In the Matter of Arbitration	
Between	Case No.:
OCSEA/AFSCME Local 11	25-12-(5-23-90)-75-01-06
and	Before: Harry Graham
The State of Ohio, Department of Natural Resources	

#512

Appearances: For OCSEA/AFSCME Local 11:

Steve Lieber
Staff Representative
OCSEA/AFSCME Local 11
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For Ohio Department of Natural Resources:

Jon Weiser
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Fountain Square, Building D-2
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on October 19, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were not filed in this dispute and the record was closed at the conclusion of oral argument.

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

> Did the Employer violate the Collective Bargaining Agreement when it changed Gary Bizjak's work schedule in 1987 and subsequent years? If so, what shall the remedy be?

Background: The parties agree upon the events that give rise to this proceeding. The Grievant, Gary Bizjak, is presently employed as a Parks Conservation Crew Leader at Punderson State Park in Geauga County, OH. Geauga County is in the northeastern section of the State. During much of the time when the events that prompted his grievance he was classified as a Golf Course Worker. The duties of the two positions are largely similar though as a Parks Conservation Crew Leader Mr. Bizjak now performs some supervisory tasks. He remains a member of the Bargaining Unit.

As a Golf Course Worker and Parks Conservation Crew Leader Mr. Bizjak performs such tasks as mowing, pesticide and fertilizer applications, changing of pin placements and cleaning of ball washers.

In 1985 Mr. Bizjak worked a Monday-Friday work schedule from January to the end of April. He worked from 7:00AM to 3:30PM. At the end of April his schedule was changed to Monday-Wednesday for 8 hours, Thursday for 4 hours, Friday for 8 hours and Saturday for 4 hours. The total hours worked remained at 40 per week. The following week his schedule was Sunday 4 hours work, Monday-Wednesday 8 hours work, Thursday 4 hours work, Friday 8 hours work. Saturday and Sunday were off. The total was 80 hours of work in a two week period.

In 1986 he worked Monday-Friday for 8 hours per day, 40 hours per week in the January-April period. At the end of April, 1986 his work schedule was changed to the same one as

he had worked in 1985. On July 1, 1986 there occurred another change. His scheduled reverted to Monday-Friday for 40 hours per week. Saturday and Sunday were days off. When he worked Saturdays and Sundays as he did with some regularity the Department paid him at the rate of time and one-half. (1.5T).

In 1987 during the golf season his schedule was changed once again. He was put on a Tuesday-Saturday schedule for 40 hours per week. Sunday and Monday were his days off. He no longer received overtime pay for his Saturday work. At the conclusion of the golf season his schedule reverted to the Monday-Friday work week he had worked in prior years.

In 1988, 1989 and 1990 the same scheduling pattern was used with respect to Mr. Bizjak. That is, during the golf season he was on a Tuesday-Saturday work week. No overtime pay was made for his Saturday work.

When Mr. Bizjak's schedule was changed in 1987 he promptly filed a grievance. His grievance was processed through the arbitration procedure of the parties. No resolution was had. For some reason the grievance was not arbitrated. The same sequence of events occurred in 1988 and 1989. Mr. Bizjak filed a grievance, it was processed but not resolved. In 1990 when the same event occurred the grievance was advanced to arbitration.

Position of the Union: At Section 13.07 the Agreement deals with overtime. By the terms of that section the State is prohibited from changing an employee's work schedule to avoid

the payment of overtime. That is precisely what occurred in this situation according to the Union. Mr. Bizjak was on a Monday-Friday work week during the time of year when the golf course was closed. When the golf season began his work week was changed to Tuesday-Saturday. On Saturday he performed the same sort of tasks that he did in the Tuesday-Friday period. The conclusion is inescapable according to the Union that the only reason Mr. Bizjak's schedule was changed was to avoid overtime. As that is prohibited by the Agreement overtime pay back to 1987 is owed to the Grievant in the Union's view.

The Grievant's supervisor did not wish to work overtime on Saturdays. He is not eligible for overtime pay due to his supervisory status. In order to avoid the necessity of reporting to work on Saturdays by Mr. Bizjak's supervisor, the State changed the Grievant's schedule. He now works Saturdays in golf season and does not receive overtime pay. His schedule was changed to avoid the necessity of making such pay. This is an explicit violation of the Agreement which must be corrected according to the Union.

Anticipating a defense by the Employer which relies upon its operational needs at Punderson the Union asserts that any such defense is bogus. Time records kept by the Grievant indicate he does little mowing on Saturday. Work other than routine maintenance is normally performed in the Monday-Friday work week. To the extent the Grievant is not at work on Monday's his participation in such tasks is limited. In

fact, drainage repair and other non-routine tasks have gone undone at Punderson. This is indicative of the fact that operational needs of the Employer have no bearing upon the outcome of this dispute according to the Union.

When the State changed Mr. Bizjak's work schedule to Monday-Friday in 1986 it created a practice. That practice has been violated in 1987, 1988, 1989 and 1990 in the opinion of the Union. As that is the case it urges an award in its favor including a directive that the Employer pay overtime to Mr. Bizjak for those years.

In support of its position in this dispute the Union introduced two arbitration decisions involving these parties. In the Union's view these indicate that the State cannot act as it did in this instance.

Position of the Employer: The State indicates that in changing Mr. Bizjak's work schedule to Tuesday-Saturday it did not violate the Labor Agreement. When the Grievant was placed on a Monday-Friday work schedule in the summer of 1986 it was done to come into compliance with the parties initial Agreement. When the State more fully understood the terms of that Agreement in 1987 and subsequent years it altered Mr. Bizjak's summer schedule to the Tuesday-Saturday schedule at issue in this proceeding. It may do that under the plain terms of the Agreement at Section 13.01. That Section provides that the standard work week shall be 40 hours consisting of 5 consecutive days on and 2 consecutive days

off. That is the schedule Mr. Bizjak has worked in the golf season since 1987.

The State points out that the golf course at Punderson is a seven day per week facility during the golf season. It requires constant care and attention. The State ensured it would be able to cope with seven day operations by the explicit language of Section 13.01 of the Agreement. It is required to provide to Mr. Bizjak a five day work week with two days off. It has done so. No violation of the Agreement has occurred.

When Mr. Bizjak's work schedule is changed to Monday-Friday during the non-golf season it is out of courtesy to him. The Employer recognizes that such schedules are regarded as being more desirable by employees and their families. It accommodates their desires when it can. When the golf course is in use that cannot be the case. Mr. Bizjak's schedule is altered to deal with the needs of the public who use the Punderson facility. If he works more than the specified 40 hours per week the State will pay overtime. As he does not normally do so under his present Tuesday-Saturday work schedule no violation of the Agreement has occurred. Consequently the State urges the grievance be denied.

Discussion: When the State placed Mr. Bizjak on a Monday-Friday work schedule in the summer of 1986 it did not create a practice which would serve to bind it forevermore. The parties were confronted with a changed environment. For the

first time they were operating under a collective bargaining agreement. The State had utilized Mr. Bizjak flexibly in the Summer of 1985. It could not act similarly in 1986 due to the implementation of the Agreement. In effect placement of Mr. Bizjak on the Monday-Friday schedule in the summer of 1986 was a one-time occurrence. As is well known one event or action does not serve to bind the Employer or the Union. It takes constant repetition to create the sort of practice the Union asserts has occurred in this instance. That has not been the case. Consequently, the past practice argument of the Union cannot determine the outcome of this dispute.

Whether or not the Grievant is participating in the non-routine maintenance of the Punderson facility or if such tasks are remaining undone does not govern the outcome of this dispute. No claim was raised by the Union that Mr. Bizjak was working outside of his classification on Saturdays. That he is not spending many hours mowing is irrelevant. From the indications of the parties at the hearing Mr. Bizjak is performing tasks associated with his position while at work on Saturdays. As that is the case, that certain tasks may remain undone is of no consequence to this dispute.

That rationale applies to the appearance of Mr. Bizjak's supervisor on Saturday as well. Whether or not that person comes to work and is paid cannot determine the outcome of the dispute. Nothing is on the record to indicate that Mr. Bizjak

is performing supervisory duties reserved to his supervisor. He is performing work within his job classification. Whether or not his supervisor is at work on Saturday is a matter for the Employer to determine. His absence does not control the resolution of this dispute.

The arbitration decisions proffered by the Union in support of its position in this dispute fail to do so. The decision of Arbitrator Drotning in Case No. G-86-70 involve an episodic alteration of work schedules. It is also concerned with five and seven day employees. Those considerations are not involved in this dispute.

Arbitrator Rivera's decision in Case No. G-86-0443 similarly is not instructive for resolution of this dispute. It deals with break time on regular and overtime work. There is relevant commentary by Arbitrator Rivera in that case which does bear upon this dispute. Arbitrator Rivera correctly notes that specific contract language is to take precedence over general contract language.

The language of Section 13.07 of the Agreement relied upon the by Union to support its position in this dispute should be carefully scrutinized. It reads:

> An employee's posted regular schedule shall not be changed to avoid the payment of overtime. (Emphasis added).

Attention must be devoted to the word "regular." It cannot be said that Mr. Bizjak has a "regular" schedule. From April to November he works Tuesday-Saturday. At other times he works

Monday-Friday. April-November is half a year. That particular schedule for the Grievant is no more irregular than the Monday-Friday schedule he works at other times of the year.

By the terms of the Agreement at Section 13.01 the State is to provide a standard work week of 40 hours. This must be followed by two consecutive days off. During the golf season that schedule has been provided to Mr. Bizjak. He works 40 hours in five consecutive days and has two consecutive days off. **The Agreement is instructive by its silence. It does not require the State to provide a standard work week of Monday-Friday. It must provide 40 hours of work followed by two consecutive days off.** It is doing so for the Grievant during the golf season at Punderson. No violation of the Agreement has occurred in this situation.

Award: The grievance is denied.

Signed and dated this 5th day of November, 1990 at South Russell, OH.

Harry Graham
Arbitrator