ARBITRATION DECISION NO.:
100

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Department of Mental Retardation/Developmental Disabilities
Columbus Developmental Center

DATE OF ARBITRATION:
January 19, 1988

DATE OF DECISION:
February 19, 1988

GRIEVANT:
David Cutlip, et. al.

OCB GRIEVANCE NO.:
G-86-0249

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Carol Bowshier

FOR THE EMPLOYER:
Eugene Brundige
Mike Fuscardo

KEY WORDS:
Contract Interpretation
Section 13.12
Stand-by pay
Eligibility factors

ARTICLES:
Article 13 – Work Week Schedules and Overtime
§13.12 – Stand-By Pay Provision

FACTS:

Grievant is a Maintenance Repair Worker 2 employed by the Columbus Developmental Center. Grievant has been employed by the Center for approximately three and one-half (3-1/2) years as of the time of this arbitration proceeding.

The Center utilizes two (2) procedures to deal with unforeseen situations which require the

assistance of maintenance personnel. The first procedure is "Stand-by Status" which requires an employee to remain on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes. As such, an employee is entitled to twenty-five percent (25%) of his/her base rate pay for each hour he/she is on Stand-By status. The second procedure is "On-Call status" which merely requires employees to carry a beeper or to leave a telephone number where he/she may be reached. This is not seen as working status and as such, employee is not entitled to pay.

Grievant was in "On-Call status" for the period of July 1, 1986, to July 7, 1986, and requested overtime pay on the ground that such status impaired his ability to use time effectively for his own purposes thus making him eligible for 25% of base pay.

EMPLOYER'S POSITION:

Employer did not violate the Stand-By Pay provision (Section 13.12) when it utilized an Emergency Call-In procedure for all maintenance personnel. Grievant failed to meet criteria defining the necessary standards for Stand-By Pay remuneration. Grievant was not restricted to one location, he was not required to stay in a work ready condition, and he was not disciplined for failing to respond to a call from Employer. Thus Grievant can only be seen as having been on emergency Call-in status.

UNION'S POSITION:

Employer did violate section 13.12 of the Collective Bargaining Agreement because Grievant met the requirements of Stand-By status yet was denied remuneration for such time. Employer's requirements that On-Call workers wear "beepers" reinforced Grievants' belief that he/she was required to respond immediately in a work ready condition and would be subject to discipline if he failed to do so. Thus the requirement for "Stand-By status" were met by Grievant and should therefore be granted overtime

ARBITRATOR'S OPINION:

Employer did not violate the Stand-By Pay provision (Section 13.12) when it utilized an emergency Call-In procedure for all maintenance personnel. The Grievant, more specifically, is not entitled to the twenty-five percent (25%) rate of pay because he was not on Stand-By status when scheduled to work via the Emergency Call-In schedule. The record does not indicate that the Grievant and the other bargaining unit members were ever required by the Employer to be "On Call". Rather, the members were scheduled on a rotating basis in the event of unforeseen emergencies.

The Grievants lifestyle was not unduly inconvenienced by the Call-In process since the "beepers" enhanced employee's mobility during off-duty time. Further, an employee can switch roster assignments, refuse assignments, and/or fail to respond to a "beep" when scheduled and not be disciplined. These alternatives would not be available to an employee required to be on Stand-By status by the employer.

AWARD:

The grievance is denied and dismissed.

TEXT OF THE OPINION: * * *

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN
THE STATE OF OHIO, OHIO DEPARTMENT OF MENTAL RETARDATION/DEVELOPMENTAL DISABILITIES,
COLUMBUS DEVELOPMENTAL CENTER
(COLUMBUS, OHIO)

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO

GRIEVANCE: David Cutlip, et. al. (Stand - By Pay)

CASE NUMBER: G-86-0249

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: February 19, 1988

Appearances

For the Employer

Eugene Brundige	Deputy Director, OCB
Mike Fuscardo	Labor Relations Officer, ODNR/DD
David S. Norris	Labor Relations specialist, OCB
Tim Wagner	Observer, OCB
Rod Sampson	Observer, OCB
Marti Harrington	Operations Director, CDC
Ima Jeanne Crawford	Director of Human Resources, CDC
Al May	Maintenance Superintendent, CDC

For the Union

David A. Cutlip	Maintenance Repair Worker II, Grievant for the Group
David Canter	Plumber II
John Porter	Associate General Counsel
Carol Bowshier	Advocate/Field Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State

* * *

of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities, Columbus Developmental Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on January 19, 1988 at the Office of Collective Bargaining. The Parties had selected Dr. 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 by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

The stipulated issue in this grievance: Did Columbus Developmental Center violate Section 13.12 of the Collective Bargaining Agreement? If so, what shall the remedy be? (Joint Exhibit 2)

STIPULATION OF FACT

The Parties stipulated to the following facts at the arbitration hearing: 1) The grievance is properly before the Arbitrator.

2) David Cutlip is a Maintenance Repair Worker 2. David Cutlip is the Grievant representing a group of grievants.

3) David Cutlip was on the Emergency Call-in Schedule for 7/1/86 until 7/7/86 and continued to be on the Emergency Call-in Schedule on a rotating basis up to the present.

4) David Cutlip was not disciplined for failing to respond-to-a beep on July 4, 1986.

5) The Emergency Call-in Schedule consisted of 10 to 14 employees from the maintenance department who on a weekly rotational basis took emergency calls from the facility concerning general maintenance problems.

(Sig) (SigL

Carol Bowshier David S. Norris

For the Union For the State

(Joint Exhibit 9)

It should be noted that the Parties did not totally concur with respect to items number 2 and 5 listed above. As a consequence, the Arbitrator required the Parties to provide arguments concerning the individuals that should be included in the group grievance.

PERTINENT CONTRACT PROVISIONS

ARTICLE 13--WORK WEEK, SCHEDULES AND OVERTIME

* * *

Section 13.07--Overtime

"Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designee has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designee shall have the right to require the least senior employee(s) who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable-time, if so requested.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute rest period between the shift and the overtime or as soon as

operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to

report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the employee will be credited as if he/she had refused the overtime.

An employee who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime.

Emergency Overtime

In the event of an emergency as defined in Section 13.15 notwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency requirements, regardless of the overtime distribution.

Section 13.08--Call-Back Pay

Employees who are called to report to work and do report outside their regularly-scheduled shift will be paid a minimum of four (4) hours at the straight rate of pay or actual hours worked at the overtime rate, whichever is greater. Call-back pay at straight time is excluded from the overtime calculation.

An employee called back to take care of an emergency shall not be required to work for the entire four (4) hour period by being assigned non-emergency work.

Section 13.12--Stand-By Pay

"An employee is entitled to stand-by pay if he/she is required by the Agency to be on stand-by, that is, to be available for possible call to work. An employee entitled to stand-by pay shall receive twenty-five percent (25%) of his/her base rate of pay for each hour he/she is in stand-by status. Stand-by time will be excluded from overtime calculation."

* * *

(Joint Exhibit 1, Pgs. 20-22) **4**

ARTICLE 5--MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 1, Pg. 7)

ARTICLE 43—DURATION

* * *

Section 43.03--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. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement."

* * *

(Joint Exhibit 1, Pg. 62)

CASE HISTORY

The Columbus Developmental Center, the Employer, is a facility which houses approximately three hundred and ninety-six (396) residents. It employs approximately fourteen (14) maintenance employees who perform general maintenance duties. David Cutlip, the Grievant, is a Maintenance Repair Worker 2, who filed a grievance on behalf of a group of fellow maintenance employees - It should be noted that the Grievant has been employed by the Center for approximately three and one half (3 1/2) years. An Emergency Call-in Schedule has been utilized by the Employer for approximately seven (7) years. M. Fuscardo, Labor Relations Officer, and M.

Harrington, Operations Director, testified that a procedure was established to deal with unforeseen emergency situations which required the assistance of maintenance personnel. A roster was developed which, on a weekly basis, rotated maintenance department personnel who received emergency calls from the facility concerning general maintenance problems.

These employees carry a "beeper" for an entire week to expedite the call-in process. The Grievant and D. Canter, a co-worker, stated that this procedure required them to carry a "beeper" during off-duty hours from Monday through Friday; that is, from 4:00 p.m. to 7:30 a.m. on a daily basis. They also noted that they carried the "beeper" on a twenty-four (24) hour basis on Saturday and Sunday if scheduled on the Emergency Call-in roster.

Fuscardo and Harrington stated that a call-in hierarchy was developed as part of the procedure if the scheduled employee could not be contacted. The hierarchy contained the following components. First, an attempt would be made to contact the employee scheduled for emergency call-in purposes. Second, if that person was unavailable for any number of reasons, then other employees listed on the roster would be contacted. Third, A. May, Maintenance Superintendent, would be contacted if the previous components proved fruitless. Last, outside contractors would be utilized to perform the required maintenance activities if all other attempts failed to provide an appropriate manpower pool.

The Grievant testified that prior to the effective date of the Collective Bargaining Agreement (Joint Exhibit 1) the appropriate call-back payment was equivalent to a minimum of four (4) hours at the straight rate of pay or actual hours. at the overtime rate. After reviewing the Agreement (Joint Exhibit 1), however, the Grievant concluded that the Stand-By Pay provision (See Pg. 4 of

this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12-Stand-By Pay) required that he should be compensated twenty-five percent (25%) of his base rate of pay for each hour scheduled for emergency call-in duty. Thus, in his opinion, he equated stand-by status with emergency call-in status.

The above interpretation engendered an Authorization For Overtime Request (Union Exhibit 1) for the period July 1, 1986 to July 7, 1986. The Grievant, moreover, based this request on his stand-by status for the above-mentioned period.

On July 25, 1986 Harrington denied the Grievant's request for stand-by pay by issuing the following memorandum:

" * * *

This is to acknowledge receipt of your request for stand-by pay.

It has been determined that you were in "on-call status" during the time noted on your Overtime Request form (copy attached). The purpose of "On-Call" is to ensure that unscheduled, unforeseen and emergency situations are attended to immediately. By definition, you are not required to remain on the employers (sic) premises, but merely required to carry a beeper or to leave word at home or with the developmental center officials where you may be reached. This is not seen as working status.

Conversely, "stand-by status" has been determined as requiring an employee to remain on stand-by on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes.

Based upon the above-noted, your request for stand-by pay is denied.

MH/eg

Attachment

cc: Labor Relations
Al May"

(Joint Exhibit 7)

Harrington's response was viewed by the Grievant as an incorrect interpretation of the Agreement (Joint Exhibit 1). As a consequence, on July 30, 1986 the Grievant filed a grievance which contained the following Statement of Grievance:

" * * *

STATEMENT OF GRIEVANCE:

List applicable violation: Article 13.12--Stand-By Pay. Mr. Cutlip is entitled to stand-by pay because he is required to be on stand-by. Adjustment required: to be available for possible call to work.

(Joint Exhibit 3, Pg. 1)

On August 7, 1986 1. J. Crawford, Director of Human Resources, denied the grievance at the second step of the grievance procedure. Her rationale was contained in the following Step 2 response:

" * * *

Group Grievance representing 10 employees in the following classifications: Maintenance Repair Worker, Carpenter, Plumber, Welder.

Disposition of Grievance:

No bargaining unit employee may be placed in "Stand-by" status without the approval of the Superintendent.

An employee who is required to remain on stand-by on the employer's permises (sic) or so close thereto that he cannot use the time effectively for his own purposes, is in a working status, ie., stand-by status. Such an employer is engaged to wait and waiting is an integral part of the job.

An employee in "On-Call" status is not required to remain on the employers (sic) premises, but just be able to be reached. This is not a working status. If such employee responds to an emergency call by coming to the institution to take care of the emergency, appropriate call back payment is made, per the union contract, ie, a minimum of four (4) hours at the straight rate of pay or actual hours at the overtime rate, whichever is greater.

For the fore-going reasons, this-grievance is denied.

(Sig)_____
Ima Jeanne Crawford
Human Resources Director
8-8-86

(Sig)_____
Susan Arnoczky, Ph.D.
Superintendent
8/11/86"

(Joint Exhibit 3, Pg. 2)

A Step 3 grievance hearing was held on August 26, 1986 in an attempt to resolve the matter in dispute. The Employer, again, denied the grievance and issued the following Step 3 grievance hearing response:

" * * *

This matter came on for consideration on August 26, 1986. Grievant, David Cutlip was represented by Carol Bowshier OCSEA/AFSCME Staff Representative, David Johnson OCSEA/AFSCME Regional Director and Cottrell Terry Union Steward.

Columbus Developmental Center was represented by lmaJeanne (sic) Crawford Human Resource Director, Marti Harrington Operations Director and A.L. (sic) May Maintenance Chief.

Issue: Article 13.12 "Stand-By Pay" is at issue in this grievance. Mr. Cutlip is the named employee representing ten (10) employees as, this is a group grievance.

Union Position: is that Mr. Cutlip be paid 25% of his rate of pay from July 1, 1986 to July 7, 1986, in that he is required to carry an institution beeper and that restricts his activities.

Columbus Developmental Centers (sic) Position: is Mr. Cutlip was "On Call" from July 1, 1986 to July 7, 1986, and that his (Mr. Cutlip) employer did not place any restrictions on him (i.e. stay on premises, limit his movement etc.).

Findings of Fact

Mr. Cutlip alleges that from July 1, 1986 to July 7, 1986 he was required to carry an institution beeper in case of an emergency maintenance problem. Mr. Cutlip alleges that he can't do what he wants such as go to Kings Island etc. because he is "On Call" and waiting around the house in case he is needed. Mr. Cutlip also alleges that he lives twenty-seven (27) miles (Mt. Sterling, Ohio) from Columbus Developmental Center,.and that, in and, of itself is inconvenient and restricting activities with his family. On July 4, 1986 Mr. Cutlip and his family went to London, Ohio to visit relatives. On July 4, 1986 Mr. Cutlip and his family enjoyed a cook out without interruption. When he (Mr. Cutlip) returned to work A.L. (sic) May, Chief of Maintenance asked him why he didn't respond to a beep on July 4, 1986. Mr. Cutlip indicated that his beeper did not go off. (Mr. Cutlip was not disciplined in any way). Mr. Cutlip replaced the batteries in the beeper and that ended the issue.

Martie (sic) Harrington, Operations Director, indicated that, employees "On Call" are furnished with long range beepers so that they (employees) can come and go freely and use his time for his own purposes.

Ms. Harrington, indicated that employees in an "On Call Status" may be called in if it is a life/safety maintenance problem (i.e. no heat or hot water, etc.). In response to a question regarding discipline, Mrs. Harrington indicated that she will review on a case by case basis. On the other

hand, if an employee is unable to respond to a beep she Will-call overtime from the overtime roster.

A.L. (sic) May, Chief Engineer in charge of C.D.C. maintenance indicated that employees are on call on a rotating basis. They are free to change "On Call" times with other employees if they wish. Mr. May also indicated that if an employee is in Cincinnati, he would be required to come in to work if needed.

Conclusion

The union (OCSEA/AFSCME) failed to prove that Mr. Cutlip's lifestyle was interrupted in anyway (sic). Mr. Cutlip testified that he and his family visited relatives in London, Ohio on July 4, 1986 and the visit was uninterrupted by beeper or telephone. Mr. Cutlip's testimony alone is evidence enough to determine that his lifestyle was not interfered with by merely carrying an institution beeper. He obviously was free to come and go as he pleased and without restrictions placed on him by his employer. Therefore, Grievance denied in that Mr. Cutlip was completely and specifically relieved from all duty at the close of his scheduled work day. After the close of his workday Mr. Cutlip was "waiting to be engaged" and this waiting is not compensable. Therefore, Grievance denied.

(Sigi
Mike Fuscardo
Labor Relations Officer

(Sig)
John Beattie, Chief
ODMR/DD Office of Labor Relations"

(Joint Exhibit 3, Pgs. 3-4)

The Union appealed the grievance to Step 4 of the grievance procedure on September 23, 1986 (Joint Exhibit 3, Pg. 5). On October 6, 1986, the Employer denied the grievance citing the reasons specified in its Step 3 response (Joint Exhibit 3, Pg. 6). The Union subsequently requested that the grievance be taken to arbitration (Joint Exhibit 3, Pg. 7). The grievance is properly before the Arbitrator. **10**

THE MERITS OF THE CASE

The Position of the Union

It is the position of the Union that the group of grieving employees is entitled to stand-by pay for all hours spent on stand-by status since the filing of the grievance. The Union, moreover, argued that the compensable rate of pay, twenty-five percent (25%), should be applied for remedy purposes, and should also be paid for all stand-by work performed by maintenance personnel in the future.

The Union maintained that the participants in the group grievance consisted of all maintenance employees on the Emergency Call-in Schedule from the filing date of the grievance to the present. Thus, the Union alleged that a recently distributed Emergency Call-in Schedule (Joint Exhibit 5)

contains the names of fourteen (14) maintenance employees taking part in the previously mentioned group grievance.

A number of arguments were offered for expanding the list of grievants from the ten (10) originally identified during the preliminary stages of the grievance procedure (Joint Exhibits 3 and 4), to the fourteen (14) maintenance employees (Joint Exhibit 5) considered to be members of the group by the Union. First, all of the fourteen (14) maintenance employees were similarly situated and would be impacted by the Arbitrator's decision. Second, the Employer, per the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) is required to pay the compensable rate of pay to all maintenance employees on the Emergency Call-in Schedule form the time the grievance was filed to the date of the arbitration hearing. Last, the Employer would not be prejudiced by such an inclusion because notice of a potential contract interpretation problem was provided via

the grievance procedure. By scheduling these employees for emergency call-in duty, after proper notice was provided, the Employer perilously expanded the potential membership of the group.

The Union argued that the contract language in dispute (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Over-time, Section 13.12--StandBy Pay) is clear and unambiguous, and that the Grievant met the criteria set forth in the Collective Bargaining Agreement (Joint Exhibit 1). Emphasis was placed on related aspects of the availability requirement in support of this argument.

Availability was allegedly ensured by a scheduling protocol used by the Employer. The Grievant and Canter testified that they were periodically scheduled for emergency call-in duty; and that they had to respond on a number of occasions. Canter, more specifically, testified that since the filing of the grievance he was scheduled seven (7) to eight (8) times, and actually called to the facility ten (10) to fifteen (15) times. Similarly, the Grievant noted that he was scheduled six (6) to seven (7) times, and called to the facility two (2) to three (3) times over the same time period. Documents (Joint Exhibits 4 and 5) were provided in partial support of this testimony.

Testimony concerning the wearing of an electronic paging device, or "beeper," was also introduced to underscore the availability requirement. Union witnesses testified that they were required to carry a "beeper" when scheduled for emergency duty; so that the Employer could contact them when their services were required at the facility. They also testified that the "beeper" requirement reinforced their perception that the Employer required them to be immediately available once an unscheduled, unforeseen, or emergency situation arose. The Union argued that the above testimony was supported by a

document issued by Harrington when she denied the Grievant's request for standby pay (Joint Exhibit 7).

The Union alleged that the immediacy and availability requirements did burden and interrupt the

maintenance employees' lifestyles, which prevented them from using their off-time effectively for their own purposes. Both Canter and the Grievant testified that when they were scheduled for emergency duty their traveling distance was potentially limited by the range of the "beeper," which prevented them from going out-of-town on the weekends. Off-time activities around their homes and communities were also allegedly restricted. For example, they stated that family affairs were unfeasible because they could not immediately respond to an emergency situation if they needed to transport their families back home. The Grievant, moreover, noted that the Emergency Call-in policy required all maintenance employees to be in a work-ready condition. As a consequence, this job status restricted his ability to drink, which modified his lifestyle.

The Union maintained that examples provided by the Employer in an attempt to distinguish stand-by from on-call status were deficient. The Employer's attempt to equate the Emergency Call-in process to an overtime procedure did not negate its responsibility to all scheduled maintenance employees in terms of compensation. The scheduling process, and an employee's consequent availability for possible call to work, required payment regardless of the label placed on the process. In a like fashion, an employee's ability to switch roster position with other maintenance employees merely delayed an employee's emergency on-call responsibilities, and the associated compensation attached to these duties. **13**

Since the contract language was viewed as clear and unambiguous by the Union, it hotly contested the Employer's attempts to use the Fair Labor Standards Act (FLSA) Interpretive Bulletin (Joint Exhibit 8) as its guide for the definition of Stand-By Pay (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stdnd--By Pay). The Union acknowledged that the two (2) Labor Relations Policy Directives dealing with on-call status (Joint Exhibit 9) and stand-by status (Joint Exhibit 10) reflect critical distinctions contained in the FLSA's Interpretive Bulletin (Joint Exhibit 8). The Union, moreover, recognized that the stand-by criteria testified to by Fuscardo extensively mirrored these documents. In the Union's opinion, however, the contract language is binding and less restrictive than the FLSA definition. That is, the Union argued that one should not equate the Interpretive Bulletin's (Joint Exhibit 8) on-call at work definition with the stand-by definition contained in the Agreement (Joint Exhibit 1). J. Porter, Associate General Counsel, stated that the Employer's interpretation was additionally faulty because the FLSA does not define stand-by status.

The Union urged that the policies (Joint Exhibits 9 and 10), and the criteria discussed by Fuscardo and other Employer witnesses, should be disregarded because they were never negotiated, but unilaterally imposed by the Employer. These guidelines, moreover, were never introduced at Step 2 and Step 3 of the grievance procedure (Joint Exhibit 3), or referenced in the memorandum (Joint Exhibit 7) denying the Grievant's request for stand-by pay.

Additional arguments dealing with notification defects were proffered by the Union. First, the Union maintained that the stand-by criteria employed by the facility, and testified to by Fuscardo, were not embedded within the Labor Relations Policy Directives (Joint Exhibits 9 and 10). Thus, the utilization **14**

of these criteria without proper notification and discussion prior to implementation, was viewed as a violation of the Work Rules Provision (See Pg. 5 of this Award for Article 43--Duration, Section 43.03 the Union contended that the Labor Relations Policy Directives (Joint Exhibits 9 and 10) were never distributed to the Union and its bargaining unit-members. Last, the Grievant also alleged that the on-call versus stand-by status distinctions testified to by Employer witnesses were never communicated to the maintenance personnel. He, more specifically, noted that he was never told that he was relatively unrestricted in terms of movement while on emergency call-in status, and that he could ignore the "beeper."

The Union argued that the provision in dispute must be interpreted in light of the law; and that whenever two interpretations are possible, one making the agreement valid and lawful and the other making it unlawful, the former should be applied. The Union contended that a ruling in the Employer's favor would make the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) unlawful. Attention was placed on the twenty-five percent (25%) requirement contained in the provision. The Union, more specifically, maintained that the Employer's application of the FLSA's definition would render the payment percentage illegal because the FLSA requires one hundred percent (100%) enumeration. Thus, in terms of intent, the Union contended that it would have been senseless for it to negotiate compensation for stand-by pay at a rate lower than that required by the FLSA for similar type of activity.

The Union argued that maintenance employees failing to report to work after being scheduled on the Emergency Call-in Schedule were subject to potential discipline. Union witnesses asserted that they expected to be **15**

disciplined for such a violation based on provisions contained in the facility's Rules Agreement. The following specific provisions were referred to by these witnesses:

" * * *

I have read the following rules and have received a copy of same. I hereby agree to follow them as a condition of employment.

HOURS AND SUPERVISION

1. 1 will work any hours requested, and in emergency, will work overtime until relieved.

2. I understand that I am expected to respect the hours of work established for me. Late arrival, early departure, and extending the meal time beyond one half (1/2) hour are not acceptable.

(Joint Exhibit 6) The Union maintained that additional support for its discipline hypothesis was contained in the Employer's Step 3 response. Harrington noted that she would consider discipline on a case by case basis for any employee who does not report to work when called from the Emergency Call-in Schedule (Joint Exhibit 3). The Grievant testified that he recalled Harrington's response at the Step 3 hearing. He also maintained that a maintenance employee had previously

been disciplined for not reporting to work after being scheduled for emergency duty.

The Position of the Employer

It is the position of the Employer that it did not violate the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) when it utilized an Emergency Call-in procedure for all maintenance personnel. The Employer, more specifically, argued that the requirements surrounding emergency call-in status were not

commensurate with conditions necessary to effectuate the twenty-five percent (25%) compensatory rate specified in the Agreement (Joint Exhibit 1).

The Employer maintained that the participants in the group grievance consisted of all maintenance employees identified in the grievance trial (Joint Exhibit 3). Emphasis was placed on the Step 2nd-Step 3 responses which alluded to ten (10) maintenance employees as the affected group. These same individuals were listed on an Emergency Call-in Schedule posted on May 27, 1986 (Joint Exhibit 4). The Employer contended that the Union could have attempted to expand group membership at subsequent stages of the grievance procedure. By failing to engage in such a possibility, the Union waived the right to enlarge the group's membership at the arbitration hearing.

The Employer also argued that the Agreement (Joint Exhibit 1, Pg. 37-38) defines the nature of a group grievance. As a consequence, it is not within the scope of an arbitrator's authority to modify group grievance membership. The Employer emphasized that it would be virtually impossible for the Arbitrator to determine whether all maintenance employees were similarly situated. Thus, it would be impossible to fashion an appropriate remedy for all of these individuals.

The Employer contended that the Grievant failed to meet the criteria it established defining the necessary standards for stand-by pay enumeration. Fuscardo, Harrington, and G. Brundige, Deputy Director for the Office of Collective Bargaining, testified that the following criteria had to be met by all maintenance employees. First, an employee must be restricted to one (I) physical location. Second, an employee must remain in a work ready condition, that is, .well rested and sober. Last, an
employee required to be on stand-by, yet failing to comply with the previously mentioned criteria, would be, subject

to discipline. These criteria were allegedly embedded within the following Labor Relations Policy Directive (Joint Exhibit 10) issued on July 9, 1986:
"July 9, 1986

Subject: Stand-By

Policy:

It shall be the policy of ODMR/DD that no bargaining unit employee may be placed in "Stand-By"

status without the approval of the Superintendent.

Purpose: To Define Stand-By Status

An employee who is required to remain on stand-by on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes, is in a working status ("Stand-By").

Example: Camping Trips

An employee who has to stay at the job site (camping area) in the event. he is needed and required to care for a number of residents is considered to be working "Stand-By." In this case the employee is engaged to wait. Waiting i an integral part of the job. (Compensible)

On the other hand, not all cases of special activities involving over-night service result in generation of stand-by status.

Example: Special Olympics

If the employee is sent to Columbus "Special Olympics" and upon arriving at Columbus he is completely and specifically relieved from duty until 8:00 a.m. the next day. This employee is not on working time during the idle period and is not considered to be on stand-by. From the time he was relieved from duty until reporting time (8:00 a.m. the next day) he is waiting to be engaged and not compensated for the idle time. (Not compensible)

REF: FSLA Guidelines
ACSEA/AFSCME Agreement
OHCEU 1199 Agreement

*NOTE: This policy does not pertain to OEA and F.O.P. Bargaining Units

Administrative Approval:
(Sig)_____
John A. Beattie, Chief
Office of Labor Relations"

(Joint Exhibit 10) **18**

The Employer, however, argued that the maintenance employees on an Emergency Call-in Schedule were viewed as being on-call. Fuscardo and Harrington noted that this status was not viewed as working status by the Employer. They, more specifically, testified that these employees were
required to carry a "beeper" or to leave word at his/her home or with institution personnel indicating where he/she could be reached. These requirements were purportedly contained in the following Labor Relations Policy Directive (Joint Exhibit 9) issued on July 10, 1986: "July 10, 1986

Subject: On Call

Policy: It shall be the policy of ODMR/DD that the bargaining unit employee may be placed an (sic) "On Call" status.

Purpose: To insure that unscheduled, unforeseen and emergency situations are attended to immediately.

Definition: "On Call": An employee who is not required to remain on the employers (sic) premises but merely required to carry a beeper or to leave word at his home or with institution officials where he may be reached is on call and not on working status.

Example: In a situation where an employee is in an "On Call" status and is free to come and go freely and use his time effectively for his own purposes, such employee is not considered to be in a "Working" status. Since the employee is considered waiting to be engaged this time is not compensible. (On Call)

On the other hand, where restrictions are placed on an employee and the restrictions modify his lifestyle to the extent that he is not free to exercise a reasonable free schedule of personal activities, that employee is considered to be in "Working" status and his time is compensible at 25% rate. (Stand-By)

REF: FSLA GUIDELINES

*NOTE: This policy applies to all Bargaining Units
Call Back Pay provisions may apply in some cases

Administrative Approval:

(Sig)_____
John A. Beattie, Chief
(Office of Labor Relations"

(Joint Exhibit 9)

Fuscardo testified that he was involved in the development of the above Labor Relations Policy Directives (Joint Exhibits 9 and 10). He noted that these Directives were fashioned in light of an FLSA Interpretive Bulletin (Joint Exhibit 8) which distinguished working from non-working status; and situations where employees are engaged to wait rather than waiting to be engaged. In his opinion, employees on an Emergency Call-in Schedule enjoy non-working status while on-call, and are waiting to be engaged. Both conditions, therefore, indicate that these employees are not entitled to stand-by pay.

Specific distinctions were provided by Fuscardo and Harrington to support the above analysis. First, employees on an Emergency Call-in Schedule are not restricted to one physical location but have a great deal of freedom to move about. The "beeper" enhances an employee's freedom of movement because of its extensive range, and thus, the lifestyle arguments proffered by Union witnesses lack merit. Second, availability restrictions are also minimized because employees have the ability to switch their on-call assignments with other employees if they wish to travel out-of-state. Third, employees are not required to be in a work-ready condition when scheduled for on-call duty. Harrington testified that if an employee was contacted and stated that he/she was unavailable for any number of potential reasons (i.e. family outing, illness, drunken state), the Employer would merely attempt to contact another employee on the Emergency Call-in Schedule. Last, failure to respond to a call **20**

or the "beeper" does not result in any disciplinary action. Harrington and Fuscardo maintained that during their tenure at the facility employees have not been disciplined for failing to respond. The Grievant's testimony regarding July 4, 1986 was referred to by the Employer in support of this argument. He stated that he failed to respond to the "beeper' because he was on a family outing. The Grievant, however, noted that he was never disciplined for failing to respond to the "beeper." The Employer also contended that the other incident referred to by the Union was not supported by any evidence of previous disciplinary action. Harrington, moreover, contested the Grievant's interpretation of her "case by case" utterance at the Step 3 hearing (Joint Exhibit 3). She maintained the statement dealt with a potential situation where an employee has agreed to come to work, and once on the premises, it was determined that the employee was not in a work ready condition. Harrington emphasized that her utterance had nothing to do with potential discipline in the event an employee failed to respond while scheduled on the Emergency Call-in roster.

The Employee argued that the Labor Relations Policy Directives (Joint Exhibits 9 and 10) directly relate to the language contained in the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) and that development of directives operationalizing contractual terms and conditions did not have to be negotiated. The Employer emphasized that since the Agreement (Joint Exhibit 1) did not specifically address on-call status, the Management Rights provision (See Pg. 5 of this Award for Article 5--Management Rights) allows the Employer to promulgate policy in this area. Brundige testified that the criteria were developed after the Agreement (Joint Exhibit 1) was negotiated by the Parties.

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Development, moreover, was initiated in an attempt to provide some guidance concerning the application of the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--StandBy Pay). Brundige also stated that the Directives (Joint Exhibits 9 and 10) were written in accordance with pertinent FLSA Guidelines (Joint Exhibit 8).

The notice arguments proposed by the Union were also refuted by the Employer. Fuscardo testified that a packet of Labor Relations Policies and Directives was delivered to the Union's

Executive Director; this packet allegedly included the Directives dealing with stand-by and on-call status (Joint Exhibits 9 and 10). Transmittal of these documents, therefore, was viewed by the Employer as placing the Union on notice in compliance with the Work Rules provision (See Pg 5 of this Award for Article 43--Duration, Section 43.03--Work Rules). Fuscardo also noted that several recent grievances were initiated by the Union contesting the Employer's right to promulgate policies and directives. This circumstance allegedly provided additional support for the Employer's notice hypothesis.

The Employer maintained that it might have erred by not providing sufficient information clarifying the distinguishing features of stand-by and on-call status. If the Employer erred, however, it was a good faith error because employees were not disciplined; and they were not adversely impacted because of the notice defects. The Employer emphasized that the restrictions alluded to by Union witnesses were never issued by the Employer, but were developed independently by the maintenance personnel. Harrington testified that she never issued any directives dealing with activity restrictions, and other standards dealing with response time requirements. Testimony provided by

Union witnesses supported her assertion concerning the non-issuance of directives regarding these items.

Porter's interpretation of pertinent FLSA sections (Joint Exhibit 8) as they relate to the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) was refuted by the Employer. Brundige testified that the one hundred percent (100%) requirement discussed by Porter was not binding on the Parties. He maintained that the FLSA allows the Parties to negotiate language which differs from requirements contained in the FLSA. The Employer also maintained that Porter's interpretation was not supported by the Union. Thus, its use of the twenty-five percent (25%) argument to refute the specific intent of the provision lacked sufficient justification.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and review of pertinent portions of the FLSA, it is the opinion of this Arbitrator that the Employer did not violate the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) when it utilized an emergency call-in procedure for all maintenance personnel. The Grievant, more specifically, is not entitled to the twenty-five percent (25%) rate of pay because he was not on stand-by status when scheduled to work via the Emergency Call-in Schedule.

It is axiomatic that a principle rule governing the interpretation of contract language is that the agreement must be construed as a whole. In the words of one arbitrator:

"Sections or portions cannot be isolated from the rest of the agreement and given construction

independently of the purpose and agreement of the parties as evidenced by the entire document. * * * The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole." (Great Lakes Dredge and Dock Co., 5 LA 409, 410, Kelliher, 1946)

In this particular instance, an interpretation of the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay) requires an analysis of a related pay provision. That is, an analysis of the Call-Back Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.08--Call-Back Pay) negotiated by the Parties.

An analysis of these two (2) provisions indicates to this Arbitrator that the Grievant's fall within the purview of the Call-Back Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.08- -Call -Back Pay) rather than the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--StandBy Pay). The former provision states that employees called to work and do report to work outside their regularly scheduled shift will be paid a minimum of four (4) hours at the straight rate of pay or actual hours worked at the overtime rate, whichever is greater. This provision is identical to the pay arrangement in effect prior to the effective date of the Agreement (Joint Exhibit 1) for maintenance employees called back to work once scheduled on an emergency call-in schedule. Both Union and Employer witnesses, moreover, testified that this was the pay arrangement presently employed by the facility for pay purposes. The wording contained in this provision, moreover, indicates that it was established to deal with unforeseen and/or emergency situations. Again, it mirrors the practice in effect prior to the Agreement (Joint Exhibit 1); and the policy (Joint Exhibit 10) promulgated by the Employer after the **24**

Parties negotiated the present Agreement (Joint Exhibit 1). An employee receives call-back pay, moreover, without any pre-conditions attached to such a payment. He/She is called or contacted, reports to work, and receives pay for hours worked while performing job related duties. There are no additional restrictions or requirements attached to this work-status.

The conditions discussed in the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--StandBy Pay) differ dramatically from those previously discussed. An employee is not entitled to stand-by pay unless he/she is required (Arbitrator's Emphasis) by the Employer to be on stand-by. This specific condition indicates that the Employer must directly communicate to the employee that he/she is in this job status. Such a job status commands a certain readiness; it does not request an employee's availability.

The record does not indicate that the Grievant and, other bargaining unit members were ever required by the Employer to be on stand-by. Scheduling of employees on an emergency call-in schedule cannot be equated with the "requirement" condition specified in the provision. The mere scheduling of employees on an on-going rotating basis implies that they may be needed if an unforeseen situation arises. This circumstance, however, dramatically differs from situations where the probability of an event can be anticipated. Requiring an employee's availability is essential, if not mandatory, when these types of situations arise.

Testimony provided by Union witnesses supports the above analysis. The Grievant and Canter

were never specifically placed on notice that they would be required to be on stand-by status. The emergency call-in scheduling procedure reinforces this conclusion. Both the Grievant and Canter noted that they could **25**

switch roster position and refuse requests if they were unavailable for a variety of reasons. The incident which took place on July 4, 1986 further supports this analysis.

The availability requirement deserves special attention because it is, It critical element of the Stand-By Pay provision (See Pg. 4 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.12--Stand-By Pay). This analysis, however, requires a discussion of the rules[1] for determining what time spent by an employee must be paid for under the FLSA, which are set forth in Interpretive Bulletin, 29 CFR Part 785. In Section 785.17 of Part 785 it states that employees are not working merely because they are required to provide information which will enable the employer to locate them while they are off duty. The Wage and Hour Division, moreover, has taken the position where employees in an on-call status are free to use the time for their own benefit, the time spent on-call is not viewed as hours worked under the FLSA unless or until they actually respond to a call back to duty. If such calls, however, are so frequent that the employee is not really free to use the off duty time effectively for the employee's own benefit, the intervening periods as well as the time spent in responding to calls would be counted as compensable hours of work. Thus, in such cases, an employee is considered as "engaged to wait" rather than "waiting to be engaged,'" and the waiting time is considered as hours worked. The Wage and Hour Division has also concluded that if employees are not called back to duty on a "frequent" basis as described

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[1]The rules discussed are based on personal communications that the Arbitrator had with two (2) Assistant Area Directors working for the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. The individuals also forwarded portions of a Field Operations Handbook and a sanitized position paper dated March 12, 1987 as an aid to the Arbitrator. **26**

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above, employees are not unduly inconvenienced by being required to wear a paging device during their off-duty time.

The above discussion clearly indicates that the availability dimension contains the following two (2) components: frequency and the use of time for an employee's own benefit. In this Arbitrator's opinion the Employer's Directives (Joint Exhibits 9 and 10) contain these features, and accurately distinguish between on-call and stand-by status. The Union, moreover, failed to convince this Arbitrator that the Grievant and his cohorts engaged in activities which complied with the critical components discussed above.

With respect to the frequency component, minimal data were provided at the hearing. The data that were provided, however, did not evidence a sufficient number of call-in occurrences to justify

stand-by status.

The Grievant's lifestyle was not unduly inconvenienced by the emergency call-in scheduling process. Obviously, the Wage and Hour Division's opinion regarding the wearing of "beepers" indicates that such a requirement enhances an employee's mobility which reduces potential inconveniences during off-duty time. The various alternatives available to an employee scheduled on an emergency call-in roster also reduce the veracity of the Union's lifestyle contention, and thus, the Union's availability arguments. An employee can switch roster assignments, refuse assignments when-contacted, and/or fail to respond to a "beep" when scheduled for emergency call-in duty. These alternatives would not be available to any employee required to be on stand-by status by the Employer. Alternatives such as those discussed above, moreover, are not viewed by this Arbitrator as plausible activities when an employee is required (Arbitrator's Emphasis) to be available for possible call to work. **27**

A major argument proffered by the Union to rebutt the Employer's intent arguments dealt with Porter's testimony dealing with the FLSA's one hundred percent (100%) rate of pay requirement for employees engaged to wait on standby status. Discussions with Wage and Hour Division personnel and review of Interpretive Bulletin, 29 CFR Part 785, indicate- that such a requirement does not exist. The Division will accept any reasonable agreement of the parties determining the compensable rate of pay. Thus, the twenty-five percent (25%) rate of pay is not illegal. This conclusion supports the Employer's argument that the provision in dispute was negotiated to compensate employees that are "engaged to wait," that is, on stand-by, rather than "waiting to be engaged," or on-call.

The Management Rights Clause (See Pg. 5 of this Award for Article 5-Management Rights) and the Overtime provision (See Pg. 3 of this Award for Article 13--Work Week, Schedules and Overtime, Section 13.07- -Overtime) allow the Employer to develop overtime related procedures. The Work Rules provision (See Pg. 5 of this Award for Article 43--Duration, Section 43.03--Work Rules), moreover, provides the Employer with the ability to promulgate agency work rules or institutional rules and directives as long as they do not violate the Agreement (Joint Exhibit 1). In addition, this provision contains a notification and discussion proviso prior to the implementation of any new work rules. Although these provisions were negotiated by the Parties, and the requirements contained therein are viewed as critical by this Arbitrator, the paucity of evidence and testimony provided by the Union precludes this Arbitrator from rendering an opinion in the Union's favor. Fuscardo testified that the Employer promulgated these (Joint Exhibits 9 and 10) and other Directives, and submitted them to the Union's Executive Director for review **28**

purposes. The Union, on the other hand, claimed that the Grievant and other maintenance personnel were never notified of these documents. Since evidence and testimony dealing with proper notice, constructive notice, and opportunities for discussion were not introduced by the Union, it failed to substantiate its arguments dealing with notification requirements.

Based on the above discussion, a ruling concerning group grievance membership is not viewed as pertinent by this Arbitrator.

AWARD

The grievance is denied and dismissed.

February 19, 1988

Dr. David M. Pincus
Arbitrator
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