

1018

NOT FOR PUBLICATION

OPINION AND AWARD

Grievance No. 31-08-10-10-07-10-01-06

In the Matter of the Arbitration

- between -

State of Ohio Department of Transportation,
District No. 8

- and -

Ohio Civil Service Employees Association,
AFSCME, Local No. 11

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OCSEA-OFFICE OF
GENERAL COUNSEL

Arbitrator:

John J. Murphy
Cincinnati, Ohio

For the Employer:

Carl C. Best
Labor Relations Officer, District 8
505 South S.R. 741
Lebanon, Ohio 45036-9513

Joe Trejo
Office of Collective Bargaining

Also Present:

Miles Koskouris
Administrator of Department of Health
and Safety of ODOT

Tammy Campbell
Traffic Engineer, District 8 of ODOT

For the Union:

Michael D. Muenchen
Staff Representative
OCSEA
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331

Also Present:

Todd E. Braden II
Grievant

Tim Clay
Occupational Safety and Health Consultant
Bureau of Workers Compensation
Public Employment Risk Reduction Program

Amy Augsberger
Health and Safety Consultant
District 8, ODOT

THE GRIEVANCE:

The parties stipulated that the Grievants are a class of five (5) individual employees who work within the Department of the Traffic Engineer in District 8 of ODOT. All five employees, Todd Braden, Eric Thompson, Tom Hilbert, Shawn Sutton, and Jim Judd work within the classification of Signal Electrician 2. Employees in this classification maintain and repair traffic control devices, open energized boxes at intersections containing traffic control devices, and work on downed lighting poles on highways if contractors are not available.

The grievance centers on the demand by the five Grievants to have the Department of Traffic Engineer of District 8 of ODOT pay for the cost of maintaining Flame or Flash Resistant pants and shirts provided by District 8 to the Grievants. The Grievance stated:

The Agency has required five Signal Electricians to wear Personal Protective Clothing + Equipment . . . The Agency has told the five Signal Electricians they must maintain the personal protective clothing.

The remedy sought was: "To have the PPE uniforms maintained by the Agency without cost to the employees." The Grievance cited Articles 11.02 and 33.01 of the collective bargaining agreement.

ISSUE:

Whether District 8 of ODOT has violated the collective bargaining agreement by providing Flame or Flash Resistant (FR)

pants and shirts to the five named Grievants without providing cleaning services of same at no cost to the five Grievants? If so, what should the remedy be?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 11 - HEALTH AND SAFETY

11.01 - General Duty

Occupational health and safety are the mutual concern of the Employer, the Union, and employees . . . The Employer . . . shall comply with applicable Federal, State, and local safety laws, rules and regulations . . .^{1/}

11.02 - Personal Protective Clothing and Equipment

Personal protective clothing and equipment required by the Agency to preserve the health and safety of employees shall be furnished and maintained by the Agency without cost to employees . . .

^{1/} The Employer did object to any reference to Article 11.01 because it was not specifically cited in the grievance. On the other hand, the parties did stipulate that the collective bargaining agreement requires the Employer to follow the standards of the Occupational Safety and Health Agency with respect to personal protective equipment and clothing. This stipulation is obviously based upon Article 11.01. Furthermore, Article 11.01 amplifies Article 11.02--provision cited in the grievance.

ARTICLE 33 - UNIFORMS AND TOOLS

33.01 - Uniforms

When the Employer requires an employee to wear a uniform, the Employer will furnish sized uniforms appropriate to the gender of the wearer on a replacement basis . . . The Employer will keep the uniform in good repair . . .

POSITIONS OF THE PARTIES:

A.) The Union Position

District 8 purchased the FR shirts and pants as a result of ODOT bid documents sent to vendors that show that the purchase was for the purpose of buying FR clothing as part of required personal protective equipment for Signal Electricians. ODOT cannot alter that fact now.

Moreover, by not maintaining the FR clothing without cost to the employees, the Employer is acting contrary to the contract and OSHA standards. The Union relies upon an opinion by a consultant from the state agency with responsibility for applying OSHA standards to public employers. In addition, the Union and the consultant relied upon ODOT's own assessment of hazards faced by Signal Electricians and the need for FR clothing. The consultant's opinion is "that based upon an analysis of the hazards, including ODOT's own internal analysis, the Employer is required to furnish two Signal Electricians FR

clothing and maintain it in a sanitary and reliable condition pursuant to OSHA laws."

B.) The Employer's Position

There was considerable confusion within ODOT on the extent to which FR clothing was required as personal protective equipment for Signal Electricians. Many ideas were generated and internal Emails used the term "required" in reference to FR clothing. But this term was not expressed in light of the contract or OSHA standards.

The testimony of the consultant from the state agency with responsibility for applying and interpreting OSHA standards does not support the Union's case. OSHA standards do not require FR clothing as personal protective equipment.

ODOT did develop an assessment of the hazards confronted by Signal Electricians but this is still in draft form, being circulated for comment. It is not a basis upon which to assert a requirement for FR clothing.

OPINION:

On a specific level, this case deals with whether District 8 of ODOT should pay for the cleaning and maintenance of FR shirts and pants provided to the five Signal Electricians working out of District 8. To understand and analyze this question, one must see the question in the context of the confusion that reigned in the central office of ODOT on the

matter of personal protective equipment (PPE) for Signal Electricians operating out of all of the twelve Districts within ODOT. The analysis below begins with a brief statement of the confusion that abounded in the central office on this matter throughout 2007, ending in February of 2008. It includes a statement of how this confusion impacted upon District 8 and upon the five Grievants involved in this case.

The analysis then turns to the central matter of conflict in the arbitration hearing. That conflict turned on whether the Occupational Safety and Health Administration (OSHA) mandated employers, including ODOT, to provide FR suits and pants as personal protective equipment--a requirement which would include the necessity of cleaning and maintaining this protective clothing. Lastly, the analysis ends with a brief discussion of whatever remedy is necessary in this case.

I. The Grievance in Context

A.) Confusion Abounds in the Central Office

The record shows that sometime in 2005-2006 a Signal Electrician from ODOT was electrocuted while performing his or her duties, apparently through negligence. The state agency entrusted with the enforcement and application of OSHA standards to public employees--Public Employment Risk Reduction Program (PERRP) conducted an investigation of the electrocution. The

investigation led to required training of Signal Electricians over three days.

The training concentrated on electrical work for large utilities would risk sites containing powerful transformers. This training led to concerns by the administrator of the Department of Safety and Health within ODOT because the training could lead to the adoption of protective equipment that could cause in and of themselves secondary risks for the Signal Electricians working within ODOT.

The confusion was manifested in documents and Emails issued by the Central Office during 2007, and this confusion was not finally resolved until February 2008.

The first document issued by the central office in February 2007 was a document for vendors as an invitation to bid for the purpose of establishing "pricing for Personal Protective Clothing and Equipment for Electrical Safety." This document noted that purchase orders would be issued for items to be delivered to the twelve districts. Included among the items as personal protective clothing was "Flash Resistant Clothing" consisting of shirts and pants.

The second document was an Email issued by the then Administrator of the Department of Safety and Health for ODOT, H. Suter. The Email was dated June 21, 2007 and was directed to

all of the districts. It stated that FR shirts were among the "minimum requirements" for Signal Electricians.

December of 2007 led to more documents issued by the central office concerning FR clothing for Signal Electricians. Miles Koskouris^{2/} issued an Email to all of the Districts reiterating that FR shirts were included as required personal protective equipment. The Email, however, reflects the struggle within ODOT to determine what should be required PPE for Signal Electricians. The Email stated in bold print: **"At this time, pants are not part of the overall PPE listed below."**

Finally, Koskouris turned to the state agency with responsibility for interpreting and applying OSHA standards to public employees--PERRP. The question was asked of the administrator of PERRP--"does OSHA require Flame-Resistant (FR) clothing for qualified persons working on or near energized electrical parts to protect against thermal burns due to an arc-flash?" Koskouris received an answer on December 26, 2007 from the PERRP administrator. After referring to OSHA standards, the administrator concluded: "therefore, there are currently no mandatory requirements for employers to provide flame-resistant clothing."

^{2/} At this time, Koskouris was a Safety and Health Consultant within the Department of Safety and Health of ODOT. On January 1, 2008, he became administrator of this department, replacing H. Suter.

The effort by the central office to deal with this important problem of protection of the Signal Electricians ended on February 1, 2008 by way of an Email from Koskouris to all of the Districts, including District 8. The Email reiterated in bold print that there are currently no mandatory requirements to provide flame-resistant clothing. With respect to any such clothing that had already been purchased, the Email directed the Districts in the following manner:

All FR Safety Apparel which has already been purchased can be distributed to employees if they wish to wear it. Since the apparel is only recommended, it will be the employee's responsibility to wash and maintain the safety apparel.

While Koskouris was seeking advice and counsel from PERRP in December of 2007, a person in his department wrote a draft that appeared as an assessment of the hazards encountered by Signal Electricians. This document of eleven pages in length with the word "draft" stamped on several of the pages lists FR clothing as a minimum PPE to protect the torso of Signal Electricians. The phrase "fire-rated safety clothing" appears several times in the draft.

B.) Impact Upon District 8 and the Grievants

The health and safety consultant at District 8 testified that there was confusion throughout 2007 as to what was to be required to be purchased, and what was optional for the District to purchase with respect to FR clothing for the Signal

Electricians. The consultant testified she relied upon the central office for help.

This reliance by District 8 is illustrated by the decision of the Traffic Engineer--the supervisor of the five Grievants--to purchase personal protective clothing for the five Grievants on September 18, 2007. She further testified that she required the five Grievants to wear the FR shirt and pants beginning in October of 2007. She rescinded this order on receiving the Email from Koskouris of the central office dated February 1, 2008, which resolved confusion over FR clothing. As noted above, this Email stated that FR clothing was not required as personal protective equipment for Signal Electricians. Also consistent with the Koskouris memorandum, she instructed the five Grievants to wear the pants and suit if they wished, but cleaning and maintenance was their responsibility.

The struggle by ODOT to clarify what is required personal protective clothing for Signal Electricians impacted upon the Grievants. The record shows that they were alerted to the question of fire-resistant clothing by an Email from the Traffic Engineer as early as February of 2007. They were then provided with an FR suit and pants in October of 2007, and required to wear such. This was followed in December of 2007 with another document supplied to the Grievants by the traffic engineer, their supervisor. This supervisor provided the draft that had

emanated from an employee in Koskouris office in December of 2007 that also listed FR clothing as necessary personal protective equipment. All of this ended when the Traffic Engineer told the five Grievants that FR clothing could be worn if they wished as a result of her receipt of the February 1, 2008 Email from Koskouris.

All of the above does demonstrate the care and attention by the central office of ODOT to reach the proper resolution of the question of personal protective equipment for the Signal Electricians. The process of reaching this result did, however, have an impact not only upon the Traffic Engineer in District 8, but also upon the five Grievants in this case. They clearly had an expectation based upon the action of their supervisor reinforced by her supplying a copy of a draft emanating from the central office in December of 2007. This expectation was that FR pants and shirts were part of their protective personal equipment.

The problem, however, in this arbitration is whether the collective bargaining agreement mandated FR pants and shirts as part of their personal protective equipment. The fact that they expected this result cannot be in and of itself be the basis for the decision in this arbitration. The contract between the parties states that the arbitrator cannot impose an obligation

that is "not specifically required by the expressed language of this Agreement."

II. Does OSHA's Standards Requirement FR Clothing?

A central conflict between the parties was whether FR shirt and pants were required as personal protective equipment for the Signal Electricians. If required, then under Article 11.02 of the contract, these items "shall be furnished and maintained by the Agency without cost to employees." The Union's position is that such items are required as a result of the application of OSHA standards to the Employer. Since the parties stipulated that the collective bargaining contract requires the Employer to follow OSHA standards, then the Employer must not only provide but also clean and maintain the FR clothing for the Grievants.

The Employer's position is simply that the OSHA standards do not require FR clothing as PPE. Since they are not so required, the Employer is contractually privileged to do what it did in this case: provide FR clothing to the Grievants to wear if they wished with the Grievants' retaining the obligation to clean and maintain the FR clothing.

The Union presented testimony of an expert on this question--an occupational safety and health consultant who works within the state agency that applies OSHA to Ohio public employers--PERRP. This expert noted and applied two provisions of the Occupational Safety and Health Act--Section 1910.132 and

Section 1910.335. The expert noted that PERRP had adopted these OSHA standards as applicable and binding on Ohio public employers.

There are two possible ways by which FR clothing could be required by this Employer under OSHA standards as personal protective equipment. The first way is to conclude that FR clothing falls within the text of the general standard found in Section 1910.335 (a)(1)(i):

Employees working in the areas of where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.

With respect to the question whether FR clothing fell within this general standard, the expert adopted the position of his supervisor in PERRP. This position was made part of the record as an Email by the administrator of PERRP to Koskouris on December 26, 2007. This position states: "Therefore, there are currently no mandatory requirements for an employer to provide flame-resistant clothing." As the expert testified on cross examination, "I know of no code, rule or standards violation by an employer who simply gives the FR pants and shirts to employees and says, wash them if you use them."

OSHA does not require FR clothing as personal protective equipment for the Grievants in the text of Section 1910.335. However, there is a second way by which FR clothing can be

required under OSHA. If the Employer declares FR clothing as required in its assessment of hazards confronted by its employees, the FR clothing is required personal protective equipment. This is found in Section 1910.132 (d).

Hazard assessment and equipment selection. (1) The Employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the Employer shall:

(i) Select, and have each affected employee use the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment

. . . .

The Union presented, and its expert witness examined, the draft document that emanated from the office of Koskouris of in December of 2007. This document did refer to fire resistant clothing as necessary PPE to protect the torso of Signal Electricians.

The expert concluded, however, in cross-examination that this document emanating from the Employer's central office was not the hazard assessment required under the above-quoted OSHA standard. The expert observed that the document was a work in progress, and that there was no evidence that it had been adopted by ODOT. The examination concluded as follows:

Q. Since Union 5 (the document) is not in effect and we (the Employer) have gifted FR pants and shirts to the

employees, are we in violation of any rules, regulations or standards?

A. No.

The conclusion is, therefore, that the Employer was not obligated under Article 11.02 to provide FR shirts and pants to the Grievants and, consequently, did not have any obligation under this provision to clean and maintain same.

III. Remedy

As noted above, the Grievants cited Article 11.02 and 33.01 as the contractual basis for the request that the Employer clean and maintain the FR pants and shirts. Based upon the above analysis, the grievance is denied with respect to Article 11.02. With respect to Article 33.01, there was very little attention to this Article during the course of the arbitration testimonial hearing and argument. This Article, however, does apply to the facts in this case.

Article 33 is not a provision that deals on the very specific level of personal protective clothing and equipment. Rather, Article 33 deals with the more generic level of required uniforms. This Article obligates the Employer to furnish uniforms that it requires an employee to wear. Moreover, the third sentence of this Article obligates the Employer to "keep the uniform in good repair . . ."

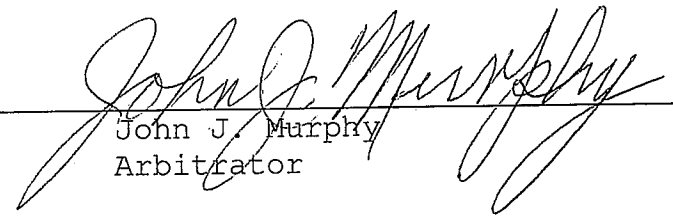
On the facts of this case, the Traffic Engineer ordered the five Grievants to wear the FR shirt and pants for a five-month period beginning in October of 2007 and ending in February 2008. Therefore, the Employer was contractually responsible for the cost of cleaning and maintaining the FR clothing during these five months.

The Union did submit evidence showing that one Grievant, Todd Braden, had a per week expense for care and maintenance of this clothing and he is entitled to be made whole for this expense over the five-month period. The Union requested the make whole remedy for this Grievant only.

AWARD:

With respect to Article 11.02, the grievance is denied. With respect to Article 33.01, the grievance is granted. However, the make whole remedy is limited to five months and is awarded only to one of the five Grievants, Todd Braden.

Date: December 6, 2008



John J. Murphy
Arbitrator