

SEP 18 2009

OCSEA-OFFICE OF
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**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. 30-04-20080211-0011-01-04

Grievant: Patricia Schulte-Singleton

ARBITRATOR'S

OPINION AND AWARD

*Arb Decision
1045*

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"). 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 July 27, 2009. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument.

APPEARANCES:

On behalf of the Union:

**ROBERT ROBERTSON, OCSEA Staff Representative,
390 Worthington Rd., Westerville, OH 43082.**

On behalf of the Employer:

**MARISSA HARTLEY, Esq., Office of Collective
Bargaining, 100 E. Broad St., 14th Floor, Columbus,
OH 43215.**

ISSUE

Is the Employer violating Article 11.08 by not scheduling at least 15 minutes of non-VDT work every 2 hours for the Tax Commissioner Agents? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

March 1, 2006 - February 28, 2009

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ARTICLE 11 - HEALTH AND SAFETY

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11.08 - Video Display Terminals

The Employer shall provide ergonomically appropriate VDT equipment at all computer and word processing stations purchased or installed after the

effective date of the Agreement, whenever the employee has principal job responsibilities which involve the use of such equipment for a majority of his/her time.

The Employer will make every effort to schedule at least fifteen (15) minutes of non-VDT work every two (2) hours for those employees who work for extended periods of time at video display terminals. Non-VDT work is in addition to rest periods provided by Section 13.04.

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ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

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13.04 - Rest Periods

Those agencies that presently have rest periods shall maintain the current practices in effect as of the effective date of this Agreement.

...

...

FACTS

Article 11.08 was negotiated into the Agreement in 1986; there have been no changes made to the language since then. Moreover, there is no record evidence of any bargaining on this subject since then.

The Employer provided Liquid Crystal Display ("LCD") Video Display Terminals ("VDTs") to the Grievants, Service Center Tax Commissioner Agents ("TCAs"), in 2004.

The Grievance

Effective January 22, 2008 & currently, the Tax Commissioner Agents of the Service Centers...are assigned to the task of Spectrum (telephone system) for 7.5 hours to 8 hours a day. This assignment is

causing a health and safety (stress, mental issues, headaches, eye strain, etc.) situation...Additionally, there is absolutely no accommodation for the scheduling of 15 minutes of Non-VDT work every 2 hours for these grievants. The majority of the TCA work in the [S]ervice [C]enters involves the use of a Video Display Terminal during an 8 hour work day.

The remedy sought in this grievance is an immediate scheduling for Non-VDT Work (15 minutes) every 2 hours for all TCAs in the Service Centers...and a significant reduction of the Spectrum assigned duty due to health related issues.

PARTIES' POSITIONS

Union's Position

Article 11.08 was put into the Agreement expressly for the health and welfare of employees who work for extended periods of time at VDTs. The 15-minute break after every 2 hours is to allow an employee time to refocus. During the 15-minute break, the employee performs non-VDT work tasks.

The Employer relies on the Spectrum system to show TCAs are not continuously on the telephone, and thereby not continuously working in front of a VDT. Spectrum, however, does not indicate what an employee is doing when not on the telephone.

TCAs work in front of a VDT for extended periods of time. No one is trying to get out of any work. Article 11.08 is not a rest break, it is merely a

relief break. By denying these VDT relief breaks, the Employer is trying to get something out of arbitration it did not get out of negotiation.

The Union seeks immediate scheduling of Article 11.08 breaks for all TCAs. To assure this break, a TCA has to be completely off the telephone and assigned work that will not require VDT use during the 15 minutes.

Employer's Position

Computers have changed drastically since 1986. In 2004, the Department of Taxation purchased new LCD monitors for all TCAs. LCD monitors do not cause the eye strain and other potential health issues that may have existed with earlier technology. In 1986, VDT monitors were black computer screens with neon green type; LCD monitors have been engineered more ergonomically.

Moreover, TCAs do not work in front of a computer screen for extended periods of time. They are responsible for a variety of other duties that does not involve computer use.

The Union has not met its burden of proof. Accordingly, the grievance should be denied.

OPINION

The questions for the Arbitrator are:

- 1. Does the Employer's 2004 switch to LCD monitors make Article 11.08 inapplicable to the grievance; and**
- 2. If Article 11.08 is applicable to the grievance, do TCAs work in front of VDTs for extended periods of time.**

VDTs, CRTs, and LCDs

The Union presented an undated, unsourced "WikiAnswer" that defines a VDT as "A terminal with a keyboard and display screen."¹ In other words, a

¹ But the Union also presented the following dated and sourced articles that indicate the WikiAnswer definition is correct:

"The Effects of Video Display Terminal Use on Eye Health and Vision," American Optometric Association," undated (most recent title in article's 52-item "References" is 1996);

"Eyestrain and your computer screen: Tips for getting relief," www.mayoclinic.com/health/eyestrain/WL00060 (2006) (recommends "a five-minute rest every hour. Do other work, such as phone calls or filing, during this time.");

"Eye M.D.s Offer Advice To Combat Eyestrain," American Academy of Ophthalmology (2001) (recommends computer users "[t]ake periodic rest breaks...."); and

"Call-Center Job: Highly Stressful," Teluguone Health Centre, www.teluguone.com/health/index.jsp?filename=callcentre.htm, (undated, but appears to not be recent, based on statements such as, "Call center jobs are the recent entity in modern occupation" and "eyestrain due to...wrong posture of the neck due to tucking of telephone between the neck and the shoulder") (recommends "[d]esk bound stretching in the office and relaxation in a silent room are of great help...and frequent gaps after long hours may be very helpful").

VDT (a video display terminal) is a computer monitor – a piece of hardware, not a technology.

The Employer presented an article, “Ergonomics Considerations of LCD versus CRT Displays,” A. Hedge, Cornell University (2003).² The article explains LCD (liquid crystal display) is a newer technology than cathode ray tubes (“CRT”), with significant improvements for the user such as less flicker and less glare on the VDT. The article also states a computer user can more readily move his or her body when using an LCD VDT, rather than a CRT VDT.

The Effect of Switching the VDTs from CRTs to LCDs

In 1986, when Article 11.08 was added to the Agreement, few computers were in use at the workplace. The record establishes computers

² The article provides in pertinent part:

Conventional computer systems have used cathode ray tube (CRT) technology for the computer display. However, in the past decade technological advances in thin film transistor (TFT) liquid crystal displays (LCDs) have made this an increasingly popular technology....Modern LCDs can offer several advantages over CRTs in terms of visual work performance....

...LCDs have been shown to allow for greater postural variety during computer work.

...LCDs are free from flicker because they do not rely on a scanning electron beam. CRTs are more prone to flicker....

...LCDs have uniform screen brightness and the screen is covered with a flexible surface that is substantially less prone to specular glare compared to a glass covered CRT screen.

...

were mainly used by data-entry personnel in 1986. The then-current technology for VDTs was CRT. As demonstrated in the record, CRT VDTs, due to their flicker and glare, made it difficult to work on a computer for extended periods without a break. Thus, the Parties added Article 11.08 to the Agreement, which provides in pertinent part:

The Employer will make every effort to schedule at least fifteen (15) minutes of non-VDT work every two (2) hours for those employees who work for extended periods of time at video display terminals.

So the question for the Arbitrator is whether the Parties intended for employees who work for extended periods of time at non-flicker/low-glare LCD VDTs to have a 15-minute break every 2 hours. Given that LCD technology was not in common use in 1986, the Parties, of course, did not contemplate this. "Arbitrators...often confront circumstances not contemplated by the parties at the time of contract formation."³

To resolve the instant situation – unanticipated during bargaining – the Arbitrator will objectively view the record. The "objective theory of interpretation is rooted in a common sense policy that contract interpretation ought to be based on objectively verifiable information and not

³ Carlton J. Snow, "Contract Interpretation," The Common Law of the Workplace – The Views of Arbitrators, (BNA/NAA 2005) at p. 71.

on a party's subjective intention that cannot be subjectively examined."⁴

Here, the objective evidence in the record does not establish TCAs work on a VDT as that term was understood by the Parties in 1986. VDTs in 1986 were CRT VDTs that flickered and had glare on the screen. These CRT attributes made it difficult to continuously enter data on a computer.

In contrast, the VDTs currently used by the TCAs are LCD VDTs, which do not flicker, and there is less glare as compared to CRT VDTs. The Employer provided evidence, which the Union was unable to rebut, that established the VDTs the TCAs use currently are more technologically advanced than the CRT VDTs used in 1986; and that these advancements in VDT technology have a direct correlation to an individual's ability to use a VDT for an extended period of time. This constitutes a materially-changed condition that goes to the heart of Article 11.08.

AWARD

For the reasons set out above, the grievance is denied.

DATED: September 12, 2009


Susan Grody Ruben, Esq.
Arbitrator

⁴ Id.