VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF HIGHWAY SAFETY, DIVISION OF STATEWAY PATROL

-AND-

THE FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL INC., BARGAINING UNIT I

GRIEVANTS: Karl L. Burris (Double Back Pay)
Ron Greenwood (Double Back Pay)

CASE NOs.: 15-03-920616-058-04-01
15-03-920906-070-04-01

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: David M. Pincus
DATE: March 25, 1993

APPEARANCES:

For the Union

Renee Engelbach	Paralegal
Jim Roberts	Chairman
Ed Baker	Staff Representative
Ron Greenwood	Grievant
Karl L. Burris	Grievant
Gwen Callender	General Counsel

For the Employer

Darryl Anderson	Captain
Pat Morgan	Second Chair
Richard Corbin	Advocate

INTRODUCTION

This is a proceeding under Article 20, Section 20.07 entitled Grievance Procedure between The State of Ohio, Ohio Department of Highway Safety, Division of State Highway Patrol, hereinafter referred to as the Employer, and The Fraternal Order of Police, Ohio Labor Council Inc., Bargaining Unit I, hereinafter referred to as the Union, for the periods March 29, 1989 through January 31, 1992 (Joint Exhibit 1) and February 1, 1992 through February 28, 1994 (Joint Exhibit 2)[1].

The arbitration hearing was held on January 6, 1993 at the office of Collective Bargaining, Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator of they planned to submit post hearing briefs. Both Parties indicated they would submit briefs.

ISSUE

Whether the State of Ohio violated the Collective Bargaining Agreements (Joint Exhibits 1 and 2) by denying double back pay to Trooper Karl Burris for a shift worked on May 21, 1992 and to Trooper Ron Greenwood for a shift worked on August 24, 1992, at the Governor's residence, and thereafter for every shift worked at the Governor's residence?

PERTINENT CONTRACT PROVISIONS

ARTICLE 26 - HOURS OF WORK AND WORK SCHEDULES

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[1] Two grievances were merged for the purpose of this present review. Both grievances deal with the subject of double back pay. But, the respective grievances arose out of differing Collective Bargaining Agreements.

26.01 Permanent Shifts[2]

Permanent shifts shall continue. Shift assignments will be made by the facility administrator on the basis of seniority on the first day of the pay period which includes March 1st and September 1st of each year. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur, except for the relief dispatcher, who shall continue on a rotating schedule as in the past. Shifts shall be bid between forty (40) hours.

The relief dispatcher shall be paid shift differential at the highest differential rate for all hours.

26.02 Report-in and Commutation Time[3]

Employees shall be at their work sites, report-in location or headquarters location promptly at their shift starting time. Any employee who must begin work at some location other than their actual work location or report-in location shall have any additional travel time counted as hours worked except that the current practice for court appearances shall continue.

26.05 Double Backs[4]

At any time when the starting times of shifts worked by a member are less than twenty-four (24) hours apart, the members will receive one and one-half (1-1/2) times his/her hourly rate, including premium pay for the second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

* * *

(Joint Exhibit 2, Pgs. 52-53)

CASE HISTORY

The present dispute involves the application and interpretation of Section 26.05 to two

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[2] The predecessor agreement (Joint Exhibit 1) contained virtually identical contract language. It merely established permanent shifts rather than continued the practice.

[3] Section 26.02 has remained consistent in terms of language with one major exception. The most recent agreement (Joint Exhibit 2) eliminated portal to portal as hours worked. The Parties negotiated language which counted any additional travel time as hours worked.

[4] The predecessor agreement (Joint Exhibit 1) contained identical language.

distinct fact situations involving Trooper Karl Burris and Trooper Ron Greenwood.

Trooper Karl Burris had been assigned to the Ashland, Ohio post. Per Section 26.01, he had successfully bid, based on his seniority, on the 8:00 a.m. to 4:00 p.m. shift. Burris testified he normally drove 1 1/10 miles from his residence to the Ashland post. This travel time is treated as uncompensable per the terms and conditions negotiated by the Parties.

On May 20, 1992, Burris worked from 8:00 a.m. to 4:00 p.m. at the Ashland post. On May 21, 1992, Burris' normal assignment was modified by the Employer. He was told to report to Cleveland Operations by 8:30 a.m. for a President's security detail. Burris left home at 6:25 a.m. and arrived at the Ashland post by 6:27 a.m. Since he had nothing to do, he started his trip toward Cleveland Operations.

Upon arriving in Cleveland, Ohio, he engaged in a number of activities. He blocked entrance and exit ramps and directed traffic. While returning to Ashland, Ohio he made an arrest during his commute. Burris eventually arrived at the Ashland, Ohio post at approximately 4:00 p.m.

Burris was paid one-and-one half hours of regular overtime pay for his driving time to the Cleveland, Ohio detail. He grieved this formulation on June 16, 1992 because it did not contain double back pay. The grievance contained the following relevant particulars:

> "...On 5/21/92 Trp. Burris was ordered to report to Cleveland Operations at 8:30 a.m. This required he leave (sic) his residence at 0625, 1 hour 35 minutes prior to his scheduled start time. The time started on 5/21/92 was less than 24 hours from starting time on 5/20/92 (0800). The total time worked on 5/21/92 was 9 hours 48 minutes portal to portal on 6/12/92. On 6/12/92 Trp. Burris (sic) pay check did not reflect double back time for entire shift as provided in contract..."

(Joint Exhibit 3)

The above-mentioned grievance was denied. The Step 3 and Step 4 responses indicate

Grievant Burris started his shift on May 21, 1992 at 8:30 a.m., and that his shift did not start until he arrived at Cleveland Operations, his work-site.

Trooper Greenwood had been assigned to the Granville, Ohio post. He, too, had successfully bid ont he shift of 4:00 p.m. to midnight based on the permanent shift language contained in Section 26.01. On August 23, 1992, the Grievant drove approximately twenty minutes to the Granville Post; which was his normal report-in location. Per the Collective Bargaining Agreement (Joint Exhibit 2), Greenwood was not compensated for his twenty minute commute to and from his normal report-in location.

On August 24, 1992, Greenwood was assigned to report to the Governor's residence in Bexley, Ohio by 4:00 p.m. He was to provide security services from 4:00 p.m. to 12:00 a.m. Greenwood left his residence at approximately 2:45 p.m. to ensure his prompt arrival at his new report-in location, the Governor's residence. Since this initial incident, Greenwood has been regularly assigned to the Governor's residence twice per month.

Greenwood was paid thirty-five minutes overtime pay for the additional travel time on August 24, 1992. This sum was based upon the requirements contained in Section 26.02. In his view, the commute also triggered double back compensable hours in accordance with Section 26.05; a sum the Employer refused to pay. As such, he filed a grievance on May 25, 1992 which contained the following statement:

"... On August 23, 1992 I reported for duty at the Granville post at 4:00 p.m. On August 24, 1992 I had to be at the post by 3:10 or 3:15 p.m. in order to arrive at the Governor's residence by 4:00 p.m. That time is less than 24 hours from my last starting time and is a double back ..."

(Joint Exhibit 3)

The grievance in question was denied at Step 3 and Step 4. The employer argued that

the Grievant's report-in location had changed, but that his starting-time had not been modified as a consequence of the August 24, 1992 assignment. As such, Section 26.02 only requires that additional travel time must be counted as hours worked.

Neither Party raised procedural nor substantive arbitrability arguments. As such, both grievances are properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

The Union asserted Section 26.05 entitles the Grievants to double back pay. Emphasis was placed on the "less than twenty-four (24) hour" standard contained in this provision. Both Grievants clearly complied with this standard which requires the triggering of double back pay.

The Employer's reliance on the "starting times of shifts" worked requirement was viewed as unpersuasive. Evidence and testimony introduced at the hearing clearly disclosed starting time of shifts are changed when an employee is required to report to a different than normal report-in location.

The Union's interpretation was bolstered by the negotiated definition of "shift starting time" contained in Section 26.02. The definition, itself, distinguishes between permanent shift locations and shift starting times when Troopers are ordered to begin work at some location other than their normal work location. In the former situation, the shift starts when a Trooper arrives at his normal report-in location. As such, commuting to and from a permanent shift assignment is not compensable as hours worked. In the latter situation, hours worked does incorporate travel time in excess of the Trooper's normal commutation time to and from his/her normal work location. As such, the Parties did intent to include "additional" travel time as part

of the shift worked when an assignment to another report-in location is issued.

The Employer's reliance on the Fair Labor Standards Act was viewed as misplaced. The Standards (Employer Exhibits 2 and 3) were viewed as irrelevant since the Parties negotiated an increase in the applicable benefit when they defined "additional" commutation time as hours worked.

The Union coupled the shift starting time definition contained in Section 26.02 with the double back language contained in Section 26.05. Both sections need to be read in tandem since the Employer never proposed a different definition for shift starting time as applied to double back pay.

This interpretation dealing with the co-existence of both of these sections was viewed as properly based on arbitral authority and the Employer's prior interpretation of these provisions. Arbitral authority mandates the interpretation of sections within articles in relation to the entire agreement. In a post-hearing brief (Union Exhibit 2) submitted by the Employer in response to another double back grievance, the Employer legitimized the co-existence of these various sections. Each of the sections within Article 26 are viewed as related to the implementation of the new permanent shift system.

The Parties' intent regarding the administration of Section 26.05 clearly discouraged the erosion of the permanent shift concept by the scheduling of double back tours of duty. Greenwood testified the Union initially proposed the concept of permanent shifts in Section 26.01 to avoid the haphazard scheduling practices engaged in by the Employer. Greenwood and Captain Alexander acknowledged Section 26.05 acted as a "penalty clause" discouraging the scheduling of regular shifts too close together. Double backs, more specifically, are discouraged

when the Employer is required to pay time and one half for the second shift worked if it commences less than twenty-four (24) hours from the shift starting time of the prior shift.

A ruling in the Employer's favor would erode the permanent shift system negotiated by the Parties as codified in Section 26.01. When a Trooper is re-assigned to a non-routine report-in location, and the new location is farther than the normal work location, the shift starting time must, therefore, change. If this assignment requires the initiation of a commute less than twenty-four (24) hours from the shift starting time of the prior shift, double back pay must be provided. Under these types of circumstances, a Trooper's hours worked while commuting shall be factored into the determination of the shift starting time.

The Employer's own Rules and Regulations (Union Exhibit 4) define "on duty" as operating motor equipment owned or leased by the State of Ohio. As such, the Employer cannot deny that a Trooper's shift has started while he/she is driving a cruiser in uniform while commuting to another report-in location.

If the Employer succeeds in its interpretation of double back pay, unpenalized double back schedules could engender perilous situations for Troopers and the public. Alterness could easily be dampered with the onset of excessive fatigue. A situation which would decrease dramatically safety on the highways.

Both Grievant's, under their respective fact patterns, comply with the standards contained in Section 26.05 and do not fall within the exception guidelines. As such, the Employer is obliged to pay double back pay per Section 26.05.

The exceptions in question were viewed as extremely critical to the Union's interpretation. Training programs, report-backs and emergencies were negotiated as explicit

exceptions to double back situations. By failing to specifically exclude commutation time from double back determinations, such situations are viewed as included. Also, double backs and commutation time are contained in Article 26 which indicates the Parties intended on dealing with these subjects in tandem.

The Position of the Employer

It is the position of the Employer that both Grievants were properly compensated in accordance with Section 26.02 requirements. The Union was merely attempting to combine two sections of the same Article; sections historically administered separately. The language in dispute was originally proposed by the Union over six years ago, recommended by a Fact Finder and accepted by the Parties. Paid travel time realized on a routine or non-routine basis has never been interpreted as work time. An interpretation of this sort would conflict with the Parties' long term practice, intent and unambiguous language negotiated by the Parties.

Bargaining history presented by the Union failed to support its intent allegations. Greenwood never fully validated the notion that the double back penalty applied when an "additional" commute time was required. He merely thought the concept was discussed during negotiations. Captain Anderson, on the other hand, based his recollections on transcribed notes gathered during the 1986 negotiation sessions. He maintained there was never any mutual understanding supporting the Union's interpretation.

Further support for the Employer's contention was found in Fact Finder Grahm's 1986 report (Joint Exhibit 5). He referred to a continuation of a past practice dealing with paid commutation time arising from changes in report-in locations. Grahm never envisioned the coupling of paid commute time with double back pay to create a new benefit; a benefit based

on a separate and distinct proposal.

Bargaining history surrounding the most recent successor Agreement supports the Employer's interpretation. Captain Anderson noted the Employer attempted to limit its costs related to commutation pay. The Employer proposed limiting commutation pay to situations where a new report-in location was further from the Trooper's residence than his/her normal report-in location. The Union agreed to this proposal. Captain Anderson, moreover, testified discussion surrounding the proposal dealt with travel time to the Governor's security detail. He also alleged the Union never linked double back pay with commutation pay engendered by the applications of Section 26.02. These circumstances clearly indicate the Union never envisioned the formal linking of Section 26.02 requirements with Section 26.05 particulars.

Captain Anderson provided insightful testimony regarding the Parties' practice regarding commutation and double back pay. Since 1986, Troopers have frequently been assigned to other than normal report-in locations. They have all been paid commutation pay in accordance with Section 26.02; including Troopers assigned to the Governor's residence since July of 1991. This same practice was in effect when Troopers were paid portal to portal for commutes even when the new report-in location was closer to a Trooper's residence than his/her normal report-in location.

The Employer argued the language in dispute is clear and unambiguous. Sections 26.02 and 26.05 only become ambiguous when they are inappropriately coupled. Commute time has never been considered to be work time under the Agreement (Joint Exhibits 1 and 2). Official shift starting times do not change as a consequence of additional commuting times. As such, additional commute time does not necessarily trigger double back pay.

Reason and equity also support the Employer's construction. The Employer viewed the payment of double back pay for additional travel-time as unreasonable. Normally, Troopers on paid or unpaid time do nothing more than drive to and from their work sites or report-in locations. On rare occasions, however, Troopers are required to provide service if circumstances warrant immediate action because they are considered on duty while commuting. If service is required while on unpaid status, the Trooper is placed ont he clock for the duration of an incident.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record, it is this Arbitrator's opinion the Employer did not violate the Collective Bargaining Agreements (Joint Exhibits 1 and 2) by denying double back pay to Troopers Burris and Greenwood. This ruling is based on clear and unambiguous contract language negotiated by the Parties, bargaining history presented at the hearing and intent manifested through custom and practice. A ruling in the Union's favor would result in a violation of Section 20.08 (5) which deals with the scope of an arbitrator's authority. The Union's interpretation would lead to an imposition on the Employer not specifically required by the language of Section 26.05 nor negotiated by the Parties.

The Grievants were properly compensated for commutation time as required by Section 26.02. Based on the fact situations presented to me, these circumstances do not trigger Section 26.05 double back payments. Such payments only materialize when starting times of shifts worked by a Trooper are less than twenty-four (24) hours apart. In other words, this provision

requires a clear change in shift starting times. The present fact situations do not evidence such a mandated change. Both Grievant's started their commutes earlier than those indicated when traveling to "their actual work location or report-in location." Their eventual arrivals, however, were based on their normal shift starting times. Section 26.05 fails to authorize the payment of double back pay whenever "additional" commute time is required to reach a non-routine work location or report-in location. A ruling in the Union's favor would require one to equate "additional" commutation time with the phrase "starting time of shifts." The clear expression of the Parties' intent as manifested in Section 26.05 fails to anticipate such a construction. Equally important are the definitions of permanent shifts negotiated by the Parties and codified in Section 26.01. Once again, this provision does not specify a definition in support of the Union's construction.

The previous analysis may be viewed as inequitable by some individuals. And yet, equity concerns in isolation cannot contravene the clear and explicit language negotiated by the Parties. The scheduling paradigms and related guidelines presently articulated in Article 26 do not equate commute time with hours of work. As such, when one is assigned a tour of duty which requires "additional" commute time, the work shift starting time does not necessarily change. Section 26.05 requires a clear starting time change within a twenty-four (24) hour period. These standards were not activated in the instances presently in dispute.

A ruling in the Union's favor would, moreover, limit the application of Section 26.02. It appears quite likely that much of the "additional" travel time under a Section 26.06 scenario would fall within the guidelines of Section 26.05. As such, Section 26.02 would rarely be applicable; an outcome unintended by the Parties based in the bargaining history surrounding

these provisions.

With respect to bargaining history, the Union failed to properly support its interpretation. Greenwoods testimony was not beneficial because it lacked clarity in terms of actual proposals and surrounding discussion. He, more specifically, failed to rebut much of Alexander's explicit recollection surrounding the bargaining history in dispute. Alexander, on the other hand, provided more credible clear and explicit testimony regarding the lack of interplay between "additional" commutation time and double back pay. Fact Finder Grahm's recommendation (Joint Exhibit 5) regarding the matter in dispute failed to envision the coupling of provisions proposed by the Union. He merely referred to a continuation of a practice dealing with the payment of commutation time engendered by charges in report-in location. Interestingly, the Union proposed the initial language which was recommended by Grahm and accepted by the Parties. Throughout the entire bargaining history surrounding Article 26, the Union never suggested the coupling of provisions as presently proposed. I am, therefore, unwilling to grant a benefit via the arbitration process which the Union failed to propose during bargaining.

Intent surrounding Sections 26.02 and 26.05 also becomes apparent when one reviews the Parties' custom and practice regarding these provisions. Alexander testified the application of these provisions has been consistent since 1986; all affected bargaining unit members have been compensated in accordance with this practice. The present grievances reflect the initial instance of an attempt by the Union to deviate from the practice engaged in by the Parties. Prior incidents, moreover, were not distinguished from the present fact patterns. As such, the Union was unable to provide any justification for an approximate six year lapse in an attempting to remedy this alleged contractual violation.

The above analysis does not, in anyway, modify the integrity of the permanent shift system contained in Article 26 and emphasized in Section 26.01. Section 26.05, moreover, still acts as a "penalty clause" as long as the starting time of shifts worked falls within the twenty-four (24) hour proviso. Avoidance of this benefit, as a consequence of a mutually agreed to starting time definition, does not erode the permanent shift system created by the Parties. The Union, through its own bargaining decisions, has by its actions condoned such a construction.

The exception argument proposed by the Union is also viewed as unpersuasive. In my judgement, one cannot equate an explicit shift starting time definition with specific exceptions such as training programs, report-backs and emergencies. Commutation time, moreover, is not deemed included in double back applications merely because it is not stated as an exception. Rather, Section 26.05 requires a critical evaluation of shift starting time as the initial triggering event. Commutation time becomes important for operational purposes once the shift starting time threshold determination is made.

AWARD

Both grievances are herewith denied.

3/25/93
DATE

DR. DAVID M. VINCUS
ARBITRATOR