SUSAN GRODY RUBEN, Esq.
Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

IN ARBITRATION PROCEEDINGS PURSUANT TO

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME

and

STATE OF OHIO, DEPARTMENT OF TAXATION

Case No. 30-07-2008-03-05-0021-01-14
Grievant: Dennis D. Woolley

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and STATE OF OHIO, DEPARTMENT OF TAXATION ("the Employer" or "ODT"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held January 21, 2010. The Parties stipulated the case was properly before the Arbitrator. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and oral and written argument.

APPEARANCES:

On behalf of the Union:

THOMAS B. COCHRANE, Associate General Counsel, OCSEA, AFSCME Local 11, AFL-CIO, 390 Worthington Rd., Westerville, OH 43082.

On behalf of the Employer:

MICHAEL P. DUCO, Deputy Director, Office of Collective Bargaining and ASHLEY HUGHES, OCB Labor Counsel, 100 E. Broad St., Columbus, OH 43215.

STIPULATED ISSUE

Did the Employer's travel policy violate Article 32 of the Agreement? If so, what should the remedy be?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

March 1, 2006 - February 28, 2009

. . .

ARTICLE 5 - MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer

has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: ...5) make any and all rules and regulations; ....

. . .

ARTICLE 32 - TRAVEL

...

32.02 - Personal Vehicle

If the Agency requires an employee to use his/her personal vehicle, the Agency shall reimburse the employee with a mileage allowance of not less than forty ($.40) cents but if the Internal Revenue Service's rate is reduced to an amount lower than forty ($.40) cents, the rate will be set at the Internal Revenue Service's rate. If an employee uses a motorchcle he/she will be reimbursed no less than thirteen ($.13) cents per mile.

32.03 - Travel Reimbursement

If an employee is required to travel in state over forty-five miles from both his/her headquarters and residence or travel out of state, he/she shall receive the appropriate in-state or appropriate out-of-state reimbursement for actual expenses incurred. The Agency may require receipts or other proof of expenditures before providing reimbursement.

...

32.11 - Miscellaneous

In all other travel matters not addressed by the agreement, the provisions of OBM's travel regulations or administrative rules will apply.

. . .

ARTICLE 44 – MISCELLANEOUS

44.01 - Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

44.02 - Operations of Rules and Law

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall be determined by those statutes, regulations, rules or directives.

44.03 - Total Agreement

This Agreement represents the entire agreement between the Employer and the Union and unless specifically and expressly set forth in the express written provisions of this Agreement, all rules, regulations, practices and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer. This section alone shall not operate to void any existing or future Ohio Revised Code (ORC) statutes or rules of the Ohio Administrative Code (OAC) and applicable federal law.

44.04 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them.

...

. . .

RELEVANT PROVISIONS OF OHIO ADMINISTRATIVE CODE ("OAC")

126-1-02

...

(C)(2) Travel by privately owned automobile

...

A state agent shall not be reimbursed for mileage commuting for his/her residence to his/her headquarters nor from his/her headquarters to his/her residence. For example, if a state agent's normal commute from his/her residence to his/her headquarters is ten miles, and a state agent commutes from

his/her residence to his authorized destination is thirty miles, the state agent shall only be reimbursed for twenty miles.

...

RELEVANT PROVISIONS OF OFFICE OF BUDGET AND MANAGEMENT ("OBM") TRAVEL POLICY

Effective 2/01/08

This pamphlet contains a summary of amended Rule 126-1-02 of the Ohio Administrative Code

...

MILEAGE

Reimburse of mileage is authorized at the Internal Revenue Service's business rate of 50.5 cents per mile. The rate is the same for autos and motorcycles. There is no reimbursement for mileage commuting from one's residence to headquarters or headquarters to one's residence. For example, if your daily commute is 10 miles from residence to headquarters, then that 10 miles is subtracted from the daily total miles for each day's travel.

...

RELEVANT PROVISIONS OF ODT POLICY

Policy Description: Travel Expense Reimbursement
Policy No. ODT-BUD-006
Authorities: OBM Travel Policy; OCSEA & FOP Contracts; OAC 126-1-02; ODT-1A-001 Fraud Policy; OEC 91-010; IG File 2004034, 20011297 & 2000158

Effective Date: February 1, 2008

1.0 PURPOSE

The purpose of this policy is to set forth procedures governing the reimbursement of travel expenses incurred by all Ohio

Department of Taxation (ODT) employees and those authorized under the Ohio Revised Code and Ohio Administrative Code. The ODT Travel Policy enhances standards set forth by the Ohio Office of Budget and Management (OBM) as well as laws in effect through the Ohio Revised Code (ORC), Ohio Administrative Code (OAC) and 2009-2012 union contracts (OCSEA and FOP).

...

2.0 POLICY

This policy details the actions necessary to receive reimbursement for authorized business travel expenses. The policy outlines the approval requirements, limitations of allowable expenses and process of submitting expenses for reimbursement. This policy outlines the responsibilities of all parties involved in the travel process, including approvals, reimbursement and reporting.

...

8.0 TRANSPORTATION EXPENSES

...

8.2 Travel by Privately Owned Automobile

...

A state agent shall not be reimbursed for mileage commuting from his/her residence to his/her headquarters, nor from his/her headquarters to his/her residence.

Employees shall not be reimbursed for their normal commute mileage when traveling on regularly scheduled work days. The employee's normal roundtrip commute miles, residence to headquarters and return, regardless of mode of transportation must be deducted from the total miles driven on such days. For example, if an employee's normal roundtrip commute from their residence to headquarters is ten miles, and the employee instead commutes roundtrip from their residence to an authorized

destination that is thirty miles, the employee shall only be reimbursed for twenty miles. Another example, if an employee's normal roundtrip commute from their residence to headquarters is thirty miles, and the employee drives to their headquarters (fifteen miles), then to an authorized location (twelve miles), then to their residence (seven miles), the employee shall only be reimbursed for four miles.

...

...

...

FACTS

The Grievant is a Tax Audit Agent 3 based in ODT's Toledo office. As part of his duties, he makes on-site visits to various businesses to perform tax audits. He uses his personal car for these trips. On days when the Grievant is scheduled to work in the ODT Toledo office, he commutes in his personal car from his home in Oak Harbor, Ohio, a one-way distance of approximately 30 miles.

On February 1, 2008, pursuant to an OBM change, ODT instituted a new mileage reimbursement policy. Previously, employees were reimbursed for:

> **(A) Miles driven on regularly scheduled work days in excess of the employee[']s normal daily commute miles, when traveling to authorized locations within**

the employee's headquarters or post of duty county.

(B) All miles driven on regularly scheduled work days to authorized locations outside the employee's headquarters or post of duty county....

The new February 1 policy did not reimburse for normal daily commute miles, regardless whether the employee is traveling to or from the employee's headquarters or post of duty county.

On February 22, 2008, the Grievant drove his personal car to an audit appointment in Lorain. It was a 115-mile round-trip, to and from the Grievant's home and Lorain. He filed an expense report dated March 3, 2008 for reimbursement of $46.00 – i.e., 115 miles x $.40/mile. ODT denied the Grievant's reimbursement request because the Grievant had not deducted his normal commute miles.

The Union grieved the reimbursement denial on March 5, 2008, alleging ODT violated Article 32 of the Agreement when it denied his reimbursement request. ODT denied the grievance, stating in pertinent part in its Step 3 response,

> **The rejection [of your reimbursement request] for not deducting your normal commute miles does not violate Article 32.03 and is consistent with rule 126-1-02[,] the applicability of which is conclusively binding under Article**

32.11.

PARTIES' POSITIONS

Union's Position

The grievance should be upheld because mileage reimbursement is clearly addressed by Sections 32.02 and 32.03. Consequently, pursuant to Section 44.01, the Agreement trumps OBM's travel regulations and administrative rules, thereby making the Grievant's reimbursement request proper.

If Sections 32.11 and 44.01 were not in the Agreement, and the OAC regulations did not exist, the Grievant would have to be reimbursed $.40/mile for 115 miles. Section 32.03 provides he "shall receive...reimbursement for actual expenses." His actual mileage was 115 miles. The Section specifies the rate at which he shall be reimbursed for his actual mileage is the "appropriate" rate. The appropriate rate, according to Section 32.02 is $.40/mile.

This contract language is not ambiguous. The reimbursement rate is not subject to any qualifiers. The Agreement does not state the employee shall be reimbursed $.40/mile, except that his commute

miles will be deducted. Reading the Agreement as straightforwardly as possible, and not reading limitations into it that do not actually appear in the text yields only one result – $.40/mile x 115 miles = $46.00, the amount the Grievant claimed in his reimbursement request.

The existence of OAC 126-1-02 creates a conflict. While Sections 32.02 and 32.03 place no qualifiers on the rule that mileage shall be reimbursed at $.40/mile, the regulations state reimbursement shall be $.40/mile, except that normal commute mileage will not be reimbursed, and thus must be deducted from any mileage claim. This would effectively modify the term "actual expenses" appearing in Section 32.03. Instead of meaning what it says -- the miles the employee actually travels – the regulation changes it to mean the miles traveled beyond normal commute miles.

The Ohio Supreme Court resolved this type of conflict in State ex rel. Parsons v. Fleming, 68 Ohio St. 3d 509 (1994), which held:

> **Except for laws specifically exempted, the provisions of a collective bargaining agreement entered into pursuant to [ORC] 4117 prevail over conflicting laws.**

This holding in Parsons is expressed in Article 44 of the Agreement; the Agreement prevails over the regulation.

One potential problem remains: Section 32.11. According to ODT, Parsons and Article 44 may have made the regulation inapplicable, but Section 32.11 makes it applicable again. The application of Section 32.11, however, is limited only to "other travel matters not addressed by the agreement." This grievance is a dispute about which travel reimbursement language governs the Grievant's request for reimbursement. The fact that sections 32.02 and 32.03 are in conflict with the regulation upon which ODT relies – 126-1-02 – is conclusive. The Agreement and the regulation conflict with each other and so, ipso facto, they "address" the same "travel matters." If they did not address the same matters, they would not conflict. Because they address the same matters, Sections 32.02 and 32.03 prevail.

The Union's approach is bolstered by Section 32.11's use of the terms "travel matters" and "addressed." These are general terms, intended to be construed broadly. Thus, OBM's regulations apply only

to issues wholly outside the purview of Article 32. If the Parties had intended that OBM's regulations apply except where the Agreement specifically directs a contrary result on a particular subject, they would have said so.

Employer's Position

Nothing in Article 32 says what mileage an employee will be reimbursed for. Rather, it says only that employees will get mileage reimbursement for using their personal cars for work. In response to high gas prices, falling State tax revenues, and the recession, OBM issued a new mileage reimbursement rule effective February 1, 2008. The new rule provides regular commute miles are subtracted from miles driven with regard to mileage reimbursement.

When a collective bargaining agreement is silent on a subject, as is the case here regarding which miles are subject to mileage reimbursement, the Employer is permitted to institute a rule addressing that subject. ODT's new mileage reimbursement policy does not conflict with the Agreement. Accordingly, the Employer did

not violate the Agreement when it instituted the new policy.

OPINION

At issue is whether the Employer's new mileage reimbursement policy effective February 1, 2008 violates Article 32 of the Agreement. Essentially, the Union contends the new policy is in conflict with Section 32.03 of the Agreement, pursuant to Section 32.11 and Article 44. The Employer contends the new policy is not in conflict with Section 32.03, but rather, covers a subject not addressed by Section 32.03. Accordingly, contends the Employer, the new policy does not violate Section 32.03, pursuant to Section 32.11 and Article 44.

Section 32.03 provides in pertinent part:

> **If an employee is required to travel...over forty-five miles from both his/her headquarters and residence...he/she shall receive the appropriate...reimbursement for actual expenses incurred....**

ODT's new travel policy based on OBM's new travel regulation provides in pertinent part:

> **Employees shall not be reimbursed for their normal commute mileage when traveling on regularly scheduled**

work days.

Section 32.11 provides:

> **In all other travel matters not addressed by the agreement, the provisions of OBM's travel regulations or administrative rules will apply.**

Accordingly, one of the dispositive questions for the Arbitrator is whether the subtraction of normal commute mileage from mileage reimbursement is "addressed" in the Agreement. The Union contends the subtraction of commute mileage conflicts with Section 32.03's promise to reimburse employees for "actual expenses incurred," and by virtue of that conflict, is "addressed" in the Agreement.

But the Arbitrator finds no conflict between subtracting commute miles and reimbursing for actual expenses. One way to look at it is this: to conclude the subtraction of commute mileage conflicts with reimbursing employees for "actual expenses incurred," implies employees' commute mileage on "non-travel" days is somehow reimbursable. I.e., if "actual expenses" on travel days includes commute mileage, why wouldn't the "actual expenses" of commute mileage be non-reimbursable on non-travel days? It is undisputed

employees are not entitled to commute mileage under the Agreement, State law, and/or State regulation.

Put another way, "actual expenses" are those expenses incurred by an employee over and above expenses normally the responsibility of an employee – e.g., commute mileage. Accordingly, because the Arbitrator finds no conflict between the commute subtraction in the new policy and Section 32.03's payment of "actual expenses," the Arbitrator finds commute subtraction is not "addressed" in the Agreement. Moreover, the Arbitrator finds no support in the record for the Union's broad contention that for a matter not to be "addressed" in Section 32 of the Agreement, the matter has to be "wholly outside the purview" of Section 32.

The Union also urges a reading of Section 32.03's "appropriate...reimbursement" to mean the appropriate *rate* of reimbursement – i.e., $.40/mile as set out in Section 32.02. Nowhere in Section 32.03, however, is the term "rate." This absence of reference to a reimbursement rate leads the Arbitrator to conclude "appropriate" reimbursement more readily encompasses the

subtraction of commute mileage, rather than concluding it refers to the $.40/mile reimbursement rate. So again, similar to finding the commute subtraction was not "addressed" in Article 32 and therefore did not conflict with Article 32, the Arbitrator concludes the commute subtraction rule does not conflict with Article 32's "appropriate" reimbursement, but rather is an example of what is considered by the Employer to be "inappropriate" reimbursement.

The above findings are dispositive with respect to the effect of Article 44 on the instant grievance. Section 44.01's primacy of the Agreement over State law is premised on a conflict between the two. As set out above, the Arbitrator finds the commute mileage subtraction does not conflict with Article 32; accordingly, Section 44.01 does not apply.

Section 44.03 provides the Employer is permitted to modify a "rule" or "practice" unless that rule or practice is "specifically and expressly set forth in the express written provisions" of the Agreement. Given that the mileage reimbursement language in Section 32 does not "specifically and expressly set forth" in the

Agreement payment for commute mileage on travel days, the Employer is permitted, pursuant to Section 44.03 to "modify" or "discontinue" the former practice of paying for commute mileage on travel days, as it did in the new reimbursement policy implemented February 1, 2008.

Finally, Section 44.04 – which prohibits State directives from being "in violation" of the Agreement – does not impede the Employer's ability to promulgate the commute mileage subtraction rule, given the Arbitrator's above findings the rule does not violate the mileage reimbursement provisions of Section 32. Section 44.04 also requires work rules to be "reasonable." The Arbitrator finds the commute mileage subtraction rule to be reasonable, given it would be unreasonable and, indeed, illogical for an employee to be reimbursed the equivalent of the employee's commute mileage on travel days, but not on non-travel days.

AWARD

For the reasons set out above, the grievance is denied in part. The Employer did not violate Article 32 when it denied reimbursement for the Grievant's regular commute mileage in his March

3, 2008 reimbursement request.

The Employer does owe the Grievant, however, the remainder of his March 3, 2008 mileage reimbursement request (i.e., the mileage requested minus the equivalent of the Grievant's commute mileage), which the Employer shall pay to the Grievant by May 14, 2010.

April 11, 2010
Date

Susan Grody Ruben, Arbitrator