ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 622

OCB GRIEVANCE NUMBER: 21-04-900615-0127-05-02

GRIEVANT NAME: WILLIAMS, TERRY ET AL

UNION: FOP 2

DEPARTMENT: LIQUOR CONTROL

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: LIVENGOOD, RACHEL

2ND CHAIR: PRICE, MERIL

UNION ADVOCATE: COX, PAUL

ARBITRATION DATE: APRIL 12 AND 23, 1991

DECISION DATE: JUNE 29, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: DID THE EMPLOYER VIOLATE THE C/B AGREEMENT WHEN IT DID NOT PAY CERTAIN FORMS OF TRAVEL TIME? STATE RAISED THE ISSUE OF ARBITRABILITY AS WELL; AND THE GRIEVANCE LACKED THE "ET AL" DESIGNATION.

HOLDING: "AT ALL TIMES, THE STATE KNEW THIS WAS A CLASS ACTION GRIEVANCE. THAT NO GRIEVANCE WAS FILED BEFORE 6/90 DOES NOT RENDER IT NOT ARBITRABLE AS THE EMPLOYEES BELIEVED THE EMPLOYER WAS IN COMPLIANCE WITH THE AGREEMENT. THE TEXT OF THE SIDE LETTER SERVES TO AID INTERPRETATION OF SECTION 22.09. PARTIES ARE DIRECTED TO MEET TO DISCUSS NATURE OF POSSIBLE LUMP-SUM SETTLEMENT." ARBITRATOR RETAINS JURISDICTION UNTIL REMEDY RESOLVED.

ARB COST: $1,357.62

#622

In the Matter of Arbitration	
Between	Case Numbers:
Fraternal Order of Police-Ohio Labor Council	21-04-(06-15-90)-127-05-02, Terry Williams et al
and	Before: Harry Graham
The State of Ohio, Department of Liquor Control	

Appearances: For Fraternal Order of Police:

Paul Cox
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For The State of Ohio:

Rachel Livengood
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 April 12 and 23, 1991 before Harry Graham. At that hearing the 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 June 6, 1991 and the record was closed on that date.

Issue: At the hearing the parties did not agree upon the precise formulation of the issue in dispute between them. They left it to the Arbitrator to formulate the issue after

listening to the evidence and testimony proffered by the parties. It is apparent that this dispute concerns the manner in which travel time is paid by the Department of Liquor Control. The issue in dispute between the parties is:

> Did the Employer violate the Collective Bargaining Agreement when it did not pay certain forms of travel time? If so, what shall the remedy be?

Background: The events that prompted the filing of the grievances that led to this proceeding are not a matter of dispute. The Ohio Department of Liquor Control is charged with regulating the selling of alcoholic beverages in the State. It is composed of several divisions. Relevant to this dispute are Compliance, Permits, Enforcement and Special Investigations. The Department has historically paid employees of these divisions for their on-the-job travel. This practice predates the institution of collective bargaining in the State and the organization of Departmental employees into what is known as Bargaining Unit 2.

With the advent of the first Collective Bargaining Agreement between the parties the question of travel time was addressed. The initial Agreement discussed the issue at Article 22, Section 22.10. Language found in that Section indicated that employees who were required to begin their work day at some location other than their actual work location or headquarters county would be compensated according to current practices. This provision of the

Agreement provided a fertile field for continued dispute. When the second Agreement came to be negotiated much attention was devoted to the question of travel time. The Union and the State each appointed a representative to deal especially with this issue. These were Gary Jones on behalf of the Union and Rachel Livengood on behalf of the State. In due course the parties reached agreement on this issue and incorporated it into the new Agreement. Found at Section 22.09 the language there expanded upon the provisions of the prior Agreement. It provided that:

> The report-in location of employees assigned to enforcement and special investigations at the Department of Liquor Control, shall be twenty (20) miles from their home or the location at which the join their partner whichever is less.

When the Agreement was first implemented employees in Enforcement and Special Investigations kept detailed daily activity logs. (Daily's). On the daily they indicated when they had passed the 20 mile mark upon departure from their home and when the reached the 20 mile mark upon return at the end of their work day. They claimed pay when reaching the 20 mile mark at the start of the work day and upon reaching it at the end of the work day. Pay was routinely made by the Department of Liquor Control according to employees.

In May, 1990 the Enforcement Division promulgated a revised travel policy. It indicated that when employees were in their home district and traveled from their lodging to the

headquarters or work site they would not be paid. In other words, the 20 mile rule would not be honored for employees when they reported to their headquarters or such locations as a court. When employees reported to a location where they would meet their partner or check on a bar or liquor vendor they would continue to receive travel pay after passing the 20 mile mark.

Before the revised policy was implemented Gary Jones of the Union wrote to the Labor Relations Officer of the Department raising the Union's concerns. His lengthy and cogent letter was unanswered. The revised policy was implemented by the Department on June 1, 1990.

Affected employees immediately grieved. Those grievances were not resolved in the procedure of the parties. They were advanced to arbitration by the Union.

Position of the Union: The Union points to the history of negotiations on this issue. Gary Jones and his opposite number, Rachel Livengood, discussed this travel time at length on January 9, 1989. His notes of their meeting, (Union Exhibit 4) indicate that the State proposed travel time commence after 30 miles. The Union held out for 20 miles. His notes continue to reflect the understanding of the parties that the 20 mile restriction was specific to employees of the Enforcement and Special Investigation Divisions. Employees of other divisions of the Department would continue their

existing practice which was portal-to-portal pay. Mr. Jones' notes continue to reflect that the understanding of the parties was signed off on January 17, 1989. The interpretation to be placed upon the new language in 22.09 was memorialized in a Letter of Understanding. (Found in Joint Exhibit 3). Signed by representatives of both parties it provides examples of when travel time is to be paid. As the Union reads the Letter of Understanding it indicates that travel time pay commences when employees reach the 20 mile mark. This is the case no matter where employees report to work. No distinction is made for a report to the office or the field. The Letter of Understanding was drafted by the State's Chief Negotiator on this issue, Rachel Livengood. It accurately reflects the understanding of the parties and the State must be held to its terms the Union insists.

Prior to issuance of the revised travel time policy the State was in compliance with the Agreement and Letter of Understanding. Dailys completed by members of the Enforcement Division show they routinely recorded their departure from home and the time they passed the 20 mile mark. They recorded the time and went on the clock for pay purposes. This was true for all trips on State business. No differentiation was made for travel to the field or the office. Such a differentiation is a clear violation of the Agreement according to the Union. As the Union urges the Agreement be

read it is crystal clear on this question. Employees are in pay status at the 20 mile mark. As the State is making a differentiation which is not sanctioned in the Agreement, the Union urges an award in its favor in this dispute. It seeks back pay for all those who were improperly denied travel pay under the plain terms of the Agreement. As read by the Union, those terms at Section 22.09 specify that enforcement and Special investigation employees of the Department of Liquor control "report-in" at a location 20 miles for their home or the location at which they join their partner, whichever is less. As their report-in location is at the 20 mile mark, they must go on pay status at that point. The Agreement makes no distinction among the various potential destinations to which an employee might be traveling. It merely refers to the 20 mile mark. As this is so, it contemplates that pay be made once employees reach that point according to the Union. The language is specific to employees of the enforcement and special investigation sections of the Department. "All other" employees continue their report-in pay practices. The Agreement differentiates between "all other" Department employees and those assigned to Enforcement and Special Investigations. They receive pay at the 20 mile mark the Union insists.

The Grievance was filed in timely fashion. When employees came to realize that they were not receiving pay in

proper fashion they grieved. The Employer issued a policy changing the manner in which employees accounted for their travel time. On May 21, 1990, prior to implementation of the policy the affected employees notified the Employer that they regarded it to be a violation of the Agreement. When the policy was implemented, the grievance followed. The Employer knew of the Union's objections and continued with its policy. Furthermore, there is a continuing violation of the Agreement inherent in this situation according to the Union. Each time an affected employee is paid he or she is improperly denied the travel time pay at issue in this proceeding. As there is a continuing violation of the Agreement, the Grievance must be considered to be timely in the Union's view.

The report-in location for these employees is the 20 mile mark. That is where pay status must commence according to the plain language of the Agreement the Union insists. As employees did not receive pay to which they are entitled, the Union urges a remedy of back pay as appropriate. It also urges that the Arbitrator order the Employer to comply with the terms of the Agreement.

Position of the Employer: The State takes the view that this grievance is untimely and hence not properly before the Arbitrator. In the Spring of 1989 the State did indeed alter the travel time policy. The grievance was not filed until June 1990. Obviously employees were aware of the change. They

slept on their rights. The Agreement calls for a grievance to be filed within 14 days of the time the grievant knew or reasonably should have known of the event prompting the grievance. The grievants knew what was occurring. They did not grieve. In a previous proceeding involving travel time the Grievants protested the alleged violation promptly. Travel time is a big issue in the Department of Liquor Control. Employees scrutinize the action of the Department closely with respect to travel pay. It is reasonable to expect them to be aware of any violation of the Agreement. They did not grieve for 15 months after signing of the Agreement. The grievance is simply not timely according to the State.

Even if the grievance is found to be timely, it is spurious according to the State. In its opinion, the Grievants never received the payments they are seeking in this proceeding. The revised policy was merely an attempt to clarify the Departmental pay practice to ensure it was in compliance with the terms of the Agreement at Article 22.

Examination of the pay provided to the Grievants and their daily activity reports indicates that they did not receive pay commencing at the 20 mile mark for some 15 months before they grieved. They had to know there was an error in their checks if indeed that was the case which is disputed by the State.

The Union never made the "continuing grievance" argument. If there is a continuing grievance, the State cannot be expected to exhume literally hundreds if not thousands of pay records covering 15 months

The side letter drafted by the negotiators, Gary Jones for the Union and Rachel Livengood for the State, should not be given great weight according to the Employer. The Arbitrator's authority is limited to interpretation of the Agreement. The letter is not included within the Agreement. Its contents were not provided to the Legislature when it ratified the terms of the Contract. That the Union recognized this is shown in the treatment of other side letters agreed upon by the parties. One of them dealt with the question of health insurance. It provides that the contents of the letter may be arbitrated. The letter composed by Mr. Jones and Ms. Livengood contains no such provision.

The State takes issue with the Union's interpretation of the term "report-in location" found at Section 22.09 of the Agreement. The "report-in location" referred to is some location other than the District Office. There is only one exception to that rule. That occurs when an employee's headquarters county is different from the county in which the District Headquarters is located and employees are required to report-in to and out of the District office on the same day. Furthermore, the Agreement is silent on the question of

pay to 20 mile mark on an employee's return trip home. Nothing exists to require pay to that point on the homeward journey according to the State.

The concerns that prompted the side letter drafted by Gary Jones and Rachel Livengood were different from those advanced by the Union at the hearing. According to the State the parties were concerned with situations where one investigator would leave home and pick up a colleague. The first person would drive some miles and not be in pay status while arguably performing service for the State. The second person would literally step out of their doorway and go on the clock. This is an inequity remedied in the letter and the Agreement according to the State. The other concern dealt with people whose headquarters county was different from their post of duty. In the State's view, people in that circumstance are compensated if they must stay overnight. In that circumstance they receive per diem and travel expense.

In fact, it was Ms. Livengood who drafted the side letter. Mr. Jones acquiesced in its contents. As the State drafted it and knew to what it referred, its interpretation should be given weight it asserts.

The State points to an anomalous situation regarding one of the Grievants, Dwight Johnson. Mr. Johnson is eligible for per diem expense reimbursement including motel cost. This is due to the fact he lives very far away from his Headquarters

which is located in Cleveland. Mr. Johnson has not applied for per diem expense. He choses to return home on occasions when he might remain in a motel. That is his business, but, he cannot decline per diem reimbursement and hold out for the travel pay at issue in this case according to the State. In its view, Mr. Johnson knew about this situation for 15 months before he joined in this grievance. More substantively, the State argues that employees cannot substitute travel time for per diem pay at their own discretion.

If the Union prevails in this dispute the State urges that back pay remedy is inappropriate. The State did not know any question regarding the travel pay existed for some time until after signing of the present Agreement. Further, only a few people grieved. Some investigators have disassociated themselves from the Grievance. One other, Mr. Ziton, has left the employ of the Department. The Grievance was not processed as a class action grievance under the terms of Article 20.05 of the Contract. While arguing for a limited remedy, the State reiterates its belief that no contract violation occurred in this instance. Consequently, it urges that the Grievance be denied.

Discussion: The policy enunciation that prompted this grievance was drafted by Chief Longerbone on May 14, 1990. It was presented to the Departmental Labor-Management Committee on May 17, 1990. Following that meeting, on May 21, 1990 the

responsible union official, Gary Jones, wrote to the Labor Relations Officer of the Department, Aisha Saunders. His letter is dated May 21, 1990. In that letter he raised concerns over the contents of Chief Longerbone's travel policy. Those concerns were not heeded and the policy went into effect. The precise date the policy became effective is not on the record though it is reasonable to presume it was in the first pay period of June, 1990. On June 1, 1990, the Union Steward, Terry Williams, spoke to Deputy Chiefs Michael Dodd and Robert Collier and indicated to them that grievances would be forthcoming. On June 15, 1990 a third step grievance was filed.

No doubt existed in the minds of Department administrators that this grievance would be forthcoming. Similarly, they did not doubt that it would embrace the affected class of employees. At Section 20.05 the Agreement provides that a Class Grievance must contain the designation "et al." Neither the grievance filed by Mr. Williams nor a subsequent grievance filed by Dwight Johnson, another affected employee, contain the "et al" designation. This is minor defect and insufficient to void the grievance. The State knew at all times that a grievance covering the members of the Enforcement and Special Investigation sections of the Department would be filed. It was filed at the time the revised policy came into effect. Testimony was received from

Jack Holycross, the Union Staff Representative in charge of processing this grievance, to the effect that at all times the State knew this was a class action grievance. No person involved with this dispute, either on behalf of the Union or the State could have been oblivious to the fact that this dispute reflects the interests of all members of the Enforcement and Special Investigation sections of the Department. There is no defect in the manner in which it was filed as it was filed immediately upon issuance of the revised policy.

The State has argued that the policy which came into effect in June, 1990 represented no change in Departmental practice. Enforcement and Special Investigation personnel were not being paid at the 20 mile mark before the policy revision. Evidence to this is on the record. Consequently, the State asserts that the Grievance is untimely because it should have been filed within 14 days of the date the grievants knew "or reasonably could have had knowledge of the event giving rise to the class grievance." If the Department was paying travel time incorrectly for months or years prior to the policy issuance in the Spring of 1990, the Union should have grieved. Its failure to do so makes the grievance not arbitrable in the State's view. The deficiency with that view is readily apparent. All concerned with this case acknowledge that the internal accounting system of the

Department is complex. Errors are legion. Those errors were manifested in a prior proceeding involving travel time. Reference is had to the Grievance of Investigators Waid and Snyder (no case number) decided by this Arbitrator on April 21, 1990. Similarly, testimony received in the course of this dispute showed errors in employee pay had occurred. It is reasonable for employees to presume that the employer meets its fundamental obligation, pay, correctly. Only when it came to the attention of investigators that what they regarded as a change in the method in which pay would be made did they grieve. This does not render the grievance non-arbitrable. To the contrary, the grievance was filed as soon as employees perceived a problem. That no grievance was filed before June, 1990 does not render it not arbitrable as the employees belief that the employer was in compliance with the Agreement was reasonable. If the Employer was not in compliance with the Agreement prior to June, 1990 the employees failure to recognize it is understandable given the complexity of the pay structure of the Department. The grievance is arbitrable.

When the first Agreement between the parties was negotiated it dealt with the question of travel time. At Section 22.10 of the Agreement the initial contract provided that employees who were required to begin work at some location other than their actual work location or headquarters county would be compensated according to the

then current Departmental Practices. This language proved to be fertile ground for grievances. The Waid-Snyder arbitration dispute referred to above is illustrative of the sorts of difficulties encountered by the parties. The Union came to view the question of travel time in the Department of Liquor Control as a source of great concern. When time arrived to negotiate the Agreement for 1989-1992 the issue of travel time pay was on the front burner for the Union. In the course of the negotiations the travel time question was delegated to a two-person subcommittee. One representative was appointed to the Committee from the Union and one from the State. As is shown by Union Exhibit 4, a number of proposals were generated by each side during the course of negotiations. The text of that Exhibit made its way into the Agreement as the resolution of the travel time issue raised by the Union. The Union believed the issue had been resolved. The argument of the State that the side letter reflected in Joint Exhibit 3 is not arbitrable is beside the point. What is unmistakably and unarguably arbitrable is the Agreement. The contents of the letter are not being arbitrated in this proceeding. The contents of the Agreement are the subject of this proceeding. The text of the side letter to serves to aid interpretation of the language found in Section 22.09.

The side letter contains several examples of the sorts of pay to be covered by Section 22.09 of the Agreement. In

spite of the State's assertion that it was designed to deal solely with situations when a Investigator journeyed to pick-up a partner and was not in pay status, the letter contemplates other situations involving the 20 mile mark. Examples of application of the language are provided in the letter. Among them is:

> -Home to District Office-
> An employee's report-in location shall be considered to be twenty (20) miles from their home when en route to their District office. If an employee resides less than twenty miles from their District office their report-in location then becomes the District office on those days that they are required to report there.

The example furnished in the side letter indicates the manner in which the Agreement is to be interpreted. When an employee is going from his home to the District office and the office is more than twenty (20) miles from his home he goes on pay status at the twenty (20) mile mark. If the office is within the 20 mile mark, no pay is due.

Similarly, if an employee is returning home it is bizarre to believe that the twenty mile mark provision would not apply. The twenty mile mark is not a one-way proposition. Rather, it applies to the journey to work and back to home.

The language found at Section 22.09 is all-inclusive. It does not make an exception for report-in to the District Office. Conspicuous by its absence is the exception urged upon the Arbitrator by the State. If the State was of the view that the sort of pay sought by the Union in this

proceeding was not to be made it was incumbent upon it to make that claim in negotiations and secure the exception in the Agreement. The Agreement does not make any distinction concerning the type of business employees may be on when they become eligible for report-in pay. The only stricture found in the Agreement is arrival at the twenty-mile mark.

Award: The grievance is SUSTAINED. Given the Herculean nature of the computations required to precisely determine the exact amount of back pay due each affected employee the parties are directed to meet forthwith to discuss the nature of a possible lump-sum payment to each person. Members of the Enforcement and Special Investigation divisions of the Department of Liquor Control are to immediately commence receiving pay at their twenty mile report-in location under all circumstances

Arbitrator will retain jurisdiction over this dispute for the purpose of resolving any disputes concerning remedy.

Signed and dated this 29th day of June, 1991 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator