#1434

VOLUNTARY RIGHTS ARBITRATION
STATE OF OHIO

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

-AND-

THE OHIO STATE TROOPERS ASSOCIATION, UNIT 15

GRIEVANT: **CLASS ACTION**

GRIEVANCE NO.: **15-00-990721-0084-07-15**

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: May 9, 2000

APPEARANCES

For the Employer

Robert J. Young	Advocate
Charles J. Liner	Sergeant
Rhonda Bell	Observer

For the Union

Jim Roberts	Executive Director
Bob Stitt	President
Herschel M. Sigall	Advocate

INTRODUCTION

This is a proceeding under Article 20, Grievance Procedure, Section 20.08 – Arbitration, of the Agreement between The Ohio Department of Public Safety, Division of the Ohio Highway Patrol (the "Employer"), and the Ohio State Troopers Association, Inc., Unit 15 (the "Union") for the period July 1, 1997 to June 30, 2000 (Joint Exhibit 1).

The Arbitration hearing was held on February 16, 2000, 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 if they planned to submit post hearing briefs. Both parties did, in fact, submit briefs.

PERTINENT CONTRACT PROVISIONS

ARTICLE 1 – AGREEMENT

This Agreement is hereby made and entered into pursuant to the provisions of Chapter 4117 of the Ohio Revised Code by and between the State of Ohio, hereinafter referred to as "Employer" and the Ohio State Troopers Association, Inc., hereinafter referred to as the "Union".

This Agreement is made for the purpose of promoting cooperation and harmonious labor relations among the Employer, employees of the bargaining unit, and the Union for the public interest, establishment of an equitable and peaceful procedure for the resolution of differences and to protect the public interest by assuring the orderly operations of the State government.

ARTICLE 2 – EFFECT OF AGREEMENT – PAST PRACTICE

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.

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. The parties agree that they will negotiate any changes to wages, hours and terms and conditions of employment, as may be required by law.

(Joint Exhibit 1, Pg. 1)

ARTICLE 3 – CONFLICT AND AMENDMENT

This agreement is meant to conform to and should by interpreted in conformance with the Constitution of the United States, the Constitution of the State of Ohio, all applicable federal laws and Chapter 4117, Ohio Revised Code.

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(Joint Exhibit 1, Pgs. 1-2)

ARTICLE 8 – OSTA TIME

8.01 Delegate and Officer Leave

A bank of three hundred (300) hours for each year of the Agreement of paid time off will be made available to Union officers for Union business at the discretion of the Union. The Union shall reimburse the Employer for the cost of the salary and Employer's share of the pension contribution for these three hundred (300) hours. Such reimbursement shall be made to Highway Patrol Operating Account, Fund 036. This leave may be used in conjunction with paid time such as compensatory time, personal leave at the option of the member. If such leave is used in conjunction with vacations, employees must give twenty-one (21) days notice. Any employee using paid time off shall receive his regular pay without loss of benefits, seniority or service credit.

The Union will notify the Employer of the names of those employees who may use this paid leave. The Union will notify the Employer of the dates of all conferences and will notify the Employer of the dates of all conferences and conventions to which delegates may be sent two (2) months in advance of the event.

Uses of time by Union officers will require notice of fourteen (14) calendar days to the Post Commander. In the event of an emergency, as defined by Article 66 of this Agreement, this leave may be canceled.

Paid leave shall not be unreasonably denied.

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8.03 Paid/Reimbursed Release Time

A. The Union may designate one (1) member for release from their job duties at no loss of pay, seniority or other benefits. In addition, the Union may designate officers who may utilize up to one hundred and sixty (160) hours of paid release time pursuant to this paragraph each year. Such time must be requested pursuant to paragraph 8.01. Each designated employee shall be available for calls during an emergency as that term is defined in Article 66 and shall be required to meet all requirements necessary for maintaining a position as an employee.

B. For the period July 1, 1997 through June 30, 1998, for the purpose of providing release time the vacation balance of each member of the Union within the bargaining unit shall be reduced by six (6) hours in the first pay period following the implementation of this agreement. This reduction shall be made from the regular accrual of vacation to which the employee would otherwise be entitled. In the event an employee's vacation hours are insufficient to accommodate such a

deduction, the remaining deficit will be deducted from the employee's compensatory hours. If a deficit still remains the Employer will advance the deficit of that employee's contributions to be retrieved from earned vacation time the following year. The cumulative amount of this deduction from the vacation/compensatory balances of Union members shall be used to provide the paid release time available in paragraph "A" above. As soon as practicable after June 30, 1998, the Employer will account for unused banked hours, and credit the cash value of those hours directly to the Union to be applied against the benefits and wage charges for release time for future use.

When all credit hours are used, the Union shall reimburse the Employer for the actual cost of the wages and benefits.

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(Joint Exhibit 1, Pgs. 7-9)

ARTICLE 20 – GRIEVANCE PROCEDURE

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4. Decisions of the Umpire

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The umpire's decision shall be final and binding upon the Employer, Union and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the umpire as set forth in this Article. The grievance procedure shall be the exclusive method for resolving grievances.

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5. Limitations of the Umpire

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration.

The umpire shall have no power to add to, subtract from or modify any of the 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.

(Joint Exhibit 1, Pgs. 37-38)

STIPULATED FACTS

1. During negotiations there was some discussion in general terms about the rate of reimbursement. This matter was not agreed upon by the parties. There was no discussion subsequent to ratification, nor any idea that there was a problem.
2. Neither party contacted the Fact-Finder to clarify the disputed matter. The disputed matter surfaced approximately 1½ years after ratification.

ISSUE

What is the correct reimbursement percentage the Union is to pay in accordance with Section 8.03 (B) of the Unit 15 Collective Bargaining Agreement?

CASE HISTORY

The disputed matter concerns a contract interpretation issue involving Article 8.03 (B). This provision deals with Paid/Reimbursement Release Time. There appears to be some controversy regarding the reimbursement percentage to be used once credit hours as defined in Article 8.03 (B), are exhausted.

The facts for the most part are not in dispute. Some form of reimbursement formula has existed for a considerable period of time. The collective bargaining agreement in effect for the period 1994-1997 provided for full time Release Persons, and a related reimbursement mechanism. Article 8.03 recognized full time pay status for Release Persons. Reimbursement took place in the form of donated vacation hours from members of the bargaining unit. This bank was credited for each hour used by the Release Person. It should be noted the Union was not required to make any other additional payment to the Employer.

Some controversy regarding the disputed provision took place during negotiations surrounding the Successor Agreement (Joint Exhibit 1). Initially, the Employer wished to have the Union absorb the entire costs associated with Release Persons. The Employer eventually relented and moved off its original position. Discussion focused on the nature of reimbursement, but the parties reached impasse on this issue. It was one of many issues dealt with by the Fact-Finder once the parties were unable to reach an amicable resolution of the issues in impasse.

Regarding the present dispute, Fact-Finder Jonathan Dworkin viewed the fiscal condition of the Union as an important portion of his recommended finding. As such, he recommended leaving the existing leave payment formulas in effect for fiscal year 1997-1998. Beginning fiscal year 1998-1999, however, the following language was recommended:

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> The Union shall reimburse the Employer for the cost of salary and Employer's share of the pension contribution of the designated release employees. Such reimbursement shall be made to Highway Patrol Operating Account Fund 036.

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(Union Exhibit 1, Pg. 32)

The Fact-Finder's report and recommendation, including the previously articulated Article 8.03 language, were ratified by the parties. The parties, moreover, proofed and signed the newly negotiated Agreement (Joint Exhibit 1).

For presently unknown and unarticulated reasons, the language in the modified version of Article 8.03 (B) contained the following phrase:

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> ....the Union shall reimburse the Employer for the actual cost of the wages and benefits.

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(Joint Exhibit 1, Pg. 9)

As such, unlike the ratified version, the newly printed Collective Bargaining Agreement (Joint Exhibit 1) contained the word "actual."

The Union, it appears, made Article 8.03 contributions at the rate of 124%. This reimbursement rate consists of the cost of the employees' salary and the Employer's share of the pension contribution.

On July 14, 1999, Major M. R. Everhart, notified the Union that it had miscalculated the contribution or reimbursement rate in accordance with Article 8.03 (B). The Employer had calculated the reimbursement rate as 139.8021%, which included costs in excess of salary and pension contributions. It should be noted the Union paid the billed rate under protest.

On July 19, 1999, the Union formally contested the Employer's calculation by filing a grievance. It stated in pertinent part:

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> Received a letter from Major Everhart on payment to the State of Ohio on reimbursement of 8.03 time. The rate requested is 139.8021%. The Fact-Finder ruled "The Union shall reimburse the Employer for the cost of the salary and Employee's (sic) share of the pension contribution of the designed (sic) release employee.

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The parties were unable to resolve the disputed matter. The matter is properly before the Arbitrator.

THE MERITS OF THE CASE

The Union's Position

The Union asserts the parties are bound by the provision articulated by the Fact-Finder and ratified by the parties. The reimbursement rate should be 123.50%, and composed of the hourly rate and the pension contribution. Any other costs were not mutually agreed to by the parties and do not require reimbursement. The Employer's unilateral language change should not serve as a binding term and condition of employment.

The language articulated by the Fact-Finder is not unique to this collective bargaining relationship. Over a number of negotiation periods, the parties have abided by similar language contained in Article 8.01. The Union has reimbursed the Employer for paid time off for Union business by paying at the hourly rate of the employee, plus the Employer's pension contribution. The 1994-1997 Agreement contained language in Article 8.01 virtually identical to language recommended for adoption by the Fact-Finder in Article 8.03 (B). In fact, the parties retained the Article 8.01 language in the 1997-2000 Collective Bargaining Agreement (Joint Exhibit 1). The consistency of the parties'

payment arrangement, language contained in predecessor and current provisions, and language employed by the Fact-Finder when fashioning the Article 8.03 (B) recommendation, lead to a clear conclusion. The parties clearly intended to have the Union reimburse the Employer at a rate consisting of the hourly rate of pay, plus the Employer's pension contribution. This formulation results in a reimbursement rate of 123.50%.

The ratified Article 8.03 (B) language is not subject to dispute nor interpretation. The Fact-Finder fashioned clear language that the parties ratified. The language, moreover, contains a reimbursement mechanism in accordance with the parties' practice and custom.

The Employer's Position

It is the Employer's position that it did not violate Article 8.03 (B) by requiring reimbursement at the rate of 139.8021%. This position was supported by a number of contract interpretation arguments and some bargaining history.

The language found in Article 8.03 (B) is clear and unambiguous. As such, it is binding on the parties, not subject to interpretation and reflects the parties' intent. The inclusion of the phrase "actual" cost requires reimbursement payments composed of costs in excess of hourly rates and pension contributions. The rate of reimbursement for payment purposes is, therefore, 139.8021%.

Article 2 requires that Article 8.03 (B) should stand without modification. This provision allows the parties to modify or amend agreed to language by mutual written agreement. At the present time, no mutual written agreement to modify exists; and the Union has never argued that the parties engaged in a mutual mistake.

Article 20.08 (5) limits the scope of an arbitrator's authority. If the Arbitrator rules in the Union's favor, he would be imposing a greater obligation on the Employer than intended by unambiguous terms and conditions negotiated by the parties.

Acceptance of the Union's position is also unsupported by extra-contractual considerations. The Union wishes the Arbitrator to support its interpretation of Fact-Finder Dworkin's report. And yet, if a misunderstanding exists, the Union never asked the Fact-Finder for a clarification. The Union, moreover, would have the Arbitrator believe that it reviewed the Agreement (Joint Exhibit 1), prior to printing, but that the controlling language was not in the Agreement (Joint Exhibit 1).

A review of the Fact-Finder's rationale, in support of his recommendation, clearly supports the Employer's intent argument. He wanted the Union to fund its own employees to avoid the possibility of any perceived dominance. The only way to accomplish this desirable end is to have the Union pay the entire cost associated with the bargaining unit employee being released.

The set of circumstances under review is not unique. There are other examples in the contested Agreement (Joint Exhibit 1), specifically Articles 26 and 40, where the exact language recommended by the Fact-Finder was not incorporated into the Agreement (Joint Exhibit 1).

Reliance placed on language contained in Article 8.01 seems totally misplaced. The rate of reimbursement specified in Article 8.01 was never argued in front of the Fact-Finder. Any language contained in Article 8.01 should, therefore, not be viewed as controlling.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record and pertinent contract provisions, it is the opinion of this Arbitrator that the Employer violated Article 8.03 (B) by requiring reimbursement at the rate of 139.8021%. The reimbursement rate, therefore, should not include any components beyond the hourly rate and the Employer's pension contribution.

This finding, at the threshold, does not rely on matters of contract interpretation, custom and practice and bargaining history. Rather, it deals with commitments the parties have fashioned under Article 3, which require them to conform to Chapter 4117 of the Ohio Revised Code.

Critical to this analysis is Ohio Revised Code Section 4117.14(6). This provision states in pertinent part:

> ...if neither rejects the recommendations, the recommendations shall be deemed agreed upon as the final resolution of the issues submitted and a collective bargaining agreement shall be executed between the parties, including the fact-finding panel's recommendations, except as otherwise modified by the parties by mutual agreement (Arbitrator's Emphasis)...

The record clearly supports the imposition of the Fact-Finder's recommendation regarding Article 8.03 (B) reimbursement rates and related costs, as opposed to the language contained in the Agreement (Joint Exhibit 1) and the corollary rate proposed by the Employer. The parties have mutually agreed that their relevant constituencies ratified the Fact-Finder's report (Union Exhibit 1). As such, per the Code, it was "deemed agreed upon as the final resolution of the issues submitted...including the fact-finding panel's recommendation..."

Nothing in the record suggests the parties agreed to modify the Fact-Finder's recommendation "by mutual agreement." The record is totally void of any explanation regarding why or how the language in the codified version of Article 8.03 (B) came into existence. Some bargaining history, from the Employer's chief negotiators, could have shed some valuable light on this matter. The testimony could have dealt with the existence of a "mutual agreement" causing the questioned change in language. Mere argument, without any substantive support, suggesting other instances where language in the Agreement (Joint Exhibit 1) failed to reflect the exact language recommended by the Fact-Finder, fails to overcome this evidentiary hurdle. Also, none of the stipulated facts shed any light on the disputed discrepancy.

This Arbitrator is not in any position to question the parties' actions, nor am I willing to delve into their relationship. And yet, neither independent nor joint efforts were engaged in to clarify the disputed matter. An undertaking deserving of some consideration in the future.

I am well aware, and have often applied, the contract interpretation and scope of authority principles opined by the Employer. In this instance, however, they cannot override the clear contractual and legal requirements agreed to by the parties in Article 3. To do otherwise would not only cause a modification of the Agreement (Joint Exhibit 1) unintended by the parties, but would also breach a state statute. Outcomes which are equally uninviting.

AWARD

The correct reimbursement rate in accordance with Article 8.03 (B) is 123.50%. This rate should only be composed of the straight time hourly rate of pay of the person

released from his or her job duties and the Employer's fringe benefit contribution. Any payment or reimbursement made in the past to the Employer based on a rate which exceeds the previously mentioned rate, shall be returned to the Union as an unjustified excess.

5/9/00

May 9, 2000
Moreland Hills, Ohio

Dr. David M. Pincus
Arbitrator