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In the Matter of Arbitration	
Between	Case Number: Shrayer
Fraternal Order of Police-Ohio Labor Council	25-18-(7-15-91)-29-05-02
and	Before: Harry Graham
The State of Ohio, Department of Natural Resources	

Appearances: For Fraternal Order of Police-Ohio Labor Council

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Fraternal Order of Police-Ohio Labor Council
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For Department of Natural Resources:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on November 15, 1991. 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 December 21, 1991 and the record was closed on that date.

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

> Did the Employer violate the Collective Bargaining Agreement when it failed to pay hazardous duty pay to employees on approved leave of absence? If so, what shall the remedy be?

Background: The facts that give rise to this dispute are not a matter of controversy. The Grievant, Chester Shroyer, has been an employee of the Ohio Department of Natural Resources for the past twenty-one (21) years. He is a Game Protector. In July, 1991 it came to the attention of Jack Holycross, Staff Representative of the Union, that Mr. Shroyer and his colleagues in the Department of Natural Resources were not receiving Hazardous Duty Pay as Mr. Holycross believed to be provided under the Collective Bargaining Agreement. After discussion, Mr. Shroyer filed the instant grievance on July 8, 1991. The grievance was processed through the procedure of the parties and reached the arbitration stage of the grievance procedure.

Position of the Union: The Union asserts that the grievance under review in this proceeding was properly filed in accordance with the provisions of the Agreement. At Article 20 the Agreement specifies that grievances are to be filed "within fourteen days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance." At the start of January, 1991 the grievant and his colleagues received hazardous duty pay for all hours worked. The concept of "all hours worked" at that time included time while on leave such as vacation or holiday. In March, 1991 Mr. Shroyer and his colleagues were informed by the Department that they would no longer receive

hazardous duty pay while on leave. No grievance was filed. That fact does not make the grievance untimely according to the Union. In March, 1991 the grievant and his colleagues were informed that not only would they not be receiving hazardous duty pay as had been the case in the January-March period, they would be required to pay the State back for the alleged overpayment. Mr. Shroyer then called the payroll office to inquire about his pay status. He was assured the revised pay scheme was correct. Thereupon he let the matter lie until informed by Jack Holycross some months later of the alleged violation. Upon learning from Mr. Holycross of his view that a violation of the Agreement had occurred, Mr. Shroyer moved promptly to file the instant grievance.

In a dispute involving the Department of Liquor Control this Arbitrator was faced with a similar fact situation regarding timely filing of a grievance. I held then that when employees realize that a potential violation of the Agreement has occurred, the time for tolling the filing deadline begins. In that case, (Terry Williams et al travel time dispute) the Grievants were found to have filed within the time lines of the Contract. So too, in this dispute according to the Union. When Mr. Shroyer came to believe that the State had erred with respect to the method in which it was paying him as a result of his conversation with Mr. Holycross, he grieved. Furthermore, this situation represents a continuing

violation of the Agreement. It reoccurs each pay period. If this grievance is determined to be untimely employees will be penalized each time they fail to discover a contract violation immediately upon its occurrence. This is an inequitable situation that should not be permitted to occur according to the Union.

Section 58.02 of the Agreement provides that members of Bargaining Unit 2 are to receive hazardous duty pay for "all hours worked." The concept of hazardous duty pay came into the Agreement from Section 124.181 of the Ohio Revised Code. Under the 1986-1989 Agreement Hazardous Duty Pay was provided solely to Liquor Control Investigator 1's and 2's in the Department of Liquor Control Divisions of Enforcement and Special Investigations. When the parties came to bargain the 1989-1992 Agreement the concept of hazardous duty pay was extended to all other members of Bargaining Unit 2. When the parties negotiated that would occur, the language was identical to that providing hazardous duty pay to the Liquor Control Investigators. That is, employees of both the Department of Liquor Control and all other bargaining unit members were to receive hazardous duty pay for "all hours worked." Two sections of the Agreement deal with hazardous duty pay. These are 58.01 and 58.02. Section 58.02 was needed to reflect the understanding of the parties that employees in the Department of Liquor Control would receive pay at

the rate of 5.0% of salary. Other bargaining unit members would receive pay at the 2.0% of salary rate. Further, the pay for non-Liquor Control employees would commence on January 1, 1991. The method by which pay was to be computed, "for all hours worked," was the same for both groups of employees. Employees in Liquor Control receive pay for time while on approved leaves of absence. Other bargaining unit members should receive hazardous duty pay in the same fashion the Union insists. No different method of computation was contemplated and none was agreed upon according to the Union.

When the parties negotiated the present Agreement the negotiators on behalf of the State who dealt with this provision were aware of the method by which employees in the Department of Liquor Control received hazardous duty pay. No alternative method of wage payment was ever suggested by the State's negotiators to be appropriate for personnel employed by the Department of Natural Resources. The State's negotiators were aware of the interpretation to be placed upon the phrase "all hours worked" in the Agreement. No alternative interpretation was ever proffered by the State's negotiators. None may be sanctioned by the Arbitrator at this late date the Union insists.

The Union represents employees of the Ohio State Highway Patrol. They are in Bargaining Unit 1 and are covered by a different Collective Bargaining Agreement. The concept of

hazardous duty pay and the language governing it are identical in the Agreements covering Bargaining Unit 1 and Bargaining Unit 2. In the Highway Patrol, employees receive pay exactly as is urged to be appropriate by the Union in this instance. That is, the concept of all hours worked includes time on approved leave of absence. Furthermore, the employer in both instance is the "State of Ohio." The State cannot plausibly argue that the same phrase covering the same issue in two different Agreements should be interpreted in a different fashion among different departments. No such inconsistency was agreed upon by the parties and none is contemplated by the Agreement according to the Union.

The Agreement at Section 55.01(D) provides for pay to be made at the "Regular Rate." The term is defined as the "base rate plus supplements." "Hazardous Duty pay is a supplement and must be paid as part of the regular rate. At various sections of the Agreement, eg. Holidays, Vacations, Sick Leave, Bereavement Leave and Occupational Leave, the parties agreed that pay would occur at the "regular rate." The regular rate must include the hazardous pay supplement in the Union's view as it is explicitly provided for under Article 55.01 of the Agreement.

Under the general rule of contract interpretation Agreements should be interpreted in their entirety. Words or phrases should be interpreted in the same manner throughout.

Nothing is on the record to sanction the different interpretations of the phrase "all hours worked" espoused by the State in this situation. As that is the case, the grievance must be sustained insists the Union.

Position of the Employer: In the opinion of the State the grievance is untimely. The Employer began payment of the hazardous duty pay supplement in the pay period including January 1, 1991. Hazardous Duty Pay is itemized on employee's paycheck stubs. If there was a question concerning the methodology used by the State to compute the pay employees should have been able to discern any alleged error immediately upon receipt of their initial pay. On his own testimony, Mr. Shroyer was aware he was receiving pay only for hours actually worked no later than March, 1991. Yet no grievance was filed until July, 1991. The Agreement provides that employees have 14 days from the date they knew or reasonably should have known, that a potential grievance exists, to file their grievance. Obviously, the grievance in this situation was filed late in the State's view.

The Highway Patrol employees who are members of Bargaining Unit 1 and the Department of Liquor Control employees who are members of Bargaining Unit 2 receive pay for all hours in pay status. That situation does not bind the Department of Natural Resources in its opinion. Employees of the Highway Patrol are in a different bargaining unit.

Whatever occurs in that bargaining unit cannot bind employers whose employees are not members of the that unit. Furthermore, the Patrol paid its employees hazardous duty pay for all hours in active pay status for many years prior to the advent of collective bargaining in State service. Its present interpretation of the language of the Agreement merely ratifies its longstanding practice according to the Department of Natural Resources. Similarly, the Department of Liquor Control employees were paid hazardous duty pay for all hours in pay status well before it came to be incorporated into the Agreement. The Department of Liquor Control chose to pay the hazardous duty pay in that manner when it became incorporated into the Agreement. That Liquor Control chose to do that does not serve to bind Natural Resources in the view of the Department.

In the view of the Employer, the Agreement is clear on its face. It provides for hazardous duty pay to be made for "all hours worked." That concept is different for "all hors in active pay status." When the parties came to negotiate the hazardous duty pay supplement for employees of the Department of Natural Resources its spokesman on this issue insisted and made it well known to union and management negotiators alike that the concept in Natural Resources would apply to hours actually worked, not to hours in active pay status. In the view of the Department, it would not pay hazardous duty pay

to employees on vacation or at home.

There are employees of the Department, Wildlife Officers, who work out of their homes. They receive a special pay supplement, $60.00 per month. On occasion people call the Wildlife Officer at home. This does not automatically constitute a work situation, let alone a hazardous one in the opinion of the Department.

At Section 55.02(D) the Agreement establishes pay to be the regular rate, plus supplements, "whichever apply." Not all supplements apply to all situations. For instance, Section 58.02 in the State's view applies to hours actually worked. At Article 60 there is the Wildlife Officer's Home Pay Supplement which does not apply to the regular rate of pay. Shift Differential pay at Article 57 applies only to regularly scheduled shift hours between 3:00 p.m. and 7:00 a.m. In the opinion of the State, when the Agreement is examined in its totality it is clear that the intent of the parties was to only apply the hazardous duty pay supplement to Department of Natural Resources employees for hours actually worked. Consequently, no such pay is due for hours spent on approved leave status. As the language is clear, the State argues that the arbitrator under the normal language restricting the authority of an arbitrator may not impose upon the State an obligation to which it did not specifically agree in the Contract.

Discussion: In this situation there has occurred the classic situation of the continuing grievance. That is, the situation complained of by Mr. Shroyer and his colleagues in the Department of Natural Resources is reoccurring. Each time employees are paid, the situation of which they are complaining occurs once again. Section 20.05 of the Contract provides that grievances are to be filed within fourteen days of the date on which any of the like affected grievants knew or reasonably could have had knowledge of the event giving rise to the class grievance. Mr. Shroyer was aware in March, 1991 that he would no longer receive hazardous duty pay for the time he was in approved leave status. Upon questioning the payroll office, he was told this procedure was specified by the Agreement. He accepted this as truth. This was not unreasonable of him as it is to be expected that the employer will meet its fundamental obligation of paying employees according to the provisions of the Agreement. Not until July, 1991 when Mr. Holycross came to learn that hazardous duty pay was not being made to Department of Natural Resources employees did the question of a possible violation of the Agreement arise. If there is indeed a contractual violation in this situation it must be considered to occur each and every time employees receive pay. This would mandate that any remedy not extend back in time prior to the date of filing of the grievance should a contract violation be found to have

occurred.

It should not be expected that an Agreement would contain within it several interpretations for the same phrase. In this situation the phrase at issue is "all hours worked." On its face, this is a simple phrase and the interpretation placed upon it by the Employer is correct. That is, hazardous duty pay should be paid to employees only for hours that they are actually at "work." That interpretation would certainly be correct if the phrase stood alone, uncolored by its use elsewhere in the Agreement. Unfortunately for the Employer's position on this issue, the phrase does not stand alone. It is used in Section 58.01 of the Agreement which is the Section preceding the section at issue in this dispute. It is uncontroverted that the Department of Liquor Control, whose hazardous duty pay practices are governed by Section 58.01, makes pay to Liquor Control Investigators in the manner urged as being correct by the Union in this dispute. The relevant language of Sections 58.01 and 58.02 is identical. It would certainly be unusual to sanction different uses of the same phrase. This is especially the case when the phrase is used to govern the same sorts of payments to employees. The only differences between Sections 58.01 and 58.02 involve the amount of payment, 5.0% and 2.0% respectively and when the payment referenced in Section 58.02 should go into effect. If the

State sought to distinguish the manner in which the hazardous duty pay referenced in Section 58.01 from that made in Section 58.02 it might have done so. A specific exclusion for hazardous duty pay to employees in leave status might have been proposed by the State and agreed upon by the Union. That did not occur. The State agreed to the same language in both Sections 58.01 and 58.02. This supports the interpretation urged upon the Arbitrator by the Union when consideration is given to the manner in which the language is interpreted by the Department of Liquor Control. The practice of making hazardous duty pay in Liquor Control predates the practice in Natural Resources. Absent specific language to the contrary it should be expected that identical language would be interpreted identically.

This view is supported by the fact that the Agreement covering members of Bargaining Unit 1, those who work in the Highway Patrol, contains language identical to that in this Agreement. The Patrol makes hazardous duty pay to employees who are on approved leave. It is not reasonable to believe that identical language, found in two separate bargaining Agreements and interpreted identically by two different State Departments, should have a different interpretation for the Department of Natural Resources. Should that be the case there could well develop a crazy quilt of contract interpretation throughout State service as each Department

covered by the Agreement sought its own interpretation of its various provisions. This is not a desirable situation for either the State or employees to find themselves in.

At the hearing sharply different versions of the history of negotiations were relayed to the Arbitrator by the Chief Spokesmen for each of the parties. Given the circumstances doubtless both were testifying to the truth as they believe it to be. Their testimony furnishes no guidance for the Arbitrator as it is mutually exclusive. This compels reliance upon the written words of the Agreements and the interpretations that have been placed upon them by other State departments to furnish guidance towards a decision in this dispute.

Award: Based upon the preceding discussion, the grievance is SUSTAINED. Back pay is due affected employees retroactive to the date of the grievance in July, 1991.

Signed and dated this 6th day of January, 1992 at South Russell, OH.

Harry Graham
Arbitrator