#597

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio

Employer.

Grievance No. 11-09-(10-04-89)
112-01-09
Grievant (Richard T. Svoboda)
Hearing Date: March 19, 1991
Brief Date: April 20, 1991
Award Date: May 21, 1991
Arbitrator: R. Rivera

For the Employer: Valerie Butler
Michael P. Duco

For the Union: Tim Miller

Present at the hearing in addition to the Grievant and the Advocates named above were the following persons: Janice Viau, Labor Relations Manager (OBES) (witness), Marty Puckett, Manager Columbus East (witness), Dan Bloodsworth, Veterans Employment Administration (OBES) (witness), Jerry Lehman, Labor Relations Officer (OBES), Raymond A. Pryor, LVER (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer

granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Relevant Contract Sections

Article 5 - Management Rights

> Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

§ 13.10 - Payment for Overtime (in part)

> 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.

§ 25.03 - Arbitration Procedures (in part)

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

§ 29.01 - Definitions: Sick Leave for State Employees

1. **Active pay status** means 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.

2. **No pay status** means the conditions under which an employee is ineligible to receive pay and includes, but is not limited to, leave without pay, leave of absence, and disability leave.

3. Full-time employee means an employee whose regular hours of duty total eighty in a pay period in a state agency, and whose appointment is not for a limited period of time.

§ 37.03 - In-Service Training

Whenever employees are **required** to participate in in-service training programs, they **shall** be given time off from work with pay to attend such programs, including any travel time needed. Any costs incurred in such training shall be paid by the Employer. Every reasonable effort shall be made to notify employees of training opportunities through available channels of communication.

§ 37.04 - Leave for Training/Continuing Education Programs

The Employer **may** grant permanent employees paid leave **during regular work** hours to participate in non-agency training/continuing education programs which are directly related to the employee's work and will lead to the improvement of the employee's skills and job performance. Reasonable effort will be made to equitably distribute such training opportunities among employees.

Joint Exhibits

1. Contract 1989-1991
2. Grievance Trail
   A. Grievance dated 10-4-89

B. Notice dated 10/10/89
C. Step Three Response dated 11/3/89
D. Notice of Arbitration dated 12/15/89

3. IOC from Dan Bloodsworth, Chief, Veterans Services to Pat Moore dated 9/22/89 Re: National Veterans Training Institute which read as follows (full text).

> The Veterans Benefits Session is now being scheduled for NVTI. The attached NVTI application(s) are for LVER/DVOPs who have already attended the Professional Skills Development (1st) Session. Applicants are requested to submit the applications to the Veterans Section for approval by central office.
>
> Each training session will be for a period of one week. All sessions start Monday, end Saturday, departing for home on Sunday (may change in future). The Veterans Benefits Session is for LVER/DVOPs **ONLY** and is NOT COMPULSORY but those **WHO ATTEND WILL BE PAID 40 HOURS WORK WEEK BUT NOT MILEAGE, OVERTIME, OR COMPENSATORY TIME.**
>
> If a selected individual is unable to attend the session contact Dan Bloodsworth IMMEDIATELY at 614-644-7301 so that another individual may be selected from those approved.
>
> The NVTI staff at the University of Colorado in Denver will be responsible for coordinating all travel arrangements. All training expenses are covered by the grant to include round trip air fare to Denver, transportation to and from the training site, lodging and meals.
>
> Casual dress is allowable for training sessions - a class picture is taken of each group. You may want to take a suit, tie, dress, etc. for this event.
>
> Please complete the attached application form and return as soon as possible to the Veterans Section, central office.

4. Title 38, USC, Chapters 41, 42, and 43 § 2009 (full text)

> § 2009. National Veterans' Employment and Training Services Institute

(a) In order to provide for such training as the Secretary considers necessary and appropriate for the efficient and effective provision of employment, job-training, counseling, placement, job-search, and related services to veterans, the Secretary shall establish and make available such funds as may be necessary to operate a National Veterans' Employment and Training Services Institute for the training of disabled veterans' outreach program specialists, local veterans' employment representatives, Directors for Veterans' Employment and Training, and Assistant Directors for Veterans' Employment and Training, Regional Administrators for Veterans' Employment and Training, and such other personnel involved in the provision of employment, job-training, counseling, placement, or related services to veterans as the Secretary considers appropriate, including travel expenses and per diem for attendance at the Institute.

5. Veterans' Program Letter No. 7-89 (U.S. Dept. of Labor) dated 5/2/89.

6. Program Outline "Professional Skills Development Agenda" NVTI dated 3/11/91.

7. Second Pilot Session Agenda (NVTI) dated 12/14/86.

8. IOC dated 4/25/89 entitled "Excused Leave to Attend 1989 Ohio Chapter of IAPES Spring Institute in Columbus on 5/18 through 5/20, 1989."

9. IOC dated 3/18/91 entitled "IAPES 1990-1991 Membership Drive."

Employer Exhibits

1. Opening Statement.

2. Veterans' Program Letter No. 1-89 (U.S. Dept. of Labor) dated 10/14/88.

3. Veterans' Program Letter (U.S. Dept. of Labor) No. 1-87 dated October 29, 1986.

4. Application for NVTI.

Union Exhibits

1. Opening Statement.
2. NVTI Application Form.
3. Travel Expense Report of Grievant dated 12/20/86.
4. Payroll Reports of Grievant dated 1/30/87 and 2/13/87.

Joint Stipulation of Facts

1. The Union raises no procedural objections.
2. NVTI was created by Title 38 of the U.S. Code.

Employer's Statement of the Issue

Was the Employer obligated to pay compensatory time or overtime for attendance at, and travel to the National Veterans' Training Institute pursuant to section 37.04 of the contract?

Union's Statement of the Issue

Did management violate Articles 37, 13, and the Fair Labor Standards Act by denying Veteran Representatives overtime for travel and training outside normal working hours to attend the National Veterans Training Institute? If so, what shall be the remedy?

Facts

The Grievant is a DVOPS, Disabled Veteran Outreach Program Specialist, a position within the Ohio Department of Employment

Services. DVOPS provide services for disabled veterans. The program is funded by the federal government through the U.S. Department of Labor. The Grievant attended the National Veterans Training Institute (NVTI) in 1986. This training program is funded by the U.S. Dept. of Labor and "is designed to provide highest priority training services for LVERs, DVOPs and other related people who provide services for Veterans of Military service." [direct quote from NVTI application form - Union Exhibit #2] The Grievant described the NVTI training as "critical for his job performance," "the best training available for DVOPs and LVERs as to what our job is about," "intensive," "geared to consider every possible area of our jobs." The Grievant testified that NVTI consisted of 1) 40 hours of classroom training, 2) a mini-training session of Sunday evening from 6-8:30 p.m., and 3) networking meetings on weekday evenings at which attendance was "encouraged by the NVTI staff." Lastly, the Grievant said that an informal meeting was also conducted on Saturday morning before participants left. The Grievant said that attendance at NVTI was imperative and crucial to the job performance of DVOPs and LVERs. He stated that without the training one learned by word of mouth, errors, and was seriously hindered in one's job performance.

The Grievant testified that when he attended NVTI in 1986 he was compensated by the State of Ohio for time expended in travel to and from NVTI and for time expended at NVTI above his normal 40-hour work week. Union Exhibit 4 indicated that the Grievant

had received credit for 29 hours of compensatory time. Moreover, the Grievant testified that he was reimbursed for mileage to and from the airport. (See Union Exhibit 3) The Grievant said that upon his return from NVTI in 1986, he had listed his hours as "over-time" and filed a travel reimbursement request. He said that originally the State has turned down these items but that had paid "after he threatened to file a grievance." (Note: The federal government pays airfare to and from their home base for all NVTI trainees; in addition, the federal government pays for food, lodging, and ground transportation at the NVTI site. The State of Ohio grants paid leave of 40 hours for the week of the Institute.)

The Grievant said that the current grievance arose when DVOPs and LVERs received the IOC of 9/22/89 concerning NVTI. [See Joint Exhibit 3: Full text appears on p. 5 of this Opinion] The Grievant indicated that he interpreted the IOC as forcing employees to forfeit their rights to overtime and travel reimbursement in order to attend NVTI. The Union rested its case after the testimony of the Grievant.

Daniel Bloodsworth, Veterans' Employment Administrator for OBES stated that NVTI in 1986 was a pilot program. (See Employer Exhibit #3) He said that OBES was uncertain at that time about the program and how OBES would participate. During that pilot program, OBES did allow overtime and did pay mileage to and from airport. However, that one year -- 1986 -- was the only year those items were paid, and they have never been paid since then.

The federal government pays airfare, limo, hotel and meals for applicants. (See Joint Exhibit No. 5) OBES makes sure all LVERs and DVOPs receive applications. (See Employer Exhibit No. 4) OBES approves all applications made and forwards the applications to NVTI. When NVTI approves an individual, OBES notifies the employee and if the employee can attend the week in question, OBES notifies NVTI. Mr. Bloodsworth stated that NVTI is not mandatory. OBES does conduct mandatory in-service for DVOPs and LVERs. This training is required, and therefore, all costs are paid including travel reimbursement and overtime where necessary to get to and from mandatory training.

On cross-examination, the Union Advocate asked Mr. Bloodsworth to read § 2009. (See Joint Exhibit No. 4) He asked Mr. Bloodsworth if NVTI was necessary. Bloodsworth said, No, that NVTI was important for LVERs and DVOPs but not "absolutely needed to do their jobs." Mr. Bloodsworth was asked about the 9/22/89 IOC: "Why exclude overtime and mileage?" Bloodsworth stated that the 9/22/89 IOC was the same policy as 1987 and 1989. Bloodsworth stated that some states did provide compensatory time for DVOPs and LVERs to cover travel time to NVTI. Mr. Bloodsworth said he did not check the Fair Labor Standards Act before drafting the IOC. Bloodsworth testified that Veterans programs were not "jointly administered" by DOL and OBES, rather that the program was federally funded, administered by OBES, and "monitored" by DOL. He said § 2009(a) does not require states to participate in NVTI. (See Employer's Exhibit No. 2)

Marty Puckett, Manager of Columbus East Office of OBES also testified. She supervises LVERs and DVOPs in her office and has approved leave for LVERs and DVOPs to attend NVTI. LVERs and DVOPs are required to attend Employment Service (ES) Basic Training, and LVERs and DVOPs also have had some required specialized training, e.g., on special computers. Ms. Puckett stated that for both required ES Basic Training and required specialized training, DVOPs and LVERs received mileage and overtime where earned. She said NVTI was neither mandatory nor required but was certainly helpful for LVERs and DVOPs.

Janice Viau, Labor Relations Manager for OBES also testified. She indicated that IAPES was another type of non-mandatory training which OBES supported by giving paid leave. In the case of IAPES, paid leave was 10 hours, (See Joint Exhibits No. 8 and 9), while NVTI was 40 hours. In neither case, she maintained, can employees earn overtime or receive mileage reimbursement.

Raymond A. Pryor, a LVER from Chillicothe with 12 years experience, also testified. He indicated that he had attended NVTI three (3) separate times. He said that based on the IOC of 9/22/89 (Joint Exhibit No. 3), he understood that the program was not mandatory. He described the program. (See Joint Exhibit No. 6) In his case, he arrived at noon on Monday and was oriented that afternoon for "couple" of hours. Classes were Tuesday 8-4:30, Wednesday 8-4:30, Thursday, 8-12, Friday 8-4:30 and Saturday 8:30-12. He said classes and required meetings were not

more than 40 hours. He said flight time was 3-4 hours each way. He was not paid any compensatory or overtime, nor was he reimbursed for travel to and from airport at home in Ohio. He said he had attended required specialized training and had been reimbursed for travel. He testified he was an IAPES member and had attended IAPES meetings. Mr. Pryor said that he could do his job without NVTI training but that the training was helpful and appropriate.

Union's Position

This Grievance involves management's denial of overtime for veterans representatives going to the National Veterans Training Institute in Denver, Colorado.

Title 38, United States Code, Chapters 41, 42, and 43 established National Veterans Training Institute. The Department of Labor recognized the need to provide training on a nationwide basis for all DVOPs and LVER's. By establishing the NVTI, the Department of Labor recognized that specific training was required to perform the job duties of a LVER/DVOP.

The legislation refers to necessary training. The Webster's New World Dictionary defines necessary as 1.) that cannot be dispensed with; essential; indispensable; as, water is necessary to life 2.) resulting from necessity; inevitable 3.) that must be done, mandatory; required. In essence, DVOPs and LVERs are "required" to go the NVTI. NVTI courses are critical to

DVOP/LVER job performance. Mr. Bloodsworth testified that necessary was something that "you have to have."

This unique program is administered by the Department of Labor and OBES. Title 38 specifies that the Labor Department will set staffing, provide funding, determine training and set program objectives. OBES conducts the day to day administration of the program.

Articles 37.03 and 37.04 encompass the basic training provisions of the contract. The language in both sections give management discretion in this area. However, management does not have an unfettered right. Management cannot make its decision arbitrarily, unreasonably, or capriciously. Arbitrator John Gorsuch in Denver Publishing and Denver Typographical Union - 52 LA 553, established the standard for judging when management acted in a reasonable manner. The 3 tests are

1.) The action was taken in good faith;

2.) The action was not discriminatory or capricious;

3.) The decision must be in accord with the contract.

In this case, management did not act in good faith. Title 38 specifies that training for DVOPs/LVERs is necessary and appropriate. Management knew this but tried to cloud this by stating that training was not compulsory. The Grievant testified as to receiving comp time and mileage when he went to NVTI in December 1986.

Management acted in a capricious manner. In the IOC dated September 22, 1989, Mr. Bloodsworth refers to not paying overtime

or compensatory time. By stating this, Mr. Bloodsworth recognized that overtime does come into play. At a point in time unknown to the union, a decision was made by OBES management to cloud this issue because it realized that the contract required overtime for more than 40 hours in pay status during a calendar week. By issuing the IOC of September 22, 1989, Mr. Bloodsworth tried to lure workers into giving up a benefit granted by the contract. Thus, management attempted to negotiate individually with union members.

Articles 37.03 and 37.04 specify that a worker will receive pay to attend training which means that under Article 13.10 they are in pay status and should receive overtime for hours in class or traveling that exceed 40 hours per calendar week. Management recognized the existence of overtime in this case as reflected in Mr. Bloodsworth's IOC dated September 22, 1989. Moreover, where reasonableness is the standard, management must prove that not requiring training and denying overtime is reasonable.

In Johnson Bronze vs. UAW, 104 LRRM 2378, the U.S. Court of Appeals Third Circuit (Philadelphia) stated that an arbitrator had "imposed a reasonableness requirement onto" management's decision and could properly do so. It is reasonable that management consider NVTI training essential to the job and require employees to go under 37.03 or grant time under 37.04 and pay overtime. In the present case, the burden of proof is on management to demonstrate that not requiring DVOPs and LVERs to

attend NVTI and denying overtime for travel hours and training time that exceed 40 hours per week is reasonable.

Management may argue that overtime must have prior approval; however, the Fair Labor Standards Act, Interpretive Bulletin, Part 785, Section 785.11 is the appropriate guideline to determine whether prior approval is necessary. Work not requested by an employer but which is suffered or permitted is deemed to be work under this regulation. Under Article 13.10, hours in pay status beyond 40 requires payment of overtime. The Fair Labor Standards Act, as well as the contract requires OBES to pay overtime.

The Union did not file with the Wage and Hour Division of the U.S. Department of Labor, which administers the FLSA because it chose to grieve and arbitrate. The contract must conform to federal law.

Section 785.27 of the Act lists four criteria that must be met if attendance at lectures, meetings, training programs and similar activities need not be counted as working time:

1.) Attendance is outside of the employee's working hours. The Grievant's regular hours are 8:00 a.m. - 5:00 p.m., Monday through Friday. Training is held in the evenings and on Saturday.

2.) Attendance is in fact voluntary. Title 38 specifies that training at NVTI is necessary and appropriate as determined by the Secretary of Labor. NVTI training is necessary for performing DVOP job duties. Article

6.03(8) of the Fair Standards Act states "Attendance at lectures, meetings, hearings, programs and other similar activities constitute "hours worked" if the training is meant to increase the employee's efficiency or is otherwise required by the employer." This section of the Fair Labor Standards Act also specifies that attendance is voluntary if the employee's classification or working conditions are not adversely effected by his decision not to participate. If the courses are "necessary and appropriate" for the effective and efficient performance of their job duties as outlined in Title 38 by not attending NVTI, a Vet Rep.'s job would be adversely affected. Article 6.04 of the Fair Labor Standards Act under Compensable Time indicates that conditions for inclusion of hours worked for training are training to increase efficiency or as required by the employer. The NVTI training is for the purpose of increasing efficiency.

3.) The course, lecture or meeting is not directly related to the employee's job. Title 38 specifies that NVTI classes are to be necessary and appropriate as determined by the Secretary of Labor. NVTI training is related to Veterans Representatives job duties.

4.) The employee does not perform any productive work during such attendance. The training in and of itself is productive. By making Veteran Representatives more

knowledgeable and efficient the Agency benefits. The four criteria for not counting training as work time have not been met.

Training is considered work under the Fair Labor Standards Act, therefore, an employee would be entitled to be paid for travel time and training time in excess of 40 hours in a week. This concept is reflected in Articles 13.06 and 32.01 of the contract.

The Union asks that the orders pertaining to veteran representatives in regard to after hours training and travel to NVTI be rescinded, that veteran representatives be paid overtime for training time and travel time in excess of 40 hours in a calendar week, and that veteran representatives be made whole.

Employer's Position

The Ohio Bureau of Employment Services (hereinafter "OBES") provides the citizens of the State of Ohio with a wide variety of programs. These programs include providing employment related services to specific sectors of the community, unemployment assistance to all Ohio citizens and providing special services for Veterans in communities throughout the State. OBES is unique in contrast to other state agencies in that 80% of the agency's funding comes from federal sources. As a result of its federal funding sources, OBES must adhere to and balance its obligations under both federal and state law.

This Grievance surrounds the payment of compensatory time or overtime for time spent traveling to, and attendance at the National Veterans' Training Institute (NVTI) at the University of Colorado in Denver, Colorado. NVTI provides classes on various topics related to servicing Veterans and is funded by a federal grant offered by the Department of Labor. NVTI consists of 40 hours of structured classroom training. The federal grant for NVTI provides funds to cover the employees' round trip airfare to Denver, transportation to and from the training site, lodging and meals. Local Veteran Employment Representatives ("LVERs") and Disabled Veteran's Outreach Program Specialists ("DVOPs") from OBES attend NVTI training sessions. LVERs and DVOPs compose only one section of the Employment Services Division. A separate federal grant provides funding for the salaries of LVER/DVOP staff statewide.

Since 1986, OBES has encouraged but never required its employees to attend NVTI. On September 22, 1989, Dan Bloodsworth, Chief of Veterans Services, issued an Interoffice Memorandum to all employees in the Employment Services Division, which requested that those interested in attending NVTI training to submit an application to him. OBES has never denied an employee the opportunity to attend this training due to staffing concerns. In this Memorandum, Mr. Bloodsworth clearly states that the training is not mandatory and that employees will be granted 40 hours paid leave for the week spent at NVTI training. However, since participation in the program is voluntary and is

not "required" by OBES, the Memorandum advises employees that no overtime or compensatory time will be paid.

Resolution of this Grievance will be determined by the Arbitrator's interpretation of section 37.04. To assist in this task, the Employer would ask the Arbitrator to compare the language of section 37.03 with that of 37.04 of the contract. This provision of the contract provides the Employer with discretion as to whether or not to permit employees to attend training programs which are presented by entities outside of the Employer's own staff. Section 37.04 states that any outside training program must be directly related to the employee's work. The NVTI program clearly falls within the constraints of 37.04. NVTI is presented by University of Colorado under contract by the Department of Labor; no OBES staff participate in presentation of the program. Further, this program is not "required" by the Employer.

Section 37.03 of the contract deals with training programs "required" by the Employer. This provision 37.03 clearly addresses those times when the Employer requires employees to attend mandatory training programs. The language of this provision indicates that whenever the employer requires employees to attend required training sessions, the employees are granted paid time and are compensated for any travel time incurred. Because NVTI is a non-mandatory training program offered by parties who are not on OBES' staff, the Employer has no obligation under the contract to pay any overtime or compensatory

time for employees participating in the training. Further, travel time for employees who voluntarily attend a non-mandatory training program are not considered to be in active pay status. Therefore, the Employer is under no obligation to pay employees for their travel time to and from the training session. The NVTI program is highly respected by OBES and has enhanced the skills of LVERs and DVOPs employees. In view of the benefits derived by employees who attend NVTI training, the Employer, as an added benefit to employees, facilitates attendance at the program. OBES has no obligation to do so under the contract and could rescind employee participation at anytime.

The Employer argues that the Arbitrator is limited to the four corners of the contract within this forum. If the Union wishes to file a FLSA claim, they should seek a remedy at the Department of Labor.

In light of the language of 37.04, the Employer respectfully requests that the Arbitrator deny the Grievance in its entirety.

Resolution of Factual Question

This Grievant primarily involves interpretation of the Contract. However, a factual issue must be settled preliminarily. The Union wishes DVOPs and LVERs to be compensated for three items 1) travel costs to and from the airport, 2) time expended in travel to and from NVTI, and 3) time expended at NVTI in excess of 40 hours. With regard to items 1) and 2), the Arbitrator finds that, presumptively, all DVOPs and

LVERs who attend NVTI do expend funds and time in travel to and from NVTI for which neither the federal government nor OBES reimburses. The time in question does represent time above the 40 hour week. The exact expenditure of time and money is idiosyncratic to the individual. However, the evidence adduced at this hearing was insufficient for the Arbitrator to find that DVOPs or LVERs spent more than 40 hours in required NVTI training activities. (See Joint Exhibits 6 and 7) Hence, Item 3 is not at issue.

Discussion

The Union maintains that the Employer is obligated to pay DVOPs and LVERs for time expended in travel to NVTI and to reimburse DVOPs and LVERs for expenses incurred in travel to NVTI (not paid by DOL). This obligation of the Employer arises out of two possible sources:

1. The Fair Labor Standards Act
2. The Contract

Turning first to the FLSA, the Union argues that under the FLSA the time in question is overtime and hence, under the FLSA, the Employer is required by law to compensate the Employees. The Union would have the Arbitrator 1) interpret the FLSA in such a manner, 2) conclude the Employer's action (or nonaction as the case may be) violates the FLSA, and 3) find for the Grievant as a matter of proper arbitration under the contract.

The Arbitrator declines this role and its conclusion for two (2) reasons, each self-sufficient:

A. NOTICE. A close reading of the Grievance Form indicates that no where in that original grievance was the FLSA mentioned. Moreover, no where in the Step Three response is found any indication that FLSA was raised at that level. The Step 4 Grievance Review also reveals no discussion of the FLSA. Lastly, at the Arbitration hearing the Employer, in its opening, specifically objected to the use of the FLSA as the basis of the Grievance on the ground of lack of notice. The Arbitrator does not wish to categorically hold that every issue must always be explicitly raised in the initial grievance. Many times grievances are drawn by persons who are untutored in specificity. Holding such persons to highly formalistic rules is unfair; pleading by inference in such cases is just. Secondly, the Arbitrator is aware that Step 3 responses and Step 4 reviews are management's documents and cannot be held to be completely accurate as to the Union viewpoint. However, in this case, the Grievance was a carefully drawn class grievance which has been in the pipeline for over two years. The FLSA could have been clearly and specifically raised long before the Arbitration hearing became imminent. To claim a FLSA violation late in the process smacks of unfairness.

Even if the Arbitrator were to find the issue timely raised, she would decline to consider it. In essence, the Union is asking the Arbitrator to interpret the FLSA, find that the

Employer violated the FLSA, and then find that an Arbitrator has the power under the contract to enforce the FLSA within the contract. Thus, the Arbitrator is asked to incorporate external law within the contract. No express provision of the contract provides that the FLSA be incorporated into the contract. (The contract does incorporate certain Ohio and federal statutes specifically, e.g., See Article 2.01, 40, 41.) Arbitral opinion is divided on the question of an arbitrator's authority to apply external law where no explicit provision exists within the agreement. These differing viewpoints are addressed in detail in Fairweather Practice and Procedure in Labor Arbitration pp. 436-468, Hill and Sinicropi, Remedies in Arbitration, pp. 207-221 and Elkouri and Elkouri (4th ed) How Arbitration Works, pp. 366-390. All the commentators speak of two opposing views: The Meltzer view, which in a moment of conflict, argues that the arbitrator must follow the agreement and ignore the law and the Howlett view, which urges the arbitrator to seek out and apply external law to bring the contract into a position consistent with the external law. Both views have adherents, and both views are plausible. Underlying both views is the question of arbitral capability and arbitral role. These questions of role and capability are not determined by a comparison of the role or capability of an individual arbitrator versus an individual judge. Rather, in many situations, the role and capability questions are determined by the institutions and/or processes within which the arbitrator or judge exist. The quality and

scope of information presented to an arbitrator is significantly different from that material presented to a judge. In many cases, that difference severely limits the capability of an arbitrator to competently decide certain issues.

In this case, the Union asks the Arbitrator to interpret the FLSA and find that Employer violated the act. The Arbitrator finds that interpretation of FLSA is beyond the competence of this arbitration process. The Arbitrator is persuaded that Justice Brennan's viewpoint in Barrentine v. Arkansas Best Freight System (as noted in the Employer's brief) is a wise one. Justice Brennan concluded that with regard to specifically the FLSA, that FLSA rights are "better protected in a judicial rather than an arbitral forum." Justice Brennan pointed out the FLSA is a "complex statute" and that any interpretation required "examination of congressional legislative history and DOL administrative rulings." The evidence adduced at the Arbitration hearing with regard to FLSA was minimal, if not sketchy. The Union's evidence did not attempt to illuminate the history and policy of FLSA.

The Arbitrator concludes that the issue of the violation of the FLSA is beyond the scope of this Arbitration.

The Union argues that under the contract, the Employer is obligated to pay employees for travel time and expenses to and from NVTI. The Union's argument takes two forms:

First, the Union argues the NVTI training falls under § 37.03 and not § 37.04. Under 37.04, the Employer may grant

employees paid leave during regular working hours to participate in non-agency training. Paid leave under § 37.04 is discretionary with the Employer. § 37.04 does not require that the Employer pay overtime or reimburse travel expenses. Section 37.03 mandates pay for required in-service training and mandates appropriate overtime pay and travel reimbursement. The Union argues that NVTI belongs under § 37.03 for two (2) reasons: First, the Union argues that NVTI is "required"; secondly, the Union argues that categorizing NVTI under § 37.04 is unreasonable.

The Union argues that because NVTI is regarded by the DOL and many LVERs and DVOPs are critical to good job performance that NVTI is "required" as defined by § 37.03. That interpretation reads "required" out of context. Section 37.03 reads "Whenever employees are required to participate in in-service training programs, ..." This phrase illustrates the problems inherent in sentences written in the passive voice. No actor is named; "who" is "requiring" is not explicit. However, in the context, the "who" is the employer. If the first sentence of 37.03 is read consistent with the second sentence, the employer is the "requiring" actor. The employer "requires" the employee to attend; therefore, the employer shall pay the costs. (i.e., the employer is "required" to pay.) The Employer has chosen in this instance to not require attendance at NVTI. The contract does not set any standards for how the Employer shall choose which training is required, and hence, the choice is the

Employer's right under Article 5. The contract limits the Employer and says that when the employer requires attendance, then the employer shall pay! The Union attempted to bootstrap a requirement of attendance into the situation by showing that the DOL "required" attendance. A close reading of all the materials shows that public law "requires" only that DOL create NVTI, but no federal requirement of attendance was proven.

The Union's next argument is that classification of NVTI under 37.04 (voluntary training) as opposed to 37.03 (required training) was and is unreasonable. As the standard, the Union points to the decision of Arbitrator Gorsuch in Denver Publishing and Denver Typographical Union (52 LA 553). The tests are as follows:

1) Was the action taken in good faith?

2) Was the action capricious or discriminatory?

3) Was the decision in accord with the contract?

Good faith is "honesty in fact." No evidence was adduced that the classification of NVTI as voluntary was "dishonest." If the Union had shown that DOL required the training, arguably, the Employer would have been "dishonest" in not classifying the training as "required." Was the Employer capricious or discriminatory? While the Employer did treat the training differently in 1986, that difference was not capricious in that the 1986 was a pilot program; both OBES and DOL were "trying it" out. To differentiate after a trial period is not capricious. Moreover, NVTI is treated consistently with IAPES which is

similarly categorized, i.e., as worthwhile but not mandatory. To treat in-services as "required," and non-agency training as "not required" is not inherently unreasonable. Management could reasonably decide that only programs whose content it controlled would be required or that only in-state training would be "required" (e.g., as a means of reducing cost). Such decisions may not be wise nor best, but they are not "unreasonable." The last requirement is that a decision must conform to the contract to be reasonable. No express contract provision mandates a different result. The Arbitrator cannot find that the classification of NVTI under 37.04 is unreasonable.

The Union's final argument is that failure to pay for the unreimbursed time and travel to NVTI violates § 13.10 of the contract.

§ 13.10 provides

> 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.

The Union argues that when and employee is at NVTI he or she is on paid leave pursuant to 37.04. Since the employee is on paid leave, he or she is "in an active pay status." Therefore,

when the employee travels to and from NVTI for which the employee is paid for 40 hours, the employee is expending time beyond those 40 hours and hence is "in an active pay status more than forty (40) hours in the calendar week" and must be compensated per § 13.10(1).

Section 13.10(2) defines "active pay status" as "conditions under which an employee is eligible to receive pay and includes, but is not limited to, vacation leave, sick leave and personal leave. (The same definition is found at § 29.01(1).) Section 29.01(2) defines the converse: "No pay status means the conditions under which an employee is ineligible to receive pay and includes, but is not limited to, leave without pay, leave of absence, and disability leave."

The question then becomes as follows: When DVOPs and LVERs are at NVTI are they "eligible to receive pay" per 13.10(2)? The section that creates their eligibility and defines that eligibility is § 37.04. Section 37.04 states "[t]he Employer may grant permanent employees paid leave during regular work hours... To be "eligible" for pay under § 37.04 requires 1) the Employer grant the leave and 2) the employees must be permanent employees. However, § 37.04 also limits the pay available to "regular work hours." In contract interpretation, the specific controls the general. Section 13.01 allows overtime for persons in an active pay status, i.e., eligible to be paid. Section 37.04 defines "eligible" for non-mandatory training purposes, and eligibility is limited to regular working hours. LVERs and DVOPs are paid

for their regular hours; however, § 37.04 does not make them "eligible" for pay beyond those regular working hours. Therefore, 13.01 does not grant overtime for those hours.

The interpretation rendered herein of Articles 37.04, 37.03, and 13.10 does not speak to the wisdom of management's attitude toward and decisions about either LVERs, DVOPs and NVTI. However, the Arbitrator does find the Employer's actions to be within the contract.

Award

Grievance denied.

May 21, 1991
Date

Arbitrator