

#1329

ARBITRATION

BETWEEN

**OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL**

- AND -

GRIEVANCE NUMBERS:

15-03-960203-0015-04-01 (UNIT 1 - JERICO, et al.)

15-03-960203-0014-07-15 (UNIT 15 - KLIER, et al.)

15-03-970306-0029-04-01 (UNIT 1 - PHILLIPS, et al.)

15-03-970318-0033-07-15 (UNIT 15 - JEFFRIES, et al.)

OHIO STATE TROOPERS ASSOCIATION

APPEARANCES:

For the Patrol:

Lt. Robert J. Young, Esq.
Columbus, Ohio

For the Association:

Herschel M. Sigall, Esq.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATION

Frank A. Keenan
Arbitrator

STATEMENT OF THE CASE:

This case was submitted to the Arbitrator, in lieu of a hearing, upon the following Joint Stipulations and Joint Exhibits:

JOINT STIPULATIONS

The parties have agreed to the following joint stipulations:

1. The Ohio State Troopers Association, (OSTA) is the exclusive representative of employees in bargaining units 1 & 15.
2. The State of Ohio and the OSTA are parties to two (2) collective bargaining agreements effective July 1, 1997, through June 30, 2000. The agreement covering the employees in Unit 1 is identified as Joint Exhibit 1. The agreement covering the employees in Unit 15 is identified as Joint Exhibit 2.
3. The grievances in this case arose under the prior labor agreement, however the articles in dispute did not change.
4. The Governor declared a state of emergency for the following counties: Adams, Belmont, Clermont, Columbiana, Jefferson, Gallia, Hamilton, Lawrence, Meigs, Monroe, Scioto and Washington. The state of emergency was for January 20, 1996 through January 31, 1996. Proclamation is identified as Joint Exhibit 3.
5. The Governor declared a state of emergency for the following counties: Adams, Athens, Brown, Clermont, Gallia, Hamilton, Highland, Hocking, Jackson, Lawrence, Meigs, Monroe, Morgan, Pike, Ross, Scioto, Vinton and Washington. The state of emergency was for March 1, 1997, through April 25, 1997. Proclamation is Joint Exhibit 4.
6. The Director of Public Safety did not declare a weather emergency in

either instance.

7. Employees of Unit 1 & Unit 15 did not receive emergency service time in either instance.
8. Employees in Unit 1 & Unit 15 filed class grievances protesting the failure to receive emergency service time. The class grievances for 1996 are identified as Joint Exhibit 5. The class grievances for 1997 are identified as Joint Exhibit 6.
9. All grievances were denied resulting in the instant arbitration.
10. The parties have agreed to waive a hearing and to submit these grievances to Arbitrator Frank Keenan for resolution on the stipulations, with attached exhibits, and briefs to be submitted August 19, 1998. Each party will provide the Arbitrator with an additional copy of their brief so that he may provide it to the other party.

It is noted that all of the grievances cite and rely on Article 66, Miscellaneous, Section 66.04, Definition of Emergency, which provides as follows:

“For purposes of this Agreement, an emergency will be defined as any situation declared by the Governor of Ohio or the Superintendent of the Highway Patrol or his/her designee, which jeopardizes the health, safety and/or welfare of the State or any portion thereof, its property and/or the residence.”

The Unit 1 grievance concerning the Governor's 1997 declaration of a state of emergency cites in addition to paragraph 66.04, Article 21 - Work Rules, Section 21.03, Application, which provides as follows:

“Any work rule and directives must be applied and interpreted uniformly as to all members. Work rules or directives cannot violate this contract. In the event that a conflict exists or arises between a work rule and the provisions

of this Agreement, the provisions of this Agreement shall prevail.”

The Patrol maintains a “Weather Emergency Guidelines” Policy in Policy 9-507-05.

This Policy, revised 5-23-94, provides in pertinent part as follows:

“

I - PURPOSE

To establish employee guidelines during formally declared ‘Weather Emergencies.’

II - POLICY

- A. POLICY STATEMENT - The Governor of the State of Ohio has designated the Director of the Department of Public Safety as his agent to declare weather emergencies. Only those declared by the Director of the Department will be considered an official weather emergency for the purposes outlined in this policy and no employee will be excused from work unless a weather emergency is declared.
- B. ESSENTIAL EMPLOYEES
1. Essential employees are those employees critical to the continuing operation of the agency and are required to report to work as directed by their supervisors during weather emergencies.
 4. Essential employees are not covered by a collective bargaining agreement shall receive their regular hourly rate and shall be credited with emergency service time (an hour for an hour) for time worked during the emergency period. Such emergency service time must be taken at a time mutually convenient to the employee and the facility commander.
 5. Essential employees covered by a collective bargaining agreement shall receive compensation for working during the emergency period according to the language of the applicable

collective bargaining agreement.

6. Any essential employee required to work overtime during a weather emergency shall be paid according to the applicable agreement or, if not covered by an agreement, at their normal overtime rate AND CREDITED WITH EMERGENCY SERVICE TIME (AN HOUR FOR AN HOUR) FOR TIME WORKED DURING THE EMERGENCY PERIOD."

It is noted that all of the Grievants have been designated as "essential employees."

The Department of Administrative Services in Directive No. 97-03, effective July 1, 1997, has promulgated instructive procedures for weather emergencies. That Directive reads in pertinent part as follows:

"TO: ALL APPOINTING AUTHORITIES AND
PERSONNEL OFFICERS
FROM: SANDRA A. DRABIK
DIRECTOR OF ADMINISTRATIVE SERVICES
SUBJECT: WEATHER EMERGENCY PROCEDURES

PURPOSE

To establish uniform procedures for all agencies implementing weather emergency procedures for bargaining unit and exempt employees.

GENERAL

Ohio Administrative Code Rule 123:1-46-01 sets forth procedures for payment of employees during weather emergencies.

It is the policy of the state of Ohio to consistently apply this rule to all classified and unclassified exempt employees and to all collective bargaining

unit members.

PROCEDURE

A. Declaring the Weather Emergency

Emergency is defined in section 5502.21(F) of the Ohio Revised Code as any period during which the Congress of the United States or a chief executive has declared or proclaimed that an emergency exists. This formal declaration or proclamation can be made by the chief executive of any political subdivision, including the Governor, for natural disaster, man-made disaster, hazardous materials incidents or civil disturbance.

Weather emergency is a term of art which refers to all formal declarations or proclamations which may limit a state employee's obligation to travel to and from work for a specific period of time due to severe weather conditions. A formal declaration or proclamation can only be made by the Governor or the Governor's designee. Emergency declarations made by chief executives, other than the Governor or the Governor's designee, do not affect state employee's obligation to travel to and from work. A weather emergency cannot be declared by an individual agency, department or director.

The director of the Department of Public Safety is the Governor's designee to declare a weather emergency which affects the obligation of state employees to travel to and from work. The authority to declare a weather emergency rests solely with the Governor in consultation with the director of Public Safety.

F. Bargaining Unit Compensation During Weather Emergencies

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- Essential Employees

Essential bargaining unit employees must report to work as scheduled regardless of the weather conditions. Essential employees shall be paid at the premium rate, if any, provided under contract.

Any employee who is on scheduled leave during a declared weather emergency shall be charged leave regardless for the declared weather emergency."

As the Association notes in its brief, the Ohio Revised Code speaks to the question of what constitutes an "Emergency" by declaring at 5502.21(F) "'Emergency' means any period during which the congress of the United States or a chief executive has declared or proclaimed that an emergency exists." There are referenced any number of potential hazards or disasters that could prompt sufficient danger to the public health and safety so as to call for the establishment of a proclaimed "emergency." With regard to the State of Ohio, the law is clear that it is the Governor as "chief executive" of the state that has the power to promulgate the existence of an "Emergency." The term "weather emergency" does exist within the Ohio Revised Code.

Chapter 123:1-46 Ohio Administrative Code sets forth the concept and differentiation of a "weather emergency" as opposed to the general class of "emergencies" established by the Ohio Revised Code in Section 5502.21(F). This Administrative Code Section sets out procedures for payment of employees during "weather emergencies." It too establishes, consistent with the O.R.C., that it is the Governor that promulgates the "emergency" which in some cases will be a "weather emergency." It declares in 123:1-46-01(A) "in the event a weather emergency is declared by the Governor"

It is noted that the 1996 state of emergency lasted some eleven (11) days, and the 1997 state of emergency lasted fifty-six (56) days.

THE UNION'S POSITION:

The Union takes the position that the Patrol violated the applicable Collective Bargaining Agreements when the Patrol failed to credit bargaining unit employees with "emergency service time" for work performed by said employees during Governor-declared emergencies in January of 1996 and March of 1997. The Union perceives the relevant inquiries to be: Was there a weather emergency declared consistent with the requirements of the Contract; did the Grievants perform services during such a declared state of emergency; were they credited with emergency service time?

The Union notes that the Ohio Revised Code at 5502.21(F) does not define a "weather emergency" and speaks only of "emergencies." The Union further notes that the Ohio Administrative Code at Chapter 123:1-46 sets forth the concept and differentiation of a "weather emergency" as opposed to the general class of emergencies established by O.R.C. 5502.21(F). Moreover, a "weather emergency" is not defined in the Administrative Code, albeit the Code establishes the procedures for the payment of employees during such emergencies. The Collective Bargaining Agreement speaks to emergency at 66.04 and not a sub-class of weather emergency, asserts the Union. However, granting the existence of a class emergency of "weather emergency," the Union asks rhetorically: Were the Governor's declarations of emergency declarations of a "weather emergency." It is the Union's position that since the Governor's emergency declarations were predicated upon

the result of weather conditions ("heavy snow and ice;" "high temperatures;" and "flooding,") then the Governor's declaration is as much of a "weather emergency" as can exist, and clearly meets the definition of an emergency within O.R.C.; the O.A.C.; and the collective bargaining agreement. Pointing to District 9 Commander Freeman's letter of April 7, 1997, to all District 9 Employees, the Union asserts that the Ohio Highway Patrol formally noticed the higher level of duty obligations imposed by the emergency and the superb way in which the bargaining units' members met the challenges imposed upon them.

As the Union sees it, the Employer takes the position that although there is no specific definition of what constitutes a "weather emergency," what ensued when snow and ice was followed by high temperatures was not a weather emergency. Although it was a declared emergency clearly attributable to weather and although the employer acknowledges that we are dealing with a "term of art" the employer asserts that it can only be a "weather emergency" if it is declared by the Director of Public Safety acting as the designee of the Governor. Thus the employer would deny to the principal what it would argue must rest only with the agent. This concept defeats the law of agency. The Director of Administrative Services in her Directive No. 96-01 notes that a formal declaration or proclamation can only be made by the Governor or the Governor's designee. She correctly notes that the Governor cannot delegate the responsibility of his office.

When the Governor acts, such as in the instant cases, to declare an emergency which is by all standards a self described "weather emergency," the state cannot thereafter shield itself from the natural consequences of such a valid act by declaring that only an

employee of the Governor can invoke the "weather emergency." In the instant cases as provided by statute the Governor of the State of Ohio, it's chief executive, acting pursuant to the powers specifically vested in him by the laws of the State of Ohio, formally proclaimed a state of emergency. There is no "weather emergency," only an emergency that might be weather related. The massive and devastating floods that claimed property and lives and brought ... increased service and responsibility [to] the members of the Ohio Highway Patrol constituted exactly what the collective bargaining agreement and indeed the Governor himself envisioned as requiring the imposition of a state of emergency. In the limited areas of the declared emergency, the Troopers and Sergeants of the Ohio Highway Patrol performed emergency service hours. It cannot be imagined a clearer example whereby such emergency service hours would lie. It was on the network of main and side roadways throughout the impacted areas that commerce and the flow of life saving effort was directed. It is exactly for such emergencies as a major flood that the emergency service hours are provided.

The employer would advance the argument that a formal emergency can exist and can indeed be declared; that the nature of the emergency can be such as to specifically call for the increased performance and increased hazard to the members of the bargaining unit; that performance consistent with the requirements of the declared emergency can be rendered; and that simply by electing to have the principal and not the agent declare the emergency the consequences of the emergency service need not be credited to the members of the bargaining unit. In this case, it not only is a situation where it walks like a duck and quacks like a duck, but a situation where the Governor has formally declared it to

be a duck. The fact that some appointee of the Governor was not delegated the assignment of naming this bird doesn't change a thing. The grievant members of the bargaining units performed exactly the kind and nature of services envisioned by emergency service. The employer should not and cannot be permitted to avoid the consequences of its own voluntary action in declaring a weather related emergency.

The Union urges that the grievances be sustained and that each of the Grievants be allotted emergency service time credit for the hours worked during the emergency.

THE PATROL'S POSITION:

The Patrol asserts that the Union carries the burden of proving that the Patrol violated the Contracts when it failed to accord emergency service time credit for time worked by bargaining unit members during certain Governor-declared emergencies in 1996 and 1997, and that the Union has failed to carry that burden. It is the Patrol's contention that with no language in either labor agreement addressing weather emergencies, three of the four grievances allege violation of the definition of "emergency." Only one of the grievances alleges violation of Article 21 "Work Rules." After reviewing the policy which the union contends the employer violated [Policy 9-507.05], there remain two major problems with the union argument. First, they have stipulated that the Director of Public Safety did not create a weather emergency in either instance. This declaration is a prerequisite to the policy being implemented. Second, even if a weather emergency had been declared by the Director, Section B5 of the policy states:

"Essential employees covered by a collective bargaining agreement shall

receive compensation for working during the emergency period according to the language of the applicable collective bargaining agreement.”

There is no such applicable language in the Unit 1 or Unit 15 agreements.

The Union is attempting to attain through the arbitration process added benefits which were not negotiated. If the union desires to receive emergency service time in accordance with Highway Patrol policy 9-507.05 during a declared “state of emergency,” they should negotiate that benefit. Other unions with state employees have negotiated specific language pertaining to weather emergencies. Unit 1 and Unit 15 chose not to. There has been no violation of the labor agreements.

By way of elaboration on the Patrol’s position, the Patrol notes that as to the 1996 grievances, the contention is that Section 66.04 has been violated. But this is a definition section, defining how the term “emergency” is to be interpreted in the labor agreement. In that regard, the Patrol points out that the term “emergency” appears in the labor agreement in Section 26.04, Split Shifts and 26.05, Double Backs. These provisions expand the Patrol’s prerogatives in emergency situations. The Patrol asserts that it is difficult to see how the Employer can violate a definition section. The Patrol notes that nowhere in the labor agreement does the concept and terminology of “emergency service time” appear.

The Patrol points out that only the Unit 1 grievance from 1997 grieves Article 21, Work Rules, and accordingly, argues the Patrol, this is the only grievance which properly grieves any alleged violation of a Highway Patrol policy. Moreover, Article 21 simply insures that a Policy developed by the Employer does not violate the labor agreement.

Article 21 does not give expanded rights to the Union to interpret or apply the Policy differently than intended by the Employer, which, however, is what the Union is attempting to achieve through the grievance procedure.

The Patrol asserts that Policy 9-507.05 was created to reflect the State of Ohio Weather Emergency Procedures contained in Directive No. 97-03 of the Director of Administrative Services, effective July 1, 1997. The purposes of both Policy 9-507.05 and Directive No. 97-03 is to establish uniform procedures to follow during formally declared "weather emergencies." Both state that the Director of Public Safety is the Governor's designee to declare a weather emergency which effects the obligation of State employees to travel to and from work. The parties here jointly stipulated that the Director of Public Safety did not declare a weather emergency in either 1996 or 1997 instances involved here. That fact alone supports the decision of the Employer to not credit bargaining unit employees with emergency service time credit, argues the Patrol.

The Patrol points out that Policy 9-507.05 provides that essential employees covered by a collective bargaining agreement, such as the Grievants, are to be compensated for working during the weather emergency in accordance with the language of their collective bargaining agreement. The problem the Union must overcome, argues the Patrol, is the fact that there is no language in either the Unit 1 or Unit 15 labor agreement addressing "weather emergency" compensation. Thus, asserts the Patrol, even if a weather emergency had been declared by the Director of Public Safety, employees in Unit 1 and Unit 15 are not entitled to any additional compensation.

The Patrol points out that sustaining the grievances would translate into a 1.9 million

dollar award, and asserts that the proper way to attain such a huge economic benefit to the bargaining units is through negotiations, and not through the grievance and arbitration procedure. In this regard, the Patrol points out that the two largest State employee Unions, O.C.S.E.A. and District 1199 have negotiated language into their labor agreements to address weather emergencies. These Unions negotiated this weather emergency language so that if a weather emergency is declared, their employees receive additional compensation. Neither O.S.T.A., nor its predecessor, the F.O.P., O.L.C., have negotiated similar contractual provisions.

The Patrol takes the position that the Union is confusing two entirely different concepts: a weather emergency and a state of emergency. As Directive 97-03 relates, a weather emergency is "a term of art" which refers to all formal declarations or proclamations which may limit a State employee's obligation to travel to and from work for a specific period of time due to severe weather conditions. On the other hand, asserts the Patrol, a state of emergency differs substantially from a weather emergency although the reason for it may in fact be weather related damage. The Governor declares a state of emergency, generally on a county by county basis. These are declared after some type of significant event has disrupted the local community extensively. The main purpose of such a declaration is to authorize state agencies to take whatever action necessary to assist local governments in protecting the citizens of Ohio. Such a declaration also enables the Governor to activate the Ohio National Guard so they may also assist the local communities. A state of emergency must be declared in order for a county to receive economic assistance from the state and/or the federal government. The fact that a state of

emergency has been declared does not automatically mean a weather emergency has been declared by the Director of Public Safety.

The Patrol additionally asserts that the State of Ohio has a past practice relative to declaring a weather emergency in that although there were a total of eight state of emergency proclamations in 1996 and 1997, yet there was never one single declared weather emergency for State employees, nor was any emergency service time credited to any State employee.

The Patrol points to two arbitration decisions involving other bargaining units as supporting its positions. The Patrol notes that one of the arbitration decisions (Rivera) dealt with the circumstance of the 1990 Shadyside flood. In that situation, a state of emergency was declared by the Governor, but a weather emergency was not declared by the Director of Public Safety. O.C.S.E.A. bargaining unit members grieved and their grievance was denied in arbitration. A similar circumstance arose from a heavy snowfall in early 1996. Again, a state of emergency was issued, but no weather emergency was declared by the Director of Public Safety. O.C.S.E.A. grieved and the grievance was denied in arbitration (Nelson).

The Patrol further argues that reason and logic fail to support the Union's contentions. Thus, the Patrol points out that the granting of the grievances would entail a \$1.9 million dollar award. The Patrol asserts that the proper way to attain such a huge economic benefit is through negotiations, not through the grievance procedure. The Patrol asserts that despite the fact there is no language in the labor agreement to support their claim, nor even a proposal by the Union to attain such a benefit, the Union expects an

Arbitrator to obtain this huge financial benefit for members of Units 1 and 15. The Patrol also contends that if a "weather emergency" had been declared, other provisions of the Policy would have been implemented. If a weather emergency had been declared by the Director of Public Safety, non-essential employees would have been sent home and paid for their full scheduled shift. They would have continued to remain home for the period of the weather emergency. In the 1996 situation, this would have been an eleven day period. In the 1997 situation, this would have been a fifty-six day period. Clearly, no weather emergency was declared. In fact, argues the Patrol, it is impossible to imagine a situation where the State of Ohio would pay non-essential employees their salary for two months to stay home.

The Patrol additionally argues that the vast majority of the member of Unit 1 and Unit 15 are already compensated for working during conditions such as those found during the declared "State of Emergency" in 1996 and 1997. Most of those employees receive hazardous duty pay.

Based on all of the foregoing, the Patrol urges that the grievance be denied.

DISCUSSION AND OPINION:

Directly to the point, after careful review of the record, I find the Patrol's contentions arguments to be the more persuasive. Thus, as the Patrol asserts, a state of emergency proclaimed by the Governor is conceptually different from a weather emergency. This differentiation is apparent from the different purposes each serves.

A declaration of a state of emergency is declared because it is a prerequisite for

authorization for State agencies to render assistance to local governmental entities; for the receipt of State and Federal monetary assistance; and for activating the Ohio National Guard. A weather emergency serves far more narrow purposes, namely, to limit an employee's obligation to travel to and from work for a specific period of time due to severe weather conditions and, if required, to nonetheless report to work and work, how certain such employees are to be compensated. These distinct and separate purposes serve to differentiate the two concepts; it is found that, while weather conditions can trigger the need for the declaration of a state of emergency and obviously enough a declaration of a weather emergency, since they serve different purposes, they remain distinct and differentiated concepts. A "weather emergency" is a term of art and is not simply subsumed within a state of emergency, as the Union argues. Neither logic nor equity mandates a different conclusion.

Under Patrol Policy 9-507.05, the Patrol has seen fit to reward essential employees who are not covered by a collective bargaining agreement who work during declared weather emergencies with a special form of compensation, to wit, emergency service time, but has left to the parties collective bargaining terms, what, if any, special compensation is to be paid to essential employees who are covered by a collective bargaining agreement who work during a weather emergency. Similar policies at State agencies affecting other bargaining units have resulted in a contractualization for bargaining unit employees of the concept of emergency service time referenced in the policy for work performed during a weather emergency, but no such contractualization has occurred here. For whatever reason, no provisions according emergency service time or any other unique compensation

linked to essential employees working during a weather emergency has been negotiated. Hence, under the terms of Policy 9-507.05, no such special compensation is due. The failure of the parties to negotiate into their agreement any concept of emergency service time for working during a weather emergency is most significant. Thus, as the Patrol notes, had the parties done so, and had a "weather emergency" been declared, 1996 and especially 1997 would have been a costly year for Patrol operations. This circumstance highlights the fact that to in some manner infer that emergency service time is due here would serve to deprive the Patrol of its negotiated bargain. Faced with no such bargained benefit, the Patrol could afford to be less parsimonious vis a vis other items of compensation.

Furthermore, contract Section 21.03 does not serve to alter the aforesaid conclusions. The first sentence thereof merely provides that directives, which presumably encompass formal written policy, be "applied and interpreted uniformly as to all members." It seems to me clear that the reference is to bargaining unit "members." And, in that regard, there is no evidence that some essential bargaining unit members received emergency service time, and others did not. Similarly, Section 66.04 does not serve to alter the aforementioned conclusions either. As the Patrol points out, it is merely a definitional section. In any event, the definition therein is declared to be "[f]or purposes of this Agreement," and within the Agreement, at Section 26.04 and 26.05, the term "emergency" is utilized. Accordingly, there is no basis to conclude that Section 66.04 had any purpose other than to clarify the meaning of the term emergency as used in Sections 26.04 and 26.05.

Based on the foregoing, it follows that the grievances must be denied.

AWARD:

For the reasons more fully noted herein above, the grievances are denied.

Dated: October 27, 1998

A handwritten signature in cursive script that reads "Frank A. Keenan".

FRANK A. KEENAN
Arbitrator