#1405

STATE OF OHIO
CASE NO. 15-00-980317-0045-07-15

In The Matter of Arbitration Between:

STATE OF OHIO,	)
OHIO DEPARTMENT OF PUBLIC SAFETY,	)
DIVISION OF THE HIGHWAY PATROL	)
	)
-AND-	)
	)
OHIO STATE TROOPERS ASSOCIATION, INC.,	)
(UNIT 15)	)

APPEARANCES

For The State

Ms. Beth A. Lewis	Office of Collective Bargaining

For The Union

Ms. Elaine N. Silveria	Ohio State Troopers Association
William T. Gruszecki	Sergeant (Retired), Grievant

BEFORE ALAN MILES RUBEN, ARBITRATOR

Cleveland-Marshall College of Law
Cleveland State University
1801 Euclid Avenue
Cleveland, Ohio 44115
Tele: (216) 687-2310
Fax: (216) 687-6881

STATEMENT OF THE CASE

This grievance over the proper calculation of personal leave pay was presented to the Arbitrator for a final and binding decision on a record consisting of a joint statement of facts, stipulated exhibits and briefs.[1]

The parties agreed that the grievance is properly before the Arbitrator, and waived all objections, procedural and substantive, to his exercise of jurisdiction over the subject matter of the dispute and the parties thereto.

In this evidentiary posture, the following facts appear.

In 1991 the Sergeants of the Ohio State Highway Patrol formed a Bargaining Unit, (Unit 15), and were then exclusively represented by the Fraternal Order of Police, Ohio Labor Council, Inc.. The original and each succeeding Collective Bargaining Agreement between the parties, of which the three year Contract entered into as of April 1, 1994 is an exemplar, provided in Article 45 for "Personal Leave" pay as follows:

> **"ARTICLE 45 - PERSONAL LEAVE**
>
> **"45.01 Eligibility for Personal Leave**
>
> "Each full-time member shall be eligible for personal leave at base rate of pay."

The "base rate of pay" referred to in Article 45, along with other pay rates, were defined in Article 60 of the Agreement in the following terms:

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1. The parties waived the testimonial hearing contemplated by Section 20.07 of the subsisting Contract.

> **"ARTICLE 60 - WAGES**
>
> **"60.01 Definitions of Rates of Pay**
>
> "All rates of pay as used in this agreement are defined as follows:
>
> "A. Class base rate is the minimum hourly rate of the pay range for the classification to which the employee is assigned.
>
> "B. Step rate is the specific value within the range to which the employee is assigned.
>
> "C. Base rate is the employee's step rate plus longevity adjustment.
>
> "D. Regular rate is the base rate plus supplements, whichever apply.
>
> "E. Total rate is the regular rate plus shift differential, where applicable."

Among the "supplements" included in the determination of the "regular rate" and the "total rate," is the "Hazard Duty Pay" set forth in Article 64:

> **"ARTICLE 64 - HAZARD DUTY PAY**
>
> "All sergeants will receive a special hazard salary adjustment of seven and one half percent (7 1/2%) of the minimum rate of the classification base pay for all hours worked."

The 1994 Agreement expired on March 31, 1997, and subsequently the Ohio State Troopers Association, Inc. succeeded the F.O.P., Ohio Labor Council, Inc. as the representative of the Bargaining Unit. A successor Contract was executed in January of 1998, but all the economic terms of the Contract were made retroactively effective to July 1, 1997. Article 45, providing for personal leave pay, Article

60 defining rates of pay and Article 64 allowing Hazard Duty Pay were all carried forward unchanged into the 1997 Contract.

The parties describe what happened next as follows:

> "After the contract between the parties was executed in January 1998, the Payroll Section of the Department of Administrative Services ("DAS") made calculations to determine the retroactive pay due to bargaining unit members. While making these calculations, Payroll discovered an error in the program for Unit 15 member's personal leave rate of pay. The program paid personal leave at the rate of step rate, longevity and hazard pay supplement. The program was corrected to be in compliance with the terms of the contract and the hazard pay supplement was deleted from Unit 15 member's personal leave rate of pay." (Stipulation 9).[2]

The program error which produced the excessive personal leave pay had been created in 1991 when the first Contract went into effect. Apparently, the incorrect calculation came about because during the period prior to 1991 when Sergeants were exempt employees, their personal leave was computed at the statutory rate which included the appropriate "step rate, longevity and the hazard pay supplement."[3]

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2. The Department did not attempt to recover any of the overpayments.

3. But, Article 2 of the Contract provided: "Fringe benefits and other rights granted by the Ohio Revised Code, which are not specifically provided for or abridged by this Agreement, shall be determined by those applicable statutes, regulations, rules or directives. ...." (Emphasis supplied).

As a matter of collateral interest, it should be noted that the Lieutenants in the Division of Highway Patrol, remain exempt from Collective Bargaining and are paid personal leave, pursuant to O.R.C. Sections 124.386 and 124.181, at a rate that still includes a step rate, longevity and the hazard pay supplement.

Payment of the compensation retroactively due Sergeants was made in the check for the payroll period ending February 28, 1998. Sergeant William T. Gruszecki received his paycheck for that pay period on March 13, 1998, and filed the following statement of grievance on March 16, 1998:

> "After receiving pay check 3-13-98, I reviewed the pay stubs from June 1997 through pay period ending 2-28-98, to determine the accuracy for payments of fitness pay, personal leave pay, holiday pay, vacation leave, administrative leave for negotiations, shift differential, overtime, double back pay, rates of pay and wages. My review and calculations indicate that retroactive payment of $1149.67 should have been $1209.98.
>
> "Also the payment for personal leave on stub for pay period ending 2-28-98 was short by $1.57."

Sergeant Gruszecki's claim for additional fitness pay, holiday pay, vacation leave, administrative leave for negotiations, shift differential, overtime, and double back pay was amicably settled for a further payment of $19.92. However, Sergeant Gruszecki's claim for an extra $1.57 for personal leave pay because of the failure of the Department to include therein the "Hazard Duty" supplement was denied. The Department's reason for refusing to adjust the Grievant's personal leave compensation was given in its third step answer:

> "Also contained in the grievance is a claim that Sgt. Gruszecki was underpaid by $1.57 on the 2/28/98 pay for payment of excess personal leave. This claim is inaccurate and he was paid correctly. The hazardous

> duty supplement is not included in the rate of pay for the payment of personal leave. Therefore, the $24.04 rate which Sgt. Gruszecki was paid for personal leave on the 2/28/98 pay is proper."

The Collective Bargaining Agreements entered into, formally with the F.O.P. and currently with the Ohio State Troopers Association, on behalf of the members of Unit 1 (Troopers) had at all relevant times contained the identical provisions as those of the Unit 15 Contracts. However, the personal leave pay of the Troopers had always consisted solely of their step rate plus longevity, and the hazard pay supplement had never been included. The reason for the discrepancy was explained as follows:

> "The State of Ohio uses a complex computer program to calculate payroll. This program uses the machine language "assembler." The program calculates gross pay, net pay, taxes, other deductions, leave accruals, etc. The rate paid for personal leave and other forms of leave are programmed into the computer using the assembler language. Rates for different types of pay are stored in the computer by bargaining unit. This is why Bargaining Unit 15 used "total rate" to compute personal leave rate of pay, whereas Bargaining Unit 1 used "base rate" and excluded any supplements." (Stipulation No. 8).

The issue presented to the Arbitrator is whether in light of the fact that, contrary to the specific text of every Collective Bargaining Agreement entered into since the Sergeants formed Bargaining Unit 15 in 1991, personal leave pay has been calculated by inclusion of the "Hazard Duty" supplements, the Employer is required as a matter of a

"binding past practice" to continue to include the Hazard Duty supplement in the calculation of personal leave pay.

The Union contends that for seven years since the inception of collective bargaining, Sergeants have been paid personal leave at a rate developed by combining base rate with the Hazard Duty supplement and the longevity supplement. This is the rate of pay members expect and are entitled to receive. The "practice" is binding upon the Highway Department and may not be unilaterally changed by the Employer, but only by agreement at the negotiating table.

Quoting from a respected work on labor law,[4] the Union points out that:

> "While the labor contract resembles the commercial contract in its form, in that it is technically an agreement between two signatory parties, it most pointedly shapes the rights and duties for a mass of third persons, the employees in the plant. Those employees spend a great part of their life doing the work which is the subject of the labor contract. By articulating or absorbing a host of rules and regulations for carrying on the day-to-day continuing activities of those employees, the labor contract functions more like a statute or a code of regulations than it does a bilateral agreement. Moreover, the union, although a legal entity with capacity to contract, does not speak for a single monolithic constituency but rather for ... [a diverse] amalgam of workers ....
>
> "Because of many of these characteristics, the labor contract - burdened with the task of regulating a complex work community on a continuing basis - cannot reduce to writing each and every norm or rule that has been

4. Cox, et al., Cases and Materials on Labor Law 692 (12th ed. 1996).

> developed over time to govern the parties' activities. It is common to treat the collective bargaining agreement as comprised not only of the written and executed document but also of plant customs and industrial practices as well as of informal agreements and concessions made at the bargaining table but not reduced to writing. ...."

As a distinguished Arbitrator wrote in his decision in Phillips Patrolium Company, 24 L.A. 191 (Merrill, 1955): "[E]xisting practices, in respect to major conditions of employment, are to be regarded as included within a collective bargaining agreement, negotiated after the practice has become established and not repudiated or limited by it."

Two insurmountable barriers stand in the way of accepting and applying the principles contended for by the Union in the present case.

In the first place, the alleged "past practice" does not serve to supplement or fill-in the gaps of the Collective Bargaining Agreement. The subject of personal leave pay and the method of its calculation have, at all times, been set forth in the Collective Bargaining Agreement, and the Contractual provision is in conflict with the practice. As a host of Arbitrators have noted, "where a conflict exists between the clear and unambiguous language of the contract and a long standing past practice, the Arbitrator is required to follow the language of the contract." BASF Wyandotte Corp., 84 L.A. 1055, 1057-58 (Caraway, 1985). See, Elkouri & Elkouri "How Arbitration Works" 651-652 (5th Ed. 1997).

While it is true, as Arbitrator Platt recognized nearly a half century ago, the clear language of the Contract may be deemed amended by an inconsistent course of conduct,[5] he cautioned:

> "While, to be sure, parties to a contract may modify it by a later agreement, the existence of which is to be deduced from their course of conduct, the conduct relied upon to show such modification must be unequivocal and the terms of modification must be definite, certain and intentional." Gibson Refrigerator Co., 17 L.A. 313, 318 (1951) (emphasis added). See Also, "How Arbitration Works," supra at page 652-53."

But, here, the Union faces a second barrier: No such "later agreement" can be found. The stipulated facts demonstrate that the Employer was unaware of the computer error which incorporated the Hazard Duty pay in the calculation of personal leave compensation. Therefore the overpayment of personal leave pay during this entire seven year period was inadvertent not intentional. The Department lacked the volition necessary to establish the element of "consent" which is essential to the establishment of a past

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5. The Contract contains a "zipper clause" in Article 2 entitled "Effect of Agreement - Past Practices:" "This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. This Agreement may be amended only by written agreement between the Employer and the Union. No verbal statements shall supersede any provisions of this Agreement." (Emphasis supplied).

Further, Section 20.08 limits the authority of the Umpire [Arbitrator]: "The umpire shall have no power to add to, subtract from or modify any terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement."

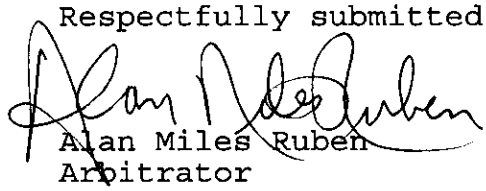
practice. The Employer cannot be held to have agreed to a practice of whose existence it was ignorant.

The Grievant, who had been a twenty-seven year veteran of the Patrol and a member of the Association's negotiating team for the current 1997 Agreement, was aware of the fact that he was being paid for his personal leave at a rate higher than that dictated by the Contract. However, so far as the record discloses, this circumstance was never communicated to the Employer, and it discovered the situation only when a computer program, designed to calculate the retroactive pay due members of the Bargaining Unit, computed personal leave pay in accordance with the Contract provision, omitted the Hazard Duty supplement and thereby triggered the present grievance.

A unilateral mistake made by an Employer, even if continued for seven years, remains just that - a mistake - and not a binding past practice. While the Employer may be precluded from demanding reimbursement of the overpayment from members of the Bargaining Unit since the over-payments resulted from its own error, the Employer is not obliged to continue to make the same mistake.

For the foregoing reasons the grievance will be denied.

Respectfully submitted,



Alan Miles Ruben
Arbitrator

AWARD

The grievance filed by William T. Gruszecki on March 16, 1998 over the failure to include hazard duty pay in his pay check for the pay period ending February 28, 1998 is denied.

AWARD signed, dated and issued at Cleveland, Ohio this 16th day of November, 1999.

Alan Miles Ruben
Arbitrator

AMR:ljg