#807

In the Matter of Arbitration Between	OPINION and AWARD
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL 11, A.F.S.C.M.E., AFL-CIO	Anna DuVal Smith, Arbitrator
and	Case 12-00-900518-0018-01-13
STATE OF OHIO ENVIRONMENTAL PROTECTION AGENCY	Jerald M. Gerber, Grievant
	Arbitrability Stand-By Pay

Appearances

For OSCEA Local 11, AFSCME:

Bob J. Rowland; Staff Representative, OCSEA Local 11, AFSCME; Advocate
John Porter; Assistant Director of Arbitration, OCSEA Local 11, AFSCME; Second Chair
Jerald M. Gerber; Environmental Specialist 2, Ohio EPA; Grievant
Donald C. Higgins; Environmental Specialist 3, Ohio EPA; Witness
Michael Dalton; Emergency Response Supervisor, Ohio EPA; Adverse Witness
Joseph Ragaglia; Arbitration Clerk, OCSEA Local 11, AFSCME; Observer

For the State of Ohio:

William R. Kirk; Labor Relations Administrator, Ohio Environmental Protection Agency; Advocate
Tim Wagner; Chief of Arbitration Services, Ohio Office of Collective Bargaining; Second Chair and Witness
Timothy Hickin; Emergency Response Supervisor, Ohio EPA; Witness
Tom Olander; Human Resources Administrator, Ohio EPA; Witness
Michael Dalton; Emergency Response Supervisor, Ohio EPA; Witness
Kenneth A. Schultz; Chemical Preparedness Manager, Ohio EPA; Witness
Janice A. Carlson; Acting Chief, Division of Emergency and Remedial Response, Ohio EPA; Observer
Kevin Clouse; Manager, ERSIS, Ohio EPA; Observer

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:00 a.m. on June 17, 1992, at the offices of the Ohio Civil Service Employees Association, Columbus, Ohio, before Anna DuVal Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. The oral hearing concluded at 1:15 p.m., June 17, 1992. Written closing statements were exchanged through the Arbitrator on July 11, 1992, and the record closed on that date. This opinion and award is based solely on the record as described herein.

Issue

The parties stipulated that the issues to be decided by the Arbitrator are:

1. Is the grievance properly before the arbitrator (was it filed in a timely manner according to the language contained in Article 25 - Grievance Procedure of the 1989-1991 OCSEA/AFSCME Agreement)?

2. Is the Grievant required by the Agency to be on stand-by? If so, what shall the remedy be?

3. If he is not entitled to stand-by pay, can he be disciplined for failing to respond?

Joint Exhibits

1. Vacancy Posting - PCN 14202.0 - Deadlining August 14, 1989
2. Position Description PCN 14202.0 (Date 6/13/89)
3. Position Description PCN 14202.0 (Date 1/24/90)
4. Position Description PCN 14202.0 (Date 3/12/92)
5. Classification Specifications for Emergency Response Coordinator dated 8/2/87, 7/1/89, and 3/26/90

6a. Time Cards for Jerald M. Gerber, 10/8/89-5/18/90
6b. Time Accounting System Activity Code List
7. 1986 Master Agreement, OCSEA/AFSCME
8. 1989 Master Agreement, OCSEA/AFSCME

9. Grievance Trail & Withdrawal, Grievance #12-00-860165-0001-01-13-0 (aka GR02B-86-13) (Higgins, Grievant)
10. Arbitration Award #154 (David Cutlip et al., Grievants; David M. Pincus, Arbitrator)
11. Arbitration Award #158 (Jack O'Boyle, Grievant; Nicholas Duda, Jr., Arbitrator)
12. Letter to Reginald A. Brown from Janietta R. Smith dated 11/25/87
13. Inter-Office Memorandum to R. Brown from K. Schultz dated 6/20/88
14. Inter-Office Memorandum to all OSCs from M. Dalton dated 7/11/88
15. Inter-Office Memorandum to R. Brown from M. Dalton dated 1/23/92
16. Grievance #12-00-900518-0018-01-13, including Step 3 and Step 4 responses.
17. Interpretative Bulletin, Part 785: Hours Worked Under the Fair Labor Standards Act of 1938, As Amended
18. Section 40.09 (Stand-by Pay) of State of Ohio/District 1199 Collective Bargaining Agreement.

Relevant Contract Provisions

Article 13 - Work Week, Schedules and Overtime

§13.12 - Stand-By Pay

An employee is entitled to stand-by pay if he/she is required by the Agency to be on stand-by, that is, to be available for possible call to work. An employee entitled to stand-by pay shall receive twenty-five percent (25%) of his/her base rate of pay for each hour he/she is in stand-by status. Stand-by time will be excluded from overtime calculation.

Article 25 Grievance Procedure

§25.02 - Grievance Steps

Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonable should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event....

Background

This case involves whether certain employees who are "on call" are actually on "stand by," and the compensation and discipline consequences of their status.

The Employer is a state environmental protection agency. Among its functions is responding to reports of oil spills and other releases of hazardous substances into the environment. This function lies within the purview of the Emergency Response Section which employs a number (11-12) of On-Scene Coordinators (OSCs). This position entails, amongst else, investigating such reports and coordinating necessary cleanup. Because spill reports may be received any time of day or night and may present an immediate public threat, On-Scene Coordinators are "on-call 24 hours/day, seven days/week" (Joint Ex. 1-5). According to Emergency Response Supervisor Hickin, the frequency of reports varies with the season, ranging from approximately two to fourteen or twenty per night.

To facilitate timely response to spill reports, each On-Scene Coordinator is provided with a beeper and a State vehicle containing necessary equipment including a mobile cellular phone. An Inter-Office Memorandum (Joint Ex. 14) dated July 11, 1988, defines Agency expectations of on-call On-Scene Coordinators:

> During "On-Call" periods, the OSC is expected to maintain himself and his equipment in condition to respond to spills. This means the OSC must be sober, his vehicle must be fueled and mechanically sound, and his equipment must be in the vehicle and in working condition. Equipment not working properly should be replaced or repaired as soon as possible. In addition, the OSC must either remain within one-half hour travel of his vehicle or have the vehicle with him.

> While "On-Call", the OSC is to wear his assigned pager and ensure it is in working condition, unless he is at home or has supplied the duty officer with an alternative telephone number where he can be contacted. When paged, the OSC is to return the call within ten minutes of receiving the page. OSCs equipped with a cellular telephone are encouraged to transfer the telephone to their personal vehicle when they are away from home.

Testimony was given on the procedure used when a spill report or citizen complaint is received on the 800 telephone number. The duty officer receiving the call attempts to reach the on-call On-Scene Coordinator in the area of the report. Employer witnesses Hickin, Dalton and Shultz testified that if the OSC did not answer the page or indicated s/he was unable to respond to the report, another On-Scene Coordinator was contacted. Employer and Union witnesses differed as to their understanding of discipline consequences for failing to answer a page or otherwise take a hand-off from the duty officer.

Jerald Gerber, the Grievant in this case, is an On-Scene Coordinator employed in the Northwest District Office, one of five geographic districts of the state, since October, 1989. His normal working hours are 7 a.m. to 4 p.m., Monday through Friday. He is also "on call" 4 p.m. to 7 a.m., Monday through Friday, and alternates weekends "on call" with another individual. He has never failed to respond to a call. Personal records kept for 1991-92 (Union Ex. 1) show call-outs at the rate of thirty per year. In addition, he estimates he responds by telephone to another four reports per month. Believing that his on-call status qualified him for stand-by pay under Article 13.12 of the Contract, and not receiving such pay, Mr. Gerber filed a grievance on May 18, 1990.

Being unresolved through lower steps of the grievance procedure, the case came to arbitration, where it presently resides for final and binding decision. It also bears noting that another grievance was filed over the same issue on July 23, 1986, but this grievance was withdrawn on April 19, 1991 (Joint Ex. 9).

Arbitrability Issue

Arguments of the Parties

The Employer points out that it has required all On-Scene Coordinators to be on call since before the first Agreement was signed. It further states that the Grievant occupied his position and was required to be on-call for nearly seven months before filing a grievance. Thus, the State argues, the grievance was filed in excess of the contractual limitations for filing of grievances specified in Article 25.02.

The Union argues that this grievance was filed in protest of a continuing violation of the Contract since the grievance has been continuously paid improperly for maintaining a state of 24-hour emergency stand-by readiness. Citing numerous arbitration decision, including this Arbitrator's holding in Edgar (Parties' Case No. 04-00-880107-0003-01-07), the Union contends that since this grievance was filed within ten days of one occurrence it must be deemed timely under Article 25.02.

Opinion of the Arbitrator

This grievance protests a continuing perceived violation of the Contract. The filing window thus commences each time the Grievant is on call and not compensated with stand-by pay. The

record shows the Grievant was in such a position within ten days of the filing of the grievance. His grievance is thus timely and therefore arbitrable.

Stand-By Status Issue

Argument of the Union

The Union first addresses the issue of whether "on call" status is really "stand-by" status. It takes the position that the Grievant was requested to be available for a possible call to work. Therefore, by the plain language of the Agreement compelling stand-by pay if an employee "is required by the Agency to be on stand-by, that is, to be available for possible call to work," the Grievant is entitled to such compensation.

Taking up criteria of stand-by status addressed in the Cutlip decision (Joint Ex. 10), the Union maintains that the instant case differs from that one in the frequency with which the employee is affected. Cutlip was scheduled for stand-by only seven times in two years, while Gerber is on stand-by almost continuously. Additionally, Cutlip was called out only twice in two years, while Gerber's log shows fifty responses in nineteen months. He also testified he received but did not record phone calls not requiring him to go out.

Notwithstanding Management's protestations to the contrary, the Grievant was required to be on stand-by status, claims the Union. The Dalton memorandum (Joint Ex. 14) places conditions on on-call OSCs that they are expected to fulfill in meeting their job obligations. Nowhere are requirements stated to be optional. Not

until arbitration, says the Union, did the Grievant learn that he could refuse phone calls or call-outs.

Management's argument that the employees were not specifically notified they were on stand-by amounts to mere sophistry, says the Union. What matters is the substance of the restrictions, not the label used. It is ridiculous for Management to take a position on paper, as it did on the Dalton memorandum, and then later claim it did not mean it and no disciplinary consequences result from failure to meet expectations of job performance.

The Union goes on to note the impact the on-call restrictions have on the Grievant's lifestyle, such as recreation, shopping, and visits with family. The Grievant's testimony was supported by a Management employee who experienced an even more constrained lifestyle as a result of the policy because of his rural residence.

With respect to discipline, the Union contends it was reasonable for the Grievant to believe he could be disciplined if he did not respond. The emergency response system would fail if Management did not hold the hammer of discipline over employees' heads because the Agency is unwilling to compensate employees for the restrictions on their off-duty lives. Moreover, Management testimony regarding potential for discipline was inconsistent. Yet a night duty officer, whose job functions are similar to the Grievant's, was disciplined.

Although not conceding the Grievant's eligibility for stand-by pay, the Union contends that if the Arbitrator determines the Grievant not to be so entitled, he should be free of fear from

discipline for failing to meet the Employer's restrictions. It says the Agency is trying to get stand-by time without paying for it, relying on the conscientiousness of employees such as the Grievant and Mr. Higgins. The Arbitrator, says the Union, should put a stop to this practice by prohibitting discipline.

The Union requests a remedy of 25 percent of the Grievant's rate of pay for every hour he was in stand-by status back to May 8, 1990, ten days prior to the filing of the grievance. It further asks that the Arbitrator retain jurisdiction pending calculation of the remedy.

Argument of the Employer

The Employer takes the position that the Grievant is not on stand-by during the period at issue, but is on call. It states that no stand-by requirement has ever been communicated nor has the term "on stand-by" ever been used. On the other hand, "on call" requirements and expectations have been communicated through the Dalton memorandum, vacancy posting, position description, and classification specifications (Joint Exs. 1-5, 14), but the Union has never grieved its use in the classification specification as permitted by the Contract.

The Employer goes on to claim that the Grievant while on call is waiting to be engaged, not engaged to wait. Waiting is not an integral part of his job. In support of its position, the Employer cites Article 785.17 -- On-Call Time from the Interpretative Bulletin, Part 785: Hours Worked Under the Fair Labor Standards Act of 1938, As Amended:

> An employee who is not required to remain on the employer's premises but merely required to leave word at his home or with company officials where he may be reached is not working while on call.
>
> (Joint Ex. 17)

The OCS is, as testimony shows, free to use this time for his own purposes, having virtually no restrictions placed upon him. The State provides a pager, cellular phone and vehicle to ensure the OSC's freedom and to eliminate on-call inconvenience. Moreover, when the Grievant is called out, he is paid in accordance with Article 13.08 -- Call-Back Pay. He is also eligible for overtime when on the phone, though he has elected not to claim the time.

The Employer refers to three arbitration decisions on stand-by pay. It maintains that the Cutlip decision (Joint Ex. 10) established certain criteria for an employee to be considered on stand-by: restricted to one physical location, remain well-rested and sober, subject to discharge for failing to respond, and required by direct communication from the Employer to be on stand-by status. It states that the Union was unable to show the latter condition because none exists. In fact, the record shows that when an on-call OSC is unavailable, established procedure is simply to call the next one. Additionally, testimony and documents demonstrate it is not the Agency's policy or practice to discipline for failure to respond.

Another factor referred to in the Cutlip case is the frequency of call-outs as an indication of the employee's freedom to use his on-call time. The State claims the Grievant's time cards (Joint Ex. 6a) show he was called back 37 times in 238 days on-call, or

less than 16 percent of the time. The Grievant's log (Union Ex. 1) indicates 48 responses in 537 days, or less than 9 percent. This, says the Employer, is not sufficient frequency to warrant being placed on stand-by.

A second arbitration decision jointly submitted was the parties' O'Boyle case (Joint Ex. 11). The Employer contends that this case is distinguished by its facts: the Signal Electricians were informed they were on stand-by status, but no such communication took place for the Grievant. Also, Ohio EPA employees are not restricted in their location to remain telephone accessible, nor are they subject to discipline if they do not respond to a call.

The third decision referred to by the State interprets different stand-by language of a contract between the State and the Ohio Health Care Employees Union. In the view of the Employer, this case is not relevant to the instant one by virtue of its different language.

In conclusion, the Employer states it does not believe it has violated the Contract. The Union has not met its burden of proof, but the Employer has shown that OSCs are placed on-call, not required to be on stand-by. It therefore asks that the grievance be denied in its entirety.

Opinion of the Arbitrator

Determination of the On-Scene Coordinators' status--on-call or standby--depends not on the label Management chooses to apply, but on whether they are "required by the Agency...to be available for possible call to work" (Article 13.12, Joint Ex. 8). The criteria for such determination were discussed by Arbitrator Pincus in the aforementioned Cutlip decision and ultimately derive from FLSA concepts of working and nonworking time. The availability dimension of standby status is addressed by restrictions as to physical location and work-ready condition (well-rested and sober). Arbitrator Pincus also considers frequency of calls and their length as a possible impingement on the employee's use of time. Thus, an employee who is so restricted in his physical location and personal condition or whose time is so interrupted by employer calls that he is not free to use the time effectively for his own purposes, is working. The requirement dimension of standby status is addressed by the potential for discipline should the employee not comply with the availability restrictions. Arbitrator Pincus adds that employees must be informed that they are required to be available. He also discusses the requirement dimension in terms of probability and necessity of call-out. So, for example, the employer might require an employee to hold himself in a work-ready condition and location if there is a good chance that the services of the employee will be necessary, but the requirement must be communicated. "Such a [standby] job status commands a certain

readiness; it does not request an employee's availability" (Cutlip, p. 25).

Now the situation faced by the "on-call" OSC is substantially different from that faced by the grievants in the Cutlip case. Gerber is "on-call" all but two days out of each fourteen, the Cutlip grievants were on-call for a week about seven times in about seventeen months. Gerber is phoned and called out much more frequently--by both State and Union count--than Cutlip. While both carried pagers, Gerber faces the additional restriction of staying within ten minutes of a phone but is provided with a mobile cellular phone. Cutlip was not constrained in physical location as evidenced by the July 4 incident. Gerber must remain within thirty minutes of his State vehicle, and the rules for personal use of the vehicle are far from clear. Gerber must be sober. No such condition is indicated for Cutlip. Cutlip rotated his on-call periods with 10-14 other maintenance workers who would be called if Cutlip did not respond to his page while on-call. Gerber rotates only weekends and with only one other employee. Although there are 11-12 OSCs state-wide plus five others who respond to spills, the fact is that there are far fewer alternatives to Gerber than to Cutlip. Without notification, the Cutlip grievants concluded they were required to be available for work, but in fact were not since they could switch roster positions, refuse requests, and fail to respond to their page without discipline, as evidenced by the July 4 incident. Gerber's vacancy posting, position description and classification specifications all state continuous "on-call" status

as a job duty, the Dalton memo is very clear that stated restrictions while "on call" are expected: "'On-Call' means the OSC is prepared and ready to respond," "the OSC is expected to maintain himself and his equipment in condition to respond" (Joint Ex. 14). The Smith letter (Joint Ex. 12) states, "While it is the nature of this position to respond to emergencies once notified, it is neither practice nor policy to impose discipline should you fail to respond to an emergency situation due to circumstances beyond your control." The entire thrust of these documents is that compliance with "on-call" restrictions is required and subject to discipline. The arbitrator in the Cutlip case concluded his grievants were not on stand-by, but were within the purview of the Call-Back Pay provision (§13.08). The question here is whether the conditions faced by Gerber are different enough to cross the line into the realm of compensable working time within the meaning of §13.12. I conclude they are by the reasoning set forth below.

Taking first the "required" element, the Union contends the Dalton memo makes it plain the OSCs have no option and that it is ridiculous for Management to now take a position opposite to that expressed on its own documents. I agree. If the authority of the employer is to have any credibility with the workforce, it must be bound by its own promulgations. Documents setting forth the job duties of the position whose very essence is responding to emergencies make being being "on call" continuously one of those duties. I find it incredulous that an employer would not take corrective action if an employee failed to perform his job duties.

The Dalton memo reinforces that this is a requirement and defines what is necessary to fulfill the requirement. The Smith letter merely states an exception: "circumstances beyond your control." I conclude the Agency effectively placed the Grievant on notice that he was required to do what the Agency said. Reinforcing this conclusion are what I view to be the practical realities of the Grievant's functions and the paucity of alternatives should he not perform them. The State defends by saying it did not order him to stand by, it has a procedure whereby other OSCs are contacted if the "on-call" OSC in the area is unprepared, and that it does not discipline nonresponsive OSCs. Contingency plans and accommodations when appropriate are well-advised. But--and this is critical--the Grievant did not get the word. The message he got through Management documents was that he had no option. It is to his credit that he acted responsibly, obeying the "work then grieve" axiom of industrial common law, with the result that this case comes before me for interpretation of the stand-by pay article. One cannot help but wonder whether the case would have been presented as a discipline issue had the Grievant not answered a page or been unable to respond to a Priority 1 spill because he or his vehicle was out of range. Fortunately, OSCs have always responded to such emergencies. I turn now to the price of this record and the "on call" restrictions' impact on the OSC's lifestyle by taking up the "availability" element.

The State has done a great deal to ensure the continuous availability of OSCs in the event of emergencies while providing

them with a fair amount of flexibility. First, I do not agree with the Union that the frequency of calls and call-outs are such as to prevent the OSC from using his "on call" time for his own purposes. The problem is more with the amount of time he is "on call" and his restrictions during the period. It is clear that unless calls are quite numerous an employee who merely must carry a pager or leave a phone number so the employer can reach him has his off-duty time to himself. Such was the case with Cutlip who consequently fell under the Call-Back Pay provision, being not engaged to wait for the call back to work. Carrying a pager and leaving a phone number do not unduly restrict a person's lifestyle. Gerber, though, must be within ten minutes of a telephone and thirty minutes of his State vehicle, which may be likened to the employer's premises. Both of these constitute physical location constraints, albeit that the physical locations are themselves mobile. The ten minute radius is overcome by the portable cellular phone which is specifically encouraged to be transferred to the employee's personal vehicle as necessary. The constraint of the thirty minute radius, however, is not overcome. Although Mr. Shultz testified OSCs have personal use of the vehicles, his examples indicated this was on an ad hoc-by permission basis. The Grievant, on the other hand, gave examples illustrating the impact of such nearly daily location restrictions on his life. It is not that he misses an occasional ballgame or reschedules his activities from time to time, but that he must do so or get special permission on a regular basis. The physical location restriction element is met.

As to the personal condition of the OSC while "on call," the Dalton memo plainly states that "the OSC is expected to maintain himself and his equipment in condition to respond to spills" and even goes on to clarify "must be sober."

In sum, both the physical location and work-readiness restrictions of the availability element are met. That the OSCs are required to be available for possible call to work while "on call" is reinforced by the off-call contrast the Dalton memo gives: "It simply means that you revert to the same status as other state of Ohio employees and are not expected to remain readily available." Notwithstanding Mr. Shultz's definition of standby on Joint Exhibit 13 and the Agency's right to promulgate policies and procedures, and otherwise to manage its operations, "on-call" as used for the On-Scene Coordinators means "stand-by" within the meaning of Article 13.12. It follows that the Grievant is entitled to Stand-By Pay.

Award

The grievance is granted.

As to the first question, the grievance was timely filed in accordance with Article 25 and is therefore properly before the Arbitrator.

As to the second question, the Grievant is required by the Agency to be on stand-by. He is to be paid 25 percent of his base rate of pay for each hour he has been on stand-by status back to May 8, 1990, ten days prior to the filing of this grievance. The

Arbitrator retains jurisdiction for sixty days to resolve any disputes over the calculation of this award.

Anna DuVal Smith, Ph.D.
Arbitrator

August 10, 1992
Shaker Heights, Ohio

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