were informed by letter of their status. The letter they received indicated that an "emergency" was to be declared by the Department of Highway Safety. The Director declared an emergency for some counties and excluded others. He may do so. As that occurred people in the counties excluded from his declaration are not entitled to pay under the Agreement the State insists.

Neither Director Hagan nor Trooper Danner have authority to declare an emergency. That declaration may be made solely by the Director of Highway Safety. As his declaration excluded certain counties and included others, only people in the counties affected by his declaration are entitled to the premium pay sought by the Union in this proceeding the State insists.

During the course of negotiations for the 1986-1989 the Union was made aware of the State's position on pay for work in "emergencies." The State was concerned that emergencies might be declared by any number of government officials such as County Sheriffs. It sought to guard against incurring an obligation to pay its employees when other than State officials declared emergencies. When the parties negotiated this issue on May 5, 1986 the Chief Spokesman of the State indicated to the Union that a local Sheriff was not the proper authority to determine if an emergency existed. He

took the view that snow for employees of ODOT was not an emergency. Employees were expected to deal with it as part of their jobs. Similarly, a prison riot was not an emergency. Dealing with it was an expected part of the job for corrections personnel. The only circumstances under which an "emergency" under the Agreement exist involve a declaration by the State. The declaration excluded some counties and included others. As that is the case, only employees who work in the counties affected by the declaration are entitled to double time pay the State insists.

Further and contemporaneous example is furnished by the disaster at Shadyside, OH. Occurring in June, 1990 a flood of great magnitude caused loss of life and damage to State property. As no "emergency" under the Agreement was declared in the Shadyside situation, employees of the State who were involved in clean-up efforts are not entitled to the sort of premium pay sought by the Union in this proceeding. The Shadyside and snowstorm situations are analogous according to the State. Consequently it urges the grievances be denied.

Discussion: It is beyond doubt that the weather conditions on April 3 and 4, 1987 constituted an emergency as the term is used in colloquial conversation. Copious amounts of snow fell in south-central Ohio rendering roads impassable despite the best efforts of ODOT employees. Certainly all who experienced the storm and attempted to alleviate its effects had and have

every reason to conceive of those days as constituting an emergency in their daily lives.

When the parties negotiated Section 13.15 of the Agreement they delegated vast amounts of authority to the Employer in the area of emergencies. It is the Employer who declares whether or not an emergency exists. The determination of the Employer is the principle against which this dispute must be evaluated. It may not be second guessed by an Arbitrator due to the explicit language in the Agreement which provides that an emergency is considered to exist "when declared by the Employer...."

When Deputy Director Hagan referenced the emergency conditions that existed in the region on April 4, 1987 he was using the word in his capacity as the Chief Operating Officer of District 5 of ODOT. The Agreement does not specify that the Director of Highway Safety is the sole and exclusive authority to issue declarations of emergency. It does not specify who in the hierarchy of State government is responsible for issuing such declarations. An emergency exists when declared by the Employer. Employees of ODOT District 5 knew that Deputy Director Hagan was the supervisor of the District. It was reasonable of them to believe that when he made reference to an emergency that such a condition indeed existed.

Language elsewhere in the Agreement is instructive on

this point. Article 14 deals with what the parties term the 1000 hour assignment issue. In Section 14.01 which is specific to ODOT the "Director of the Ohio Department of Transportation or designee" is given authority to make temporary assignments. In contrast, Article 13 refers to the "Employer" declaring an emergency. The Deputy Director in charge of District 5 used the word emergency when asking his employees to report to work and work overtime to the limits of their capabilities. Working in a snowstorm of great severity it is reasonable for employees to believe that he was the proper authority to do so. This is true even when his announcement is read in conjunction with the notice to essential employees found in Joint Exhibit 5. The letter to essential employees in that Exhibit indicates that they are to report to work when a weather emergency is declared by the Department of Highway Safety. When Deputy Director of ODOT Hagan announced the emergency it is not to be expected that employees would inquire of him whether or not he was acting on the authority of the Department of Highway Safety. To the contrary, they had a legitimate expectation that he was acting pursuant to proper authority, which in this case was the Department of Highway Safety.

It is not realistic to expect employees plowing snow and spreading grit and salt in very inclement weather to inquire if the comment by their District Director was properly made

by him. Sitting in trucks, coping with the hazards of the road in a very heavy snowfall, they cannot be expected to inquire if he was cloaked with the authority to declare an emergency. To the contrary, they are entitled to rely upon his representations when made in the context of asking them to report to work or remain beyond a double shift due to the extraordinary weather conditions. When Deputy Director Hagan came on the ODOT radio network to make his announcement on April 5, 1987 he was preceded by another announcement. Employees were asked to observe radio silence in order to receive a message from the Deputy Director. In such circumstances when he made reference to an "emergency" reasonable people could well expect that he carried the authority to commit the State.

In the third paragraph of Section 13.15 the parties indicated their agreement that an emergency did not occur (emphasis added) when employees were asked to cope with occurrences which are normal or reasonably foreseeable at the work site. Eighteen inch snowfalls in early April in south central Ohio are not reasonably foreseeable. The unusual time at which the event occurred plus the magnitude of the snowfall put it well beyond the realm of reasonable contemplation.

Employees of ODOT cannot fail to report to work when a weather emergency is declared and then attempt to defend

their action by claiming no such emergency existed. In the circumstances of this case when employees were apprised of the emergency by Deputy Director Hagan they were entitled to rely upon his representation. They reported to and remained at work.Hence double time pay is due to all employees of ODOT District 5 who worked overtime on April 4, 1987.

Award: The grievance is sustained. All employees in ODOT District 5 who worked overtime on April 4, 1987 are to be paid double time pay.

Signed and dated this 14th day of July, 1990 at South Russell, OH.

Harry Graham

Harry Graham