

ARBITRATION

In the Matter of Arbitration :

Between : Case No. 15-03-921019-090-04-01

THE STATE OF OHIO, : Grievance:
HIGHWAY PATROL : Portal to Portal Pay

and :

THE FRATERNAL ORDER OF POLICE, : DECISION AND AWARD
OHIO LABOR COUNCIL, INC., :
UNIT 1 :

This matter was heard on March 22, 1993 in Columbus, Ohio.

Appearances:For the Employer:

Richard Corbin, Lt/Advocate
Ann Van Scoy, OSHP
Robert E. Brooks, Staff Lieutenant
William E. Lanning, Captain
Col. Robbie K. Hartsell, Lt. Col.

For the F.O.P.:

Gwen Callender, General Counsel
Jim Roberts, Staff Representative
Terry Mamula, Grievant
David Simpson, FOP/Paralegal
Dick Miller, Negotiating Chairman, Unit 1 -Trooper

I. INTRODUCTION

The State of Ohio ("Employer") and the Fraternal Order of Police, Ohio Labor Council, Inc. Unit 1 ("FOP") are parties to a collective bargaining agreement effective on February 1, 1992 until February 28, 1994. ARTICLE 20 of the contract contains the grievance procedure. If the grievance is not resolved through multiple steps the matter is referred to arbitration. The matter at issue involves the interpretation of the Collective Bargaining Agreement language. The parties have decided to submit the matter to this Arbitrator for a decision. Section 20.08 5. Limitations of the Arbitrator (referred to as the Umpire) states that the arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of the Agreement. The parties have stipulated that all procedural steps have been complied with relative to the grievance procedure and that this matter is properly before the arbitrator for a decision.

The grievance in this case was filed by Terry D. Manula on behalf of himself and all other similarly situated employees of the Ohio State Highway Patrol. The grievance alleges that the Employer has breached Sections 26.02 and 27.01 of the Agreement by terminating the portal to portal compensation for certain employees including load limit inspectors, motor vehicle inspectors and resident troopers.

II. ISSUE

The issue for determination is whether or not the Employer has breached the collective bargaining agreement, and specifically, Section 26.02 by terminating the portal to portal pay for load limit inspectors, motor vehicle inspectors and resident troopers. In the event a breach is found, the Arbitrator shall fashion the appropriate make-whole remedy.

III. APPLICABLE CONTRACT LANGUAGE

ARTICLE 26 HOURS OF WORK AND WORK SCHEDULES

26.02 Report-in and Commutation Time

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 shall have any additional travel time counted as hours worked except that the current practice for court appearances shall continue.

ARTICLE 27 OVERTIME

27.01 Overtime and Compensatory Time

1. Any member who is in active pay status more than eight (8) hours in one day or forty (40) hours in one week shall be paid one and one-half (1.5) times his/her regular rate of pay including shift differential if ordinarily paid for all time over eight (8) hours in one day or forty (40) hours in active pay status. The regular rate of pay includes all premium pay routinely received.

ARTICLE 2 EFFECT OF AGREEMENT - PAST PRACTICE

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement will continue to effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Labor Council.

ARTICLE 4 MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

... 2. Direct, supervise, evaluate, or hire employees;

... 4. Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

5. Suspend, discipline, demote or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees; (emphasis added)

... 8. Effectively manage the work force;

IV. FACTS

The parties mutually negotiated a change to the language of 26.02 in the present collective bargaining agreement. The prior agreement contained the following language:

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 be paid from the time they leave their residence until the time they return to their residence.

The present contract language states that 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. The language relates to all "employees" and the change in language reflects a compensation adjustment.

There are different types of troopers with varying work assignments. Road troopers are required to report to their work site, report-in location or headquarters location at the beginning of each work shift and they are required to return to the same location at the conclusion of the work shift. The troopers who are Grievants in this case, however, have never been required to report for work at a designated work site, report-in location or headquarters location. Load limit inspectors ("LLI's") use transportable scales to look for overweight vehicles and they conduct roadside weight checks. Motor vehicle inspectors ("MVI's") are involved with similar duties. They inspect vehicles and set up roadside inspections. A resident trooper ("RT") is assigned to a County that has no patrol post. The trooper lives and works in the County because it is remote. He operates out of his home and is not required to report to his assigned patrol post at the start and end of each shift. Likewise, MVI's and LLI's are not required to report to any designated work site, report-in location or headquarters at the beginning or end of their shifts. LLI's, MVI's and RT's have always been paid from the time they leave their homes until the time they return at the end of their shift. Accordingly, the travel time to the first work location at the beginning of the shift was compensated time and the travel from the last work site to home was also compensable. This is what is referred to as portal to portal pay.

The Employer has applied the 1992-94 contract language change not only to the road troopers, but to the LLI's, MVI's and RT's as

well. Each of these troopers is assigned to a particular post for administrative purposes, notwithstanding that they are not required to actually report for duty at their assigned posts at the beginning or end of their shifts. Instead of being paid from the time they leave home until they return, these troopers are now allocated a certain amount of travel time representing the time it takes for them to leave home and drive to their assigned posts, together with the time it takes to drive from their assigned posts back to their home at the end of the day. This amount of travel time is deducted from their compensation, such that they no longer receive portal to portal pay. In order to receive the same compensation as before, these troopers must leave their homes early and stay at their work site until the end of the shift.

By way of example, assuming a load limit inspector has a 30 minute commute to his assigned post, he/she would not be compensated for the commuting time at the beginning or end of the shift, for a total of one hour. The trooper would have to leave home at 6:30 and arrive back home at 3:30 in order to be compensated from 7:00 until 3:00 p.m. If the first work site actually required one hour of travel, the trooper would be compensated for only one-half hour of travel because the Employer includes the normal 30 minute commute as non compensable time. Likewise, if it took an hour to travel from the last work site to home, the trooper must remain at the work site for an additional one-half hour to receive payment and one-half hour would be non-compensable as being the normal commute time.

IV. POSITION OF THE FOP

The FOP argues that the method of compensation for LLI's, MVI's and RT's is a matter of established past practice and that these types of troopers were never included within Section 26.02, either under the prior contract or under the present contract. It has been understood between the parties that these troopers were never required to report for duty at a designated work site, report-in location or headquarters location, and that they always have been paid on a portal to portal basis. Since they were never included within the language under the prior contract, they necessarily are not included within the provisions of the present contract. The fact that each of these troopers has an assigned post for administrative purposes is irrelevant. These employees have no required or designated work site, report-in location or headquarters and therefore, cannot be considered employees who are covered by Section 26.02.

The negotiations between the parties which resulted in the changed language of Section 26.02 did not involve any discussion of changes in compensation for RT's, MVI's or LLI's. The portal to portal compensation was not discussed with respect to these particular troopers because it was never considered by the parties that these troopers were covered by the language in Section 26.02. Since the compensation for these troopers was a matter of established past practice, it was incumbent upon the State to negotiate a change in this practice with the FOP if it actually intended to make a change. The Employer in this case neglected to engage in

any specific discussions regarding a change in this practice; and, therefore, this practice should remain. The State may not unilaterally change any established past practice without the agreement of the FOP.

The LLI's, MVI's and RT's are now at a severe disadvantage relative to other troopers. The new change in policy allows the State to receive free driving time from these troopers; but, as a matter of practice, these troopers will never receive overtime compensation. A road trooper who is required to report to another work location will receive overtime for the travel time to the different location, less his or her normal commute time. Requiring LLI's, MVI's and RT's to leave before the starting time of their shift and to return after the conclusion of their shift, based on their commute times, effectively denies them overtime opportunities. Under the prior agreement, the State could have required the RT's, MVI's and LLI's to be at their work site at the start of their shift. If this were done, however, these troopers would have received substantial overtime pay for their travel time. Instead, the State permitted these troopers to leave their home at the start of their shift and return at the end of the shift so that they were compensated for their travel time, but they would not receive overtime pay.

V. POSITION OF THE EMPLOYER

The Employer argues that LLI's, MVI's and RT's were included under the language of the prior agreement and are included under the present contract language. Section 26.02 refers to "employees"

and does not distinguish between road troopers, RT's, MVI's or LLI's. The change in the contract language was made for the specific purpose of eliminating portal to portal pay. The elimination of this pay applies to all employees.

The parties engaged in extensive and comprehensive negotiations for the language change in Section 26.02. The FOP negotiated a specific exception for court appearances. Therefore, the FOP had the opportunity to negotiate an exception for the RT's, the LLI's and the MVI's, but this was not done.

The issue in dispute does not involve the interpretation of any past practice. The payment for RT's, LLI's and MVI's was specifically provided for within the contract language of the prior agreement and their compensation is specifically identified under the present clause. The Employer attempted to eliminate portal to portal pay because the payment for travel time was inefficient and costly. Only four troopers have complained about the contract change. The contract language clearly provides that the change in language and the elimination of portal to portal pay applies to the Grievants because they are included within the classification of "employees."

VI. DISCUSSION

This Arbitrator is in agreement with the contract interpretation principals espoused by the Employer relative to the interpretation of Section 26.02. An Arbitrator should only resort to parole evidence, including evidence of contract negotiations between the parties, when ambiguities exist from a plain reading of

the contract language. Moreover, before a determination is made as to whether or not an established past practice between the parties has come into existence, which practice is not included or referred to within the contract, a careful reading of the contract must take place to determine whether or not the contract, in reality, refers to or accounts for the facts which are alleged to constitute the established past practice. In this case, it is presumed that the parties intended to include all compensation issues within the terms of the collective bargaining agreement. This presumption, however, is rebuttable.

The evidence is clear from the first sentence of Section 26.02 in both the prior agreement and the present agreement that all employees shall be at their work sites, report-in location or headquarters location promptly at their shift starting time. The evidence, however, is also clear that LLI's, MVI's and RT's have non-fixed and varying work sites each day. Further, they have no established report-in locations and they are not required to report to headquarters each day. Each of the LLI's, MVI's and RT's are assigned to a particular post for administrative purposes, but none of these troopers have ever been required to report to the post at the beginning of their shift or at the end of their shift. Under the prior contract language, LLI's, MVI's and RT's were included within the second sentence as employees who must begin work at some location other than their actual work location or report-in location. It is important to note that the phrase "actual work location or report-in location" is in the conjunctive. These

troopers were required to begin work at some location other than their report-in location or assigned post. Accordingly, they were paid from the time they left their residence until the time they returned, or on a portal to portal basis.

Under the changed language in Section 26.02 of the new contract, however, the term "report-in location" is removed from the second sentence. Instead, it provides that employees who must begin work at some location other than their actual work location shall have any additional travel time counted as hours worked, except that the current practice for court appearances shall continue. LLI's, MVI's and RT's still have "actual work locations" each day. The work locations, however, vary from day to day depending upon particular assignment. These employees, therefore, in accordance with the plain reading of the language, are required to be at their non-fixed work site, which site is their "actual work location" at the starting time for each work shift.

Notwithstanding this plain reading of the contract language, however, the evidence is clear that before this language change, LLI's, MVI's and RT's were not required to be at their non-fixed work site at the shift starting time. The language change, when read literally, now requires these employees to be at their actual work location, or non-fixed work site, each day at the starting time. LLI's, MVI's and RT's are clearly within the term "employees" and "any employee" as set forth in Section 26.02.

This contract language change now has a dramatic adverse impact upon the compensation arrangement for LLI's, MVI's and RT's.

For example, if the first work site, or actual work location, is an hour away from their residence, they would have to appear at that location at the start of the shift and they would not be compensated for any travel time. This would involve two hours of travel time, both coming and going, which would not be compensated. It is obvious from the evidence presented, that neither party intended this result from a change in the contract language.

The Employer has now redefined the term "actual work location" to include the post to which these employees are assigned for administrative purposes, notwithstanding that they are not required to report to the post at the start of their shift or at the end of the shift. The Employer appears to be within its management rights to make this decision because there is nothing in the contract which prohibits the Employer from designating the assigned post as the actual work location for each of these employees, and further, providing that the employees are not actually required to report to the assigned post each day, at the beginning or the end of the shift. In this way, the Employer has unilaterally relieved some of the adverse financial circumstances which were imposed upon these employees from the change in the contract language. The Employer requires these employees to calculate the commute time between their homes and their assigned posts and once each employee has exhausted the commute time, they begin on the clock for compensation purposes. In the prior example, if there was a thirty minute commute time from a trooper's residence to the assigned post, but there is actually an hour from his residence to his/her first work

site or actual work location for the day, thirty minutes of the travel time would not be compensated and thirty minutes would be compensated. The trooper, in order to be compensated for an entire shift, would have to leave thirty minutes before starting time and stay on his shift thirty minutes before quitting time.

This interpretation by the Employer actually varies from a plain reading of the contract language. Nevertheless, the Employer appears to be within its management rights to redefine the actual work location for these particular employees as their assigned posts pursuant to Article IV, The Management Rights Clause, which permits the Employer the right to assign and schedule employees, except to the extent modified by the agreement. The Employer's policy has the effect of compensating LLI's, MVI's and RT's more, under some circumstances, than they would otherwise receive from the plain meaning of Section 26.02, which literally requires them to be at their particular work site or actual work location at the start of each shift.

These employees received a portal to portal pay under the prior contract language because they were included within the classification of employees who must begin work at some location other than their "actual work location or report-in location." They necessarily remain included within the changed contract language which removed portal to portal pay. Unfortunately, when the new language was negotiated, the parties neglected to consider the impact of the new language upon the compensation terms for LLI's, MVI's and RT's. The management rights decision of the

Employer declaring their administrative posts as their actual work locations lessens the impact somewhat; but, obviously, not to the complete satisfaction of these employees. Nevertheless, it cannot be found that the Employer has violated the collective bargaining agreement by applying the plain meaning of the contract language and adjusting it within the bounds of its management rights under the circumstances presented in this case.

VII. AWARD

The grievance is denied.

Date: May 4, 1993

Mitchell B. Goldberg
Mitchell B. Goldberg, Arbitrator