#1585

In the Matter of Arbitration	
Between	Case Number:
OCSEA/AFSCME Local 11	14-00-20000629-0021-01-09
and	Before: Harry Graham
The State of Ohio, Department of Health	

APPEARANCES: For OCSEA/AFSCME Local 11:

Brenda Goheen
Staff Representative
OCSEA/AFSCME Local 11
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For The State of Ohio:

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INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. Post-hearing briefs were filed in this dispute. A reply brief was filed by the Employer. Briefs were exchanged as appropriate by the Arbitrator on June 5, 2002 and the record in this matter was closed.

ISSUE: At the hearing the parties agreed upon the issue in

dispute between them. That issue is:

> Does the Employer violate Section 13.06 of the parties Collective Bargaining Agreement by failing to designate the report-in location as the employee's home for the following employees and for other employee's who are similarly situated? If so, what shall the remedy be?
>
> The employees who are specified are:
>
> Dwight Leeseburg
> Cynthia Grant
> Robert Reed
> Laralee Becker

BACKGROUND: There is agreement upon the event that gave rise to this grievance. For many years the Employer paid certain employees who traveled as part of their daily activities what is termed "portal-to-portal" pay. That is, they were on the clock from the time they left home to the time they returned. In 2000 the Director of the Office of Collective Bargaining, Steve Gulyassy, notified State agencies they were to strictly follow the terms of Section 13.06 of the Agreement. As is set forth below, Section 13.6 deals with "Report-In Locations." The Department of Health interpreted Mr. Gulyassy's directive to mean that it should not pay portal-to-portal pay to any employees unless their home had been designated as their report-in site. Initially employees classified as Blood Alcohol Inspectors were declared eligible for portal-to-portal pay. Subsequently two other employees of the Department were found to be eligible for such pay. Other employees were determined by the Department to be ineligible

for portal-to-portal pay and it was discontinued for them. A grievance protesting that decision was filed. It was processed through the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: The Union asserts Section 13.06 of the Agreement is clear. It provides "Employees who work from their homes shall have their homes as a report-in location." The Grievants all work from their homes. For instance, Dwight Leeseburg is what is termed a "flex" employee. That is, he works an irregular schedule and his work week is complete when he has worked 40 hours. Mr. Leeseburg stores necessary equipment at his home and loads it in his car daily. Similarly, Cynthia Grant loads her car daily and goes to the regional Department of Health office sporadically. Allen Richards receives mail and messages at the office but reports there infrequently. Historically the Grievants received portal-to-portal pay. Nothing has changed in their daily tasks. These employees and those similarly situated work from their homes. The only thing that changed was the issuance of a directive by the Office of Collective Bargaining directing the longstanding practice of making portal-to-portal pay. That directive cannot be enforced given the history of payment and the clear language of the Agreement according to

the Union.

The Union supports its claim with reference to the Fair Labor Standards Act. That statute was amended by the Portal to Portal Act which delineated certain activities for which employers did not have to pay employees. These constitute activities preliminary to work. Nor are employees compensable for commuting to and from their work site. In Reich v. New York City Transit Authority, 45 F. 3d, 646, 649, (2nd Cir., 1995) the Court was of the view that "The more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable." Thus, work performed on behalf of the employer during commuting time is compensable. So too are task performed before and after the normal work schedule when done for the benefit of the Employer. Employees are to be paid for consequential work from which the employer derives significant benefit. In this situation the Employer has lengthened employee's workweeks. The Grievants work from their homes. They travel to non-office work sites. They load and unload equipment. They work in the field but aspects of their tasks are performed at home. In fact, one employee, Robert Reed, is specifically granted one hour per week at

home to perform administrative tasks associated with his job.

The Union is aware that the Employer will cite the decision of Arbitrator Rhonda Rivera in Case No. G87-0522 in support of its position in this matter. Such contention is misplaced according to the Union. In her award Arbitrator Rivera referred specifically to Section 13.06, and indicated that the third sentence dealing with employees who work from their homes is applicable to State employees other than Project Inspectors who work for the Department of Transportation. Similarly, Arbitrator John Drotning was concerned with an employee who did not report for work at her house. In contrast, this dispute deals with employees who do report for work at home according to the Union. Further, the Grievant in Arbitrator Drotning's dispute worked a normal eight (8) hour day.

When the Grievants are traveling to their work site they do not spend anything more than a de-mimimus amount of time in their principal activities. Rather, they regularly load and unload valuable and necessary equipment from their vehicles. As the Grievants and their similarly situated colleagues in fact report-in at home, the Union urges the grievance be granted and prior manner of payment be restored to them.

POSITION OF THE EMPLOYER: The Employer acknowledges that

prior to the change in policy initiated by Mr. Gulyassy it paid the Grievants portal-to-portal. That notwithstanding, it may make a change in policy when its action is supported by the Agreement. This concept is supported by the Ohio State Employment Relations Board in Defiance City School District Board of Education, SERB 97-016, (11/21/97). In Defiance the Employment Relations Board indicated that "The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that it is forever precluded from doing so." A similar view has been adopted by arbitrators. Thus, Arbitrator John F. Caraway in BASF Wyandote, 84 LA 1055, 1057 (1985) quoted approvingly from John Deere Des Moines Works decided by Arbitrator Harold Davey. 22 LA 628, 631, (1954). Arbitrators Caraway and Davey were of the view that if there was a conflict between a practice and the Agreement, the Agreement took priority and must be enforced by the Arbitrator. That is what the State urges occur in this situation. In fact, the Union has taken pains to bypass the views of Arbitrators Caraway and Davey in this matter. The grievance does not seek restoration of portal-to-portal pay. Rather, it deals with the fact that some employees did not have their homes designated as their report-in sites for pay purposes. In this situation the Employer has authority to require employees to deduct their normal commute time when

traveling. Some employees received a windfall from the manner in which the State applied Section 13.06. The State may end that windfall based upon the language of the Agreement it contends.

Negotiating history bears upon this issue. When the parties came to bargain their initial agreement the Union proposed language dealing with the question of when an employee was considered to report-in at home. The Union proposal was rejected by the Employer which in turn made a counter proposal. It proposed the following: "Due to the nature of their work, employees may have their home designated as a report-in location." That was accepted by the Union. In 1987 Arbitrator Rhonda Rivera considered a dispute similar to the instant matter. (OCB Case No. 140). She reviewed the bargaining history and found that the current Section 13.06 had the same "intent" as the management proposal cited above.

In OCB Case 240 Arbitrator John Drotning amplified Arbitrator Rivera's discussion on report-in location. He found:

> In short, the Contract language does not differ from the language accepted on May 10, 1986 and the phrase "Employees who work from their homes" constitutes a decision which must be made by the Employer. There is absolutely no language in 13.06 which allows a conclusion that, in fact, an employee who carries out a minor amount of work at his/her home and who leaves from his/her home, then has the right to elect that their home becomes the

report-in location. That decision is Management's....

Arbitrator Drotning also considered the meaning of the phrase "report-in location." He indicated:

> The common and logical concept of a report-in location is a place where an employee goes in order to report-in, ready to commence his/her job.... That a person's job is performed at more than one location and is composed of "field" type work does not automatically mean that that employee works from his home. That some correspondence is received, supplies stored, and records kept at home is not sufficient to prove that a person works from home. That a field type employee has no set designated office is also not a sufficient basis to conclude that she works from her house and her home should be her report-in location. The clerical, report writing and office work involved with field jobs, such as tax examiner, meat inspector or hazardous material inspector, may be of varying amounts and could be conducted from a governmental office location, field site, or may, in some cases, be performed at the employee's home. If a substantial amount of the person's job description is done at home, the home may be designated as his report-in location.

As the State interprets the decisions of Arbitrators Rivera and Drotning, it may determine the report-in location of employees. In doing so it must act in a non-discriminatory manner. Arbitrator Drotning in the decision cited above, determined that if an employee did a "substantial" part of his or her work at home the home could be designated as the report-in location. No employee of the Health Department performs a "substantial" part of their work at home. The Employer determined that Breath Alcohol Inspectors worked from their homes. Thus, their homes were designated as their report-in location. Next, the Employer used the Breath

Alcohol Inspectors as benchmark jobs and compared other positions in the Department with the Breath Alcohol Inspector. Inspectors work in the field and report to the office infrequently. They have no designated office space and no office equipment or telephone assigned to them. They receive their assignments via computer at home and proceed to field sites as directed. The Employer then applied the characteristics of the Breath Alcohol Inspector to other employees who travel as a routine part of their jobs. Two Asbestos Abatement Inspectors were determined to have the characteristics of the Breath Alcohol Inspector and to work from their homes. The Asbestos Abatement Inspectors spend about ten percent (10%) of their time in the office. Like the Breath Alcohol Inspectors they receive their assignments via computer. They may also print some labels for photographs at home. The Employer decided to designate their homes as their report-in locations. There was a period during which the Asbestos Abatement Inspectors did not have their homes designated as their report-in sites. The Union is seeking back pay for the Asbestos Abatement Inspectors for the period they did not receive portal-to-portal pay. The State submits that it exercised its contractually reserved discretion when they were not designated to report-in at their homes. Thus, no back pay for that period is due under any circumstance

according to the Employer.

The job descriptions of the Grievants are on the record in this matter. (Jt. Ex. 4). They show that the Grievants perform either none, or a very small amount of their tasks at home. On the other hand, they spend anywhere from 20 to 76% of their weekly hours in the office. This is unlike the Blood Alcohol Inspectors who spend no time in the office or the Asbestos Abatement Inspectors who spend at most 17% of their work hours at the office. One Grievant, Robert Reed, traveled infrequently in December, 2001 and January 2002. Another Grievant, Dwight Leeseburg, testified he normally spends 1.5 days per week in the office. He also indicated he did no work at home. Cynthia Grant works twenty-four hours per week. She indicated she is in the office about 7 hours per week. Finally, another Grievant, Laralee Becker, spends about one day per week in the office according to her testimony. She indicated she performs little work at home. All Grievants have an assigned office space. This is unlike the situation of the Blood Alcohol Inspectors who have no office space.

The State takes issue with the Union's reliance on the Portal-to-Portal Act. In Reich the Court was of the view that the Act was intended to relieve employers of liability for preliminary and postliminary tasks that fell outside the "conventional expectations and customs of compensation." (p.

835). The State also cites 29 CFR 785.34, 29 CFR 790.4(c) which provides that payments may be made if not inconsistent with the Collective Bargaining Agreement. The statute places primacy on the Agreement. The Agreement, according to the Employer, permits it to act as it did in this instance. While it made the disputed payments prior to July 1, 2000, it may withdraw the payments per the terms of the Agreement the State contends.

In Reich the Court denied time spent reviewing logs prior the start of their shifts. That activity is analogous to the loading and unloading of vehicles and other incidental activities performed by the Grievants according to the State. In Reich dog handlers argued that transporting dogs prior to the start of the shift was compensable. Not so said the Court. It was de-minimus. That is the case in this situation as well. Such tasks as the Grievants perform prior to and after their shifts is de-minimus as well the State asserts.

The job description of all Grievants provides for extensive travel. Travel is an integral part of their duties and is expected. In Kavanagh v. Grand Union Co., Inc. 5 WH 2d, 1089, 1091, (2nd Cir. 1999) the Court enforced the FLSA exemption for normal travel time. That should be the case in this situation as well contends the State. Employees of the Department are paid for travel time which exceeds the normal

home-to-work commute. Nothing else is required by the Agreement or law the State insists.

In Reich the Court noted that the policy of the law is to disregard compensable work which is truly minimal. If it were the case that loading equipment in vehicles is compensable activity, an unsettled point, the Employer asserts such work is minimal. Hence, pay is not due.

At arbitration one Grievant, Robert Reed, testified that he performs "work" during his commute. On occasion he receives cell phone calls and pages while on the road. No documents were entered to substantiate that claim. Nor was anything put on the record to indicate how much time Mr. Reed spent actually at work during his travel time. As the State views his situation, whatever work might be performed by Mr. Reed while he is on the road is de-minimus.

Some Grievants indicated they transport equipment with them while traveling. One Grievant, Dwight Leeseburg, indicated he spent 10-15 minutes per day loading and unloading equipment. The Employer doubts that much time is spent on a daily basis. Even if it were, it may be considered de-minimus per the holdings in Lindow v. U.S., 26 WH Cases, 1391, (9th Cir. 1894) and Usery v. City Electric Inc., 23 WH Cases, 256, 257, (W.D. Texas, 1976). No supporting records were introduced to corroborate Mr. Leeseburg's testimony. Nor

does the Employer understand why Mr. Leeseburg does not store equipment in the vehicle. As no records of loading time were produced and only a small amount of time is spent in this activity it should be considered de-minimus the Employer contends. Employees have recourse to the Department of Labor and the United States Courts if they feel they are being improperly paid. When the parties came to bargain the Employer retained authority to designate the report-in location. That authority has been sustained by Arbitrators Drotning and Rivera. The Employer has not acted in discriminatory fashion towards the Grievants. Thus, the State urges the grievance be denied.

DIS2USSION: When a practice is in conflict with the terms of the Agreement it is the terms of the Agreement which must govern. The written words are the expression of the parties meeting of the minds. Of course, it occurs that Agreements become encrusted with interpretations. When those interpretations contradict the clear terms of the Agreement the interpretations must be set aside. This is particularly the case in an Agreement such as that between OCSEA/AFSCME Local 11 and the State of Ohio. That Agreement covers a multiplicity of Departments and Agencies of the State and tens of thousands of employees. Uniformity in application is desirable, both from the standpoint of the Employer and the

Union and its members. A crazy-quilt of interpretations across State agencies obviously holds potential for mischief. Employees may be set against each other defending particular benefits and management is placed in the untenable position of justifying different interpretations of the same language across the multiplicity of State operations.

Arbitrator Harold Davey recognized as much in John Deere. He was of the view that a practice in conflict with the terms of the Agreement cannot stand. In the dispute before him he indicated that a change in practice bringing it into conformity with the terms of the Agreement was not the same as a violation of the Agreement. That is the proposition urged upon this Arbitrator by the Employer in this dispute. If, indeed, the practice is in conflict with the Agreement as contended by the State, the Agreement must control.

Arbitrator John Drotning in Case No. 240 involving these parties discussed when a person might be determined to be working from home. It was his view that only if a "substantial" part of an employees' tasks were performed at home was it possible for the home to be designated as the report-in location. This Arbitrator concurs unreservedly with the opinion of Arbitrator Drotning. That a person would leave from home and report to a field location without reporting in at an office does not automatically render the home the

report-in site. In order for the home to be considered the report-in site there must occur there the "substantial" amount of work referenced by Arbitrator Drotning. Such determinations must be made on a case-by-case basis.

In this situation the Employer has made such a determination. Its determination was made carefully and in good faith. The Employer examined the various positions in the Health Department and determined that Breath Alcohol Inspectors and two Asbestos Abatement Inspectors met the criteria for working from home. No Blood Alcohol Inspector spends time in an office. Nor does any have an office assigned to them. Shamus Estep, an Asbestos Abatement Inspector spends according to his account from 10-17% of his time in an office. He and his colleague, Allan Richards, both have office space assigned to them. All Breath Alcohol and Asbestos Abatement Inspectors perform such tasks as downloading assignments and checking e-mail at home. In contrast, the Grievants by their own accounts spend from 20 to 76% of their work hours in an office. All have office space assigned to them. Two Grievants, Robert Reed and Cynthia Grant, do no work at home. Two others, Dwight Leeseburg and Laralee Becker, by their own accounts perform little work at home. Mr. Leeseburg specifically indicated he loaded and unloaded equipment. Crediting his account that he

might spend up to 15 minutes per day on such a task, he does not meet the test of "substantial" work set forth by Arbitrator Drotning. The Grievants fall squarely within the test outlined by the Court in Reich, "... where the compensable preliminary work is truly minimal, it is the policy of the law to disregard it." The third paragraph of Section 13.06 provides that "Employees who work from their homes shall have their homes as a report-in location." Arbitrator Drotning applied the "substantial" test to that language. The Grievants do not meet that test. The State is in compliance with the second sentence of Section 13.06, "Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel time counted as hours worked." (Emphasis supplied). That is what the Agreement calls for and that is what the State is doing.

The history of negotiations supports the position of the Employer in this dispute. On May 1, 1986 the Union proposed to the State language regarding the work week. Its proposal (Er. Ex. 5) at page 6 includes the language "Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel

time counted as hours worked." (Emphasis supplied). On May 5, 1986 the State counterproposed proposed language dealing with the work week to the Union. (Er. Ex. 6). Included within the State's counterproposal is Section 6 concerned with "Report-In Locations." The State accepted the proposal of the Union cited above which came into the Agreement (Er. Ex. 7) in 1986 and has remained unchanged to the current Contract. As far back as 1986 the Union was aware of the concept that it was "additional travel time" that would be determinative. It was the Union which proposed as much to the Employer. Were the position of the Union to be accepted in this matter the very words it proposed would be read out of the Agreement. That should not be expected to occur.

AWARD: The grievance is denied.

Signed and dated this 21st day of June, 2002 at Solon, OH.

Harry Graham

Harry Graham
Arbitrator