#678

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration	
	ARBITRATOR'S OPINION
-between-	
STATE OF OHIO, DEPARTMENT OF TRANSPORTATION	**GRIEVANCE: Emergency Overtime**
-and-	**No. 31-10 (2-2-90) 14-01-07**
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO	

FOR THE STATE:

JOHN TORNES
Arbitration Advocate
Ohio Department of
Administrative Services
Office of Collective Bargaining
65 E. State Street, Suite 1612
Columbus, Ohio 43215

FOR THE UNION:

MICHAEL MUENCHEN
Staff Representative
Ohio Civil Service Employees
Association, Local 11
AFSCME, AFL_CIO
1680 Watermark Drive
Columbus, Ohio 43215

DATE OF THE HEARING: **September 5, 1991**

PLACE OF THE HEARING: **Offices of OCSEA**
Columbus, Ohio

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

* * * *

The hearing was held on September 5, 1991 at the offices of OCSEA, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:05 a.m. and was concluded at 4:50 p.m.

* * * * *

On February 22, 1990 Pauline Minks, Chief Union Steward, District 10, OHIO DEPARTMENT OF TRANSPORTATION filed a grievance with the **OHIO DEPARTMENT OF TRANSPORTATION**, the "**State**" on behalf of **CHARLES SAFFELL, ROBERT SCHELL**, and **A. LEE STOTTSBERRY** protesting the State's failure to pay them the proper rate of pay for working during an "emergency" in Pomeroy, Ohio. The grievance was denied by the State after which it was appealed at the applicable steps of the grievance procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "**Union**". Since the parties were unable to resolve the grievance, it was submitted to arbitration.

FACTUAL OVERVIEW

The Grievants are employed as Survey Technicians for the State. Among the duties of a Survey Technician are the following: obtains survey data for the preparation of highway construction plans, construction change orders, property line data, and right of ways. In addition, Survey Technicians operate survey equipment and prepare survey notes, which in turn create a clear picture of field conditions that are included in plans.

When the grievance was filed District 10 of the Ohio Department of Transportation (ODOT) employed ten (10) Survey Technicians who comprised three (3) different crews, each crew headed by a Surveyor. The Grievants are part of what is called the "Noble/Monroe County" crew. They report to the local county maintenance garage in the northeast section of District 10. From there they are dispatched to various job sites usually in the counties of Noble, Monroe and Washington. The second crew reports to a county garage in the north central part of the district; this crew is referred to as the "Morgan County crew". The third and last crew in the district reports to a garage in the southern part of the district and is referred to as the "Meigs/Gallia County crew".

On Friday, February 2, 1990 the Grievants stopped by the District 10 headquarters to deliver survey notes. While at the headquarters they were summoned to the office of Howard Gifford, Department Head of Location and Design. Frank Blair, Survey Supervisor was already present in the office when the Grievants arrived. As Grievant Schell related, "they told us that there was an emergency situation at a culvert in Pomeroy, which had collapsed". Grievant Schell went on to indicate that "they need to send us down there to do the survey work and that we would be in the area for

three (3) weeks". He stated that he and the other Grievants were told that the State was arranging for overnight accommodations at a hotel and their lodging and meals would be paid for by the State. Furthermore, the Supervisors indicated that the Grievants would be working ten (10) hour days from Monday thru Friday and that they would be home on Friday evenings. Grievant Schell asked if he "had a choice" in determining whether to work the assignment and Gifford's response was that "I guess you can take three (3) weeks vacation". Reviewing the testimony in the record it is a fact that the "choice" was either to work in Pomeroy or they would not work for the next three (3) weeks. The Grievants were advised that their assignment in Pomeroy would begin on Monday, February 5.

The Grievants reported to the Pomeroy site on Monday morning on February 5 and continued to work and live in the area for the next two (2) weeks except for weekends. They were paid straight time rate for the first forty (40) hours of the work week and time and one-half for hours in excess of forty (40) hours.

In light of this factual overview, the instant grievance was filed.

DISCUSSION

Article 13.15

The instant dispute primarily involves a controversy over the interpretation and application of Article 13.15 of the Agreement. This Article provides as follows:

> "§13.15 - Emergency Leave
>
> Employees directed not to repot to work or sent home due to weather conditions or another emergency shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the emergency. Employees required to report to work or receive pay at time and one-half (1 1/2) for hours worked during the emergency. Any overtime worked during an emergency shall be paid at double time.
>
> An emergency shall be considered to exist when declared by the Employer, for the county, area or facility where an employee lives or works.
>
> For the purpose of this Section, an emergency shall not be considered to be an occurrence which is normal. or reasonably foreseeable to the place of employment and/or position description of the employee.

> Essential employees shall be required to work during emergencies. Essential employees who do not report as required during an emergency must show cause that they were presented from reporting because of the emergency.

The Union contends that an emergency existed under the terms of Article 13.15. Accordingly, the Grievants are entitled to receive premium pay for the hours worked during the emergency and additional premium pay for the overtime that they worked in Pomeroy. The State contends that no "emergency" existed under Article 13.15. Accordingly, the Grievants received their proper contractual rate of pay for both the regular hours and overtime that they worked in Pomeroy.

NEGOTIATING HISTORY

There was undisputed testimony by N. Eugene Brundige on the negotiating history behind Article 13.15. Brundige previously served as Deputy Director of Labor Relations with the Ohio Department of Transportation. While serving in this position, he was also the chief spokesperson for the State during the 1986 contract negotiations with the Union.

Prior to the enactment of the Public Employee Bargaining Law of the State of Ohio in 1984, the Ohio Department of Transportation

was a party to two (2) collective bargaining agreements. One agreement was with the Communication Workers of America; the other agreement was with the Union involved in this dispute. Before 1986 the State's procedures were in doubt on how to deal with emergencies. Prior to 1986, the Ohio Department of Administrative Services determined how an emergency situation affected State employees. The authority to do so stemmed from the applicable section of the Ohio Revised Code. There was also confusion over who was authorized to declare the existence of an emergency. For example, in some counties, the Sheriff was authorized to declare an emergency; in other counties the County Commissioners were authorized to declare an emergency. Both parties were unhappy with this situation.

When the parties came to the bargaining table in 1986, -- uniform procedures were needed to provide clarity concerning emergency situations. At the outset of negotiations, the State's position was that if the normal duties of employees were not affected, there was no emergency. Thus a snow storm to the Department of Transportation employees was not an "emergency". However, if a snow storm was unusual and employees were unable to report to work and if some employees did so, it was because they risked life and limb it was felt that an emergency existed. Brundige said that this type of situation would be covered under Article 13.15.

The discussion "at the table" focused on the Employer who would be authorized to declare an emergency. The State's representatives indicated that the Employer who declares that an "emergency" exists under Section 13.15 is the "Department of Highway Safety as embodied in the Highway Safety Patrol". Brundige explained the "reasons" for designating the Department of Highway Patrol as the "Employer" under Section 13.15. First of all, it was "better than the status quo". In addition, "the Highway Safety Patrol has 24 hours communication services and is geographically based across the State".

Brundige said that a commitment was made to the Union that the process would be implemented and conveyed to it. Accordingly, "every department determined who were essential employees". The phrase "essential employees" are "those employees who are needed to work despite the emergency". For example, employees at the Department of Correction who are responsible for the direct care of inmates; employees who could plow snow at the Department of Transportation and employees at the Department of Mental Retardation who are responsible for the direct care of patients of essential employees. These employees, Brundige said, would be "essential employees" under Article 13.15. Since 1986, Brundige said that lists are compiled and posted in many State agencies--and many agencies give employees a copy of the list of essential employees.

The second step of the process, according to Brundige was to identify the radio and T.V. stations for the announcement that an emergency existed. The third step was to establish a voice mail system through the Director of Highway Safety to indicate that an emergency exists and when it ends.

This process was communicated to Russ Murray, the then Executive Director of the Union, and "the heads of other Unions". Brundige said that the Union did not want to get involved in setting management procedure, but, "the Union would be aware of the procedure".

In his testimony, Brundige provided examples and explanations that were referred to during the 1986 negotiations. I have decided to attribute great weight to various aspects of Brundige's testimony in light of the express language contained in Article 13.15. Parenthetically, Article 13.15 was not changed during the 1989 negotiations between the parties.

Elaborating on the terms contained in the first paragraph of Article 13.14, Brundige said that conditions could be "so bad" that employees are unable to report to work, for example, "due to a blizzard or gas shortage". The initial paragraph sets forth "who works,

who does not and what they get paid". The State pointed out at the 1986 negotiations that some employees have to work since the roads must be cleared. It was "important" to decide who were and were not "essential employees". If an emergency is declared by the Department of Highway Safety the essential employees are required to report to work. The "other employees at work are sent home". Brundige went on to state that many departments provide cards to essential employees which can be presented to the police in order to permit them to report to work. The initial paragraph of Article 13.15 provides that non-essential employees can remain at home and are paid for it. Such employees are "granted leave with-pay at regular rate for their scheduled work hours during the duration of the emergency".

Brundige said that only essential employees who are employed in an emergency, are paid premium pay ("time and one-half (1 1/2)" and "double time" for overtime) under Article 13.15. There are occasions when non-essential employees volunteer to work or continue to work. There is no obligation by the State to pay premium pay to these employees.

The second paragraph of Article 13.15 provides as follows:

> "An emergency shall be considered to exist when declared by an Employer for the county area or facility where an employee lives or works".

Brundige explained that these terms were discussed at the bargaining table. To illustrate the reason for the second paragraph Brundige said that an employee might live in one county but work in another county. The Sheriff of B County might not want the employee to come through B County where the emergency exists. In this example, there is no state wide emergency. The terms of the second paragraph indicate that there is a geographical designation where an emergency is in existence. The second paragraph provides a limited definition and scope that are given to an emergency because emergencies are not necessarily state wide.

Turning to the third paragraph of Article 13.15, it provides as follows:

> "For the purpose of this section, an emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee."

This paragraph, according to Brundige was included to meet the objective of the State that employees who are "merely" doing jobs under difficult situations, are not entitled to premium pay. He characterized these employees as non-essential because they were just doing their jobs.

APPLICATION OF ARTICLE 13.15

The basic inquiry to be addressed is whether an "emergency" as defined in Article 13.15 existed on February 2, 1990 and the two (2) weeks to three (3) weeks thereafter when the Grievants were assigned to perform their job duties with respect to a road cave-in which occurred in Pomeroy. It should be noted that in a newspaper article which appeared on February 2, 1990 in The Daily Sentinel, the cave-in caused Route 124 in Pomeroy to be closed to traffic around 3:00 a.m. Furthermore, "sagging telephone and electric lines were a concern, as well as a gas line running parallel to the road".

The evidentiary record warrants the conclusion that when they met with the Grievants on February 2, Supervisors Gifford and Blair referred to the Pomeroy road cave-in as an "emergency". I have concluded that Supervisors Gifford and Blair gave the word its ordinary and customary meaning, rather than the meaning that the

parties attributed to the word in Article 13.15. Thus, Supervisors Gifford and Blair utilized the word "emergency" to describe a situation which was sudden requiring immediate action. The definition of "emergency" in Article 13.15 includes various criteria and serves a different function than the ordinary and customary meaning in which Supervisors Gifford and Blair used the term.

a. ESSENTIAL AND NON-ESSENTIAL EMPLOYEES

Turning to Article 13.15 the first sentence provides as follows: "[E]mployees directed not to report to work or sent home due to weather conditions or another emergency shall be granted leave with--pay at regular rate for their scheduled work hours during the duration of the emergency". There is nothing in the record to indicate that non-essential employees were directed not to report to work or sent home" due to the Pomeroy road cave-in. Brundige indicated that during the 1986 negotiations, the Union provided one (1) example as the type of situation which would fall within the category of "another emergency". The example involved a computer operation that was struck by lightning which prevented the employees from doing their work. A "building shut-down" also resulted from the lightning. However, the road "cave-in" is poles apart from the example given by the Union. No employees were prevented from performing their work due to the road cave-in.

As Brundige related, the "emergency" under Article 13.15 contemplates the dichotomy between "essential employees" who are required to work during an "emergency" and "non-essential employees" who are not required to work. Brundige's testimony is supported by the first and last paragraphs of Article 13.15. The initial paragraph provides for the rates of pay for non-essential employees who are directed not to report to work or are sent home due to weather conditions or another emergency and the premium pay for essential employees who are required to report to work during an emergency. The first sentence of the last paragraph of Article 13.15 must be read in conjunction with the second sentence in the first paragraph of the Article which refers to the premium pay of employees who are required to report to work. As the first sentence of the last paragraph provides: "Essential employees shall be required to work during emergencies". Grievant Schell said that he did not think that he was an "essential employee". Indeed, the two (2) other Grievants never indicated that they were "essential employees" which is a status that is triggered by the "emergency" referred to in Article 13.15.

b. DECLARATION OF EMERGENCY-COUNTY, AREA OR FACILITY

The second paragraph of Article 13.15 provides as follows: "An emergency shall be considered to exist when declared by the Employer for the county, area or facility where an employee lives or works". I do not believe that the phrase "when declared by an Employer for the county, area or facility" can be reasonably interpreted to include a reference to the term "emergency" as used by Supervisors Gifford and Blair on February 2 when they assigned the Grievants to work in Pomeroy on February 5. In my judgment, the phrase contemplates a formal announcement or statement concerning the existence of an emergency. Brundige indicated that during the 1986 negotiations the State representatives said that the "Employer" would be the Department of Highway Safety "as embodied" in the Highway Safety Patrol which has the ability to perform communication services around the clock and is geographically based across the State. Such a declaration would be applicable to a "county, area or facility" where an employee lives or works. Brundige's testimony that the State's designation of the Department of Highway Safety as the "Employer" who declares whether an emergency exists is consistent with the "county" or "area" where an employee lives or works as provided in Article 13.15. Whether this designation of the Employer is applicable to a "facility" or consistent with the scope of the phrase "another emergency" in Article 13.15 which during the 1986 negotiations was illustrated by the Union's sole example of a

"computer operation" that has been struck by lightning is a matter that is not required to be resolved in this arbitration.

It should be pointed out that Brundige testified with regard to a memorandum dated November 5, 1986 from William G. Sykes, Director of Ohio Department of Administrative Services to "All State Appointing Authorities, Personnel and Payroll Officers" concerning "Weather Emergency Guidelines" and his [Brundige] memorandum dated January 30, 1990 when he was Deputy Director of Collective Bargaining which he issued to "Labor Relations Coordinators and Personnel Officers" on the subject of "Declaration of Emergencies". In these memoranda, both of which were dated before the events which began on February 2, 1990 the Department of Ohio Safety is designated as the agency to declare an "emergency". However, the 1986 memorandum refers solely to "weather conditions"; and the January 30, 1990 memorandum indicates that it was prompted by "the recent weather emergency". Whether the "Department of Highway Safety" constitutes an "Employer" under Article 13.15 for the declaration of "another emergency" is not applicable to the facts of this case. This conclusion has been reached because the sole example mentioned by the Union which involved a computer operation that was struck by lightning is a completely different occurrence than the facts which gave rise to the instant grievance. As I have previously established,

the Pomeroy road collapse does not come within the scope of "any emergency" which is provided in Article 13.15.

Moreover, the "declaration" of the "Employer" contemplated by Article 13.15 is a formal statement or announcement that triggers the creation of non-essential and essential employees which were not established in this case. None of the non-essential employees were directed not to report to work or were sent home; and in the absence of evidence to the contrary, I have concluded that Grievants Stottsberry and Saffell were not essential employees although they were assigned to work on the Pomeroy road cave-in. Grievant Schell acknowledged that he did not think he was an "essential employee" as this phrase is utilized in Article 13.15. There was no such formal statement or announcement made by Gifford and Blair on February 2 as an "Employer" for the "area" of Pomeroy in assigning the Grievants to work in Pomeroy beginning February 5.

In a memorandum dated February 5, 1990, to Theodore J. Stitt, Deputy Director Planning & Design, Joseph L. Leach, District Deputy Director recommends that the Pomeroy project "be declared an emergency by the Director so that the planning process can be expedited". Leach goes on to state:

> "* * The District will proceed to expedite the plan as much as possible with intention of having a plan complete to go to emergency contract by mid-summer. This would allow a drainage structure to be replaced this year and traffic could be maintained.* *"

Furthermore, in his February 5 memorandum, Leach indicates as follows:

> "With the declaration of a emergency by the Director, we would also recommend that an environmental consultant be engaged to perform a Phase I and Phase II, if needed, Hazardous Wastes Site Assessment and that they be given advanced authorization to proceed immediately.
>
> We will submit a list of prospective contractors to be invited to bid on the project when plans are filed."

In his undisputed testimony on this aspect of the dispute between the parties, Blair said that the Pomeroy "project" was

declared an "emergency" by the Director to accelerate plans and avoid the necessity of "going through the bidding process". In this connection Ohio Revised Code §5517.02 provides that if the director determines that he is unable to complete emergency work by "force account" he is authorized to contract for any part of the work with or without advertising for bids as he considers in the best interests of the Department of Transportation." Thus, the declaration of the Pomeroy project as an "emergency" in the internal memorandum by Leach to Stitt is of no relevance to the definition of "emergency" as set forth by the various factors contained in Article 13.15. The use of the term "emergency" in Leach's memorandum is to expedite the planning process in order to complete a plan for the purpose of going "to emergency contract this summer". The declaration of emergency as Leach indicates in his memorandum, is to engage an environmental consultant and if needed a Hazardous Wastes Site Assessment in order "to proceed immediately". The memorandum by Leach indicates that the term "emergency" is serviceable to the State in a manner not contemplated by Article 13.15.

There is also a memorandum dated February 5 from Leach to the "Monroe/Noble County Survey Crew [the Grievants] which covers the subject of "Travel Expenses". In his memorandum Leach refers to the Grievants working in Meigs County "for the next few weeks * * and the need to expedite an emergency project". The memorandum to the

Grievants indicates that in order to expedite the work, they are required to stay overnight in the area. Furthermore, Leach states that overnight expenses are authorized for them "for Monday through Thursday of each week".

The reference by Leach in his memorandum to the Grievants is to an "emergency project", rather than an emergency in a "county, area or facility". The use of the term "emergency project" is to indicate the need to expedite the project which is usually associated with the common and ordinary meaning of the word "emergency". The circumstances in Pomeroy demanded immediate action. As a result expenses for the overnight stay by the Grievants, were authorized by Leach under the appropriate directive. I cannot conclude that the use of the word "emergency project" given the content of the memorandum by Leach could be reasonably interpreted to come within the scope of Article 13.15. The fact is that in 1989, there have been twelve "Declared Emergency Projects by the Director of the Ohio Department of Transportation in various counties throughout the State of Ohio. However, none of the declared emergencies fall within the scope of Article 13.15.

c. "NORMAL OR FORESEEABLE * * "

The third paragraph of Article 13.15 provides as follows:

> "For the purpose of this Section, an emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/on position description of the employee.

Based upon the evidentiary record, I have concluded that the Pomeroy road cave-in was an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the Grievants.

The Grievants comprise a crew, in addition to the "crew leader" or party", leader, Ron Riser who did not file a grievance in this case. The crew is one (1) of three (3) crews that perform their duties within the District 10 Survey Operations Section. The Grievants occupy District-wide positions and normally work in areas of the District close to their homes in order to minimize travel time. Thus travel liability by the State is also minimized under Article 13.06.

Schell indicated that he usually performs work in Noble, Monroe and Washington counties. Unless the assigned work borders" on these three (3) counties, he indicated that he never performs work in other counties. When he worked in Pomeroy, which is located in Meigs County, Schell said that it was the only time that he worked outside of the three (3) counties (Noble, Monroe and Washington).

Furthermore, the State's job description provides that the Survey Technician "acts as a lead worker * * over Noble Co.--Monroe Co. Survey crew * *."

Since Meigs County is located within District 10, and the Grievants comprise a crew within the District, their assignment in Pomeroy, Meigs County was "normal or reasonably foreseeable to the place of employment". Moreover, the reference to "Noble Co--Monroe Co." in the State's job description of Survey Technician comes within 65% of the duties that are required to be performed by the Survey Technician. I have concluded that the assignment in Pomeroy, Meigs County, comes within 5% of the job duties of a Survey Technician in the State's job description which states: "Performs other related surveying duties as assigned". There is no question that the assignment in Meigs County was necessitated by an "emergency" in the common and well understood meaning of the word.

As a crew, the Grievants were also assigned to the Pomeroy road cave-in because as Blair testified, "Canter's crew" which normally handles projects in Meigs County, was handling a "higher priority" project. When Blair found out about the Pomeroy road collapse it was felt by supervision that the crew handed by Riser which includes the

Grievants "could fit in and do the project". This decision is within the discretion of supervision and has not been shown to violate the Agreement.

The Grievants report to work at the State garage in Noble County The assignments for the day to day work come from Riser who in turn assigns the work to the crew. At the end of the shift, Riser gives the Grievants their assignments for the following day. On February 2, 1990 this procedure was not followed. The Grievants were summoned to Gifford's office where he and Blair informed them of their assignment for the next two (2) to three (3) weeks in Pomeroy. I do not find that the manner in which the Grievants were assigned to work on the Pomeroy road collapse as an indication that an emergency existed. In light of the overnight stay close to Pomeroy that was required on the part of the Grievants to perform the assignment does not warrant the conclusion that there was "an occurrence" which is not normal and foreseeable "to the place of "their employment and/or position".

Turning to the work of the Grievants, Schell said that he performed the normal "topo work" which he does "at all times". He added that there was nothing out of the ordinary in the work that he performed in Pomeroy. Schell said that the "culvert partially collapsed and traffic stopped". Riser said that the work in Pomeroy

was the "same work" that the crew usually performs. Blair explained what the crew does on a project. He indicated that the crew receives information from the District office on "the needs" required. They then proceed to "put out wing points". The crew also takes field measurements. Aerial photography is usually performed but it was not done for the Pomeroy project. The evidence indicates that the crew performed work that they customarily performed.

Indeed, Schell's statement that the Pomeroy job was "a regular assignment but in a different area" is revealing. Thus what was not normal or reasonable was the fact that the Grievants performed their assignment in Pomeroy, located in Meigs County, rather than in Noble, Monroe and Washington counties. However, Article 13.15 does not indicate that if an employee performs his customary work in a county outside of the counties in which he normally performs such work but is nevertheless within District 10, the work assignment constitutes an "emergency". The Grievants are district employees and there is nothing in Article 13.15 that warrants the conclusion that performing a job assignment outside of Noble, Monroe and Washington counties constitutes an emergency.

Schell acknowledged that he did not experience any hazards on the Pomeroy project. There is nothing in the record to indicate that there was any special peril to the Grievants in traveling to and from Pomeroy and in the work that was involved on the project.

Based upon the testimony of the Grievants, the only disturbing aspect of the assignment in question was being away from home. However, overnight lodging which the State requires for a job assignment does not convert the assignment into an emergency under Article 13.15.

Moreover, the "emergency" referred to by Gifford and Blair required immediate action but it was not so urgent that the Grievants were dispatched to Pomeroy on February 2, 1990. They were able to spend the weekend at home since the assignment began on February 5. Thus, even the characteristic of immediate action to address an emergency as it is used in the common and ordinary sense of the term was not present in this case. In light of the aforementioned considerations, I have concluded that consistent with the terms of the third paragraph of Article 13.15, the Pomeroy road collapse was an "occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the Grievants. Thus the occurrence was not an "emergency" under Article 13.15.

ARTICLE 13.07

The Grievants were required to perform overtime work on the Pomeroy job. As Schell indicated he and the two (2) other Grievants worked ten (10) hour days in Pomeroy in performing regular surveying work.

In support of its position that an "emergency" existed in Pomeroy, the Union relies on the final paragraph of Article 13.07 which provides as follows:

> "Emergency Overtime
>
> In the event of an emergency as defined in Section 13.15 notwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily met the emergency requirements, regardless of the overtime distribution."

The Union refers to another part of Article 13.07 which provides that "overtime shall be equitably distributed on a rotating by seniority among those who normally perform the work". Moreover, the Union indicates that another segment of Article 13.07 provides that if a sufficient number of volunteers is not secured through the

provisions of the Article, "the Employer shall have the right to require the least senior employee(s) who normally performs the work to perform said overtime". The Union contends that these terms must be read in conjunction with the specific term of Article 13.07 concerning "emergency overtime".

It must be underscored that the terms dealing with emergency overtime became operative when an emergency exists "as defined in Section 13.15 * *." I have concluded that no emergency as defined in Article 13.15 existed in Pomeroy. Furthermore, the procedure set forth in Article 13.07 by which overtime is distributed is preceded by the operative phrase "Insofar as practicable". Thus, the full sentence reads: "Insofar as practicable, overtime shall be equitably distributed on a rotating basis by seniority among those who normally perform the work". Emphasis added. The evidentiary record indicates that consistent with the terms of Article 13.07, the overtime was distributed among the members of the crew or "those employees who normally perform the work". The Grievants were assigned to perform the work which was consistent with the terms of Article 13.07. In addition, it would not be practicable to pull one (1) employee from one (1) crew, another employee from a second crew to perform the Pomeroy job so that the overtime would be equitably distributed.

Finally, it was undisputed that ten (10) hour days, as Schell indicated were not unusual in the spring which is their busiest season. To summarize, the Union's argument concerning Article 13.07 is not supported by the evidentiary record.

ESTOPPEL

The Union contends that the concept of estoppel bars the State from claiming that no emergency existed with respect to the Pomeroy road collapse. Estoppel involves a promise which is reasonably expected to induce action or forbearance on the part of another party and which induces such action or forbearance and to avoid injustice the promise is enforced. See, Calamari and Perillo, *The Law of Contracts* (West Publishing Co., 1970) at page 172.

I cannot conclude that the reference to emergency by Gifford and Blair on February 2 in assigning the Grievants work in Pomeroy gives rise to the doctrine of estoppel. Nor does the doctrine apply because of the reference to "emergency project" in Leach's February 5, 1990 memorandum to the Grievants concerning their "travel expenses". These references contemplate the ordinary and common sense meaning of the word "emergency". I cannot conclude that the Grievants were induced to rely upon these references to emergency given the particular and limited context in which the terms were used.

To sustain the claim of the Union on this aspect of the dispute between the parties would seriously undermine the agreed upon terms of Article 13.15.

The Union refers to an arbitration decision between the parties which was issued on July 14, 1990 by Arbitrator Harry Graham. (Case No. 687-1380). The facts of the 1990 decision are significantly different than the facts presented in this case. On April 3, 1987 a storm in south-central Ohio produced large amounts of snow in the area. The Director of the Department of Highway Safety declared a weather emergency in various counties, two (2) of which were in District 5. The employee who worked in the two (2) counties, namely Muskingum and Guernsey were paid double time; but the State refused to pay such premium pay to employees who worked in five (5) other counties in District 5. The State was of the view that an emergency did not exist in those five (5) counties. The factual record indicated that the Deputy Director in charge of District 5 declared that an emergency existed when he asked the employees in the five (5) counties in question 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. The Deputy Director waived the rule prohibiting more than sixteen (16) hours of work without a break. That an emergency was declared was corroborated by a Trooper of the State Highway Patrol

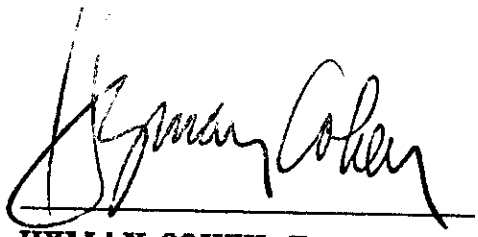
who stopped at a County ODOT garage within the five (5) counties. He indicated to the employees that he heard the announcement on AM radio. Furthermore, he confirmed that a weather emergency had been declared after he telephoned the Highway Patrol Post in Lancaster, Ohio.

These facts are dramatically different than the reference by Gifford and Blair to an emergency in Pomeroy and the "emergency project" alluded to in Leach's February 5, 1990 memorandum on travel expenses. The nature of the emergency, the work performed, the announcement by the Deputy Director and the corroboration by the State Highway Trooper, are to be contrasted to the facts in this case. It is enough to state that the Graham decision is of no support to the Union in this case.

AWARD

In light of the aforementioned considerations, the grievance is denied.

Dated: October 18, 1991
Cuyahoga County
Cleveland, Ohio



HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295