In the Matter of Arbitration Between the	:	Grievance Number: DOT-2021-00713-07
	:	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 11, AFL-CIO,	:	Grievant: Matthew Gould
Union	:	Date of Hearing: July 26, 2022
and the	:	
	:	
STATE OF OHIO, DEPARTMENT OF TRANSPORTATION,	:	Howard D. Silver, Esquire Arbitrator
Employer	:	

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

Bruce Thompson
Staff Representative
OCSEA, AFSCME, Local 11, AFL-CIO
390 Worthington Road, Suite A
Westerville, Ohio 43082
bthompson@ocsea.org

For: State of Ohio, Department of Transportation, Employer

Jay Hurst
Labor Relations Administrator 1
Ohio Department of Transportation
1980 East Broad Street
Columbus, Ohio 43223
jay.hurst@dot.ohio.gov

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PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing at 9:00 a. m. on July 26, 2022 via the teleconferencing platform ZOOM. During the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The arbitration hearing concluded at 1:00 p. m. on July 26, 2022 and the evidentiary portion of the hearing record was closed at that time.

Post-hearing briefs were received by the arbitrator from both parties by August 29, 2022, and exchanged between the parties by the arbitrator on August 29, 2022.

This matter arises from a grievance filed on February 26, 2021 under the grievance procedure in effect between the Ohio Department of Transportation and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO as presented in the parties' collective bargaining agreement, a collective bargaining agreement in effect from May 12, 2018 to February 28, 2021, Joint Exhibit 1. Article 25, section 25.01 in the parties' collective bargaining agreement in effect between the parties from May 12, 2018 to February 28, 2021 defined “grievance” as “... any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement...” The grievance in this case alleges that Article 7, section 7.06 and Article 13, section 13.07 of the parties' collective bargaining agreement had been violated, dating to January 25, 2021.

No challenge to the arbitrability of the grievance underlying this proceeding has been raised. Based upon the language of the parties' collective bargaining agreement in effect from May 12, 2018 to February 28, 2021, the arbitrator finds the grievance giving rise to this proceeding to be arbitrable and properly before the arbitrator for review and resolution.

JOINT ISSUE STATEMENT

"Did the employer violate the contract when they assigned seasonal and auxiliary employees to 12 hour shifts before offering overtime to permanent employees from an alternate shift."

If not, what shall the remedy be?

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, and the State of Ohio, Department of Transportation, hereinafter referred to as the Employer, are parties to a collective bargaining agreement in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1. Within this collective bargaining agreement is Article 25, the parties' agreed grievance procedure. Article 25, section 25.01 defines a grievance as "any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement."

On February 26, 2021, a grievance was filed by the Union on behalf of grievant Matthew Gould, a bargaining unit member employed permanently as a Highway Technician 2, complaining that the Employer's application of Article 7, section 7.06 and Article 13, section 13.07 in the parties' collective bargaining agreement, in matters of overtime work during snow and ice removal events, was not in compliance with the language of these Articles. The grievance claimed that in the months and years prior to January 2021, overtime opportunities during snow and ice events had first been offered to permanently employed Highway Technicians, and only those overtime opportunities first offered to and not accepted by permanent employees were then offered to seasonal and temporary employees.

The grievance filed on February 26, 2021 asserts that in late December 2020 and early January 2021, it was noticed that overtime assignments during snow and ice events were being offered to seasonal and temporary employees and not being offered first to permanently employed Highway Technicians. The grievance claims that this change in how overtime opportunities during snow and ice events were to be handled violated Article 7, section 7.06, and Article 13, section 13.07. In this regard the Union pointed to language in Article 7, section 7.06 that provides: "Overtime that is available when seasonal, intermittent, temporary and interim employees are on staff shall first be offered to permanent employees pursuant to Section 13.07." The grievance also refers to language in Article 13, section 13.07 that provides: "Insofar as practicable, overtime opportunity hours shall be equitably distributed on each overtime roster on a rotating basis by seniority among those who normally perform the work..." Article 13, section 13.07 also directs that: "Management has the sole and exclusive right to determine the need for overtime."

The Employer and the Union negotiated and agreed to a snow and ice event procedure to be applied in ODOT's District 4 by September 24, 2020, an agreement titled: "District 4 Winter Snow and Ice Procedure 2020/2021." This agreement specified that twelve-hour work shifts were to be utilized during snow and ice events, with each shift comprised of eight (8) hours of regular work at a regular rate of pay, coupled with four (4) hours of overtime work at an overtime rate of pay. Each bargaining unit member declared the twelve-hour shift preferred to be worked during a snow and ice event, and was assigned a shift determined by seniority among bargaining unit members. The parties' agreed 2020/2021 snow and ice procedure stated that the four (4) hours of overtime work could precede the eight (8) regular hours of work in a shift or could follow the regular eight (8) hours of work in a shift. The parties' arrangement specified that employees working a twelve-hour shift may work an additional four (4) hours of overtime work but in no event shall a bargaining unit member be permitted to work

more than sixteen (16) hours of work in a twenty-four (24) hour period.

Article 13, section 13.07 also provides the following:

* * *

Snow and ice overtime opportunities shall be offered in the following order:
a. All HTs, RM, BW, HMW & PIs (with CDLs) whose daily work assignment is at a county facility as they have grievance rights under Article 25 …

The grievance was reviewed under the parties' agreed grievance procedure but remained unresolved. The unresolved grievance was directed on to final and binding arbitration. A hearing was convened and completed on July 26, 2022. Post-hearing briefs were filed by August 29, 2022.

SUMMARY OF TESTIMONY

Matthew Gould

Matthew Gould, the grievant in this proceeding, employed as a Highway Technician 2. Mr. Gould has served in this capacity for the past eight to nine years. Mr. Gould was originally hired by the Ohio Department of Transportation effective April 12, 2010. Mr. Gould's duties as a Highway Technician 2 include snow and ice removal through the operation of trucks equipped with snowplows and salt distributors, clearing and treating road surfaces, filling in potholes, performing ditch maintenance, installing culverts, and replacing catch basins. Mr. Gould is a full-time, permanent employee of the Ohio Department of Transportation and a member of the bargaining unit to which the parties' collective bargaining agreement attaches.

Mr. Gould recalled in his testimony that during all times relevant to this proceeding Mr. Gould had been assigned a regular work shift from 4:00 a. m. to 12:30 p. m. Under a snow and ice event agreement that reserves to the Employer the right to schedule twelve-hour work shifts during a snow

and ice event. Mr. Gould's work schedule during a snow and ice event would have attached to it an overtime assignment of four (4) hours, from 12:00 a. m. to 4:00 a. m., at which time Mr. Gould's regular hours would be worked, producing a twelve-hour work day, with four (4) hours compensated through premium pay. Mr. Gould testified that in prior days Mr. Gould had been offered overtime that had become available beyond the twelve (12) hours of his work shift during a snow and ice event but these offers had ceased in January, 2021, with Mr. Gould and other bargaining unit members being told by the Employer that the bargaining unit members were not entitled to overtime beyond the four (4) hours of overtime within the twelve-hour work schedule worked during a snow and ice event.

Mr. Gould pointed out that agreed contract language requires permanent employees to accept seventy percent (70%) of overtime offers or face disciplinary action. Mr. Gould noted that this demand does not attach to seasonal workers.

Under questioning by the Employer's representative, Mr. Gould confirmed that has never been called on to manage snow and ice removal operations. Mr. Gould is assigned to District 4 in Summit County, a county with twenty-eight (28) separate snow and ice routes, covering 622 lane miles.

Mr. Gould identified Joint Exhibit 6, page 151 as the snow and ice removal twelve-hour shift schedules for 2020 and 2021 in District 4.

Mr. Gould testified that he had filed his grievance based on the failure of the Employer to continue to offer to bargaining unit members overtime opportunities in January 2021.

Adam Smith

Adam Smith is employed by the Ohio Department of Transportation as a Highway Technician 1 in Summit County, within ODOT's District 4. Mr. Smith has served in his present position for seven (7) years as a full-time, permanent employee.

Mr. Smith testified that in recent times the Employer had been by-passing bargaining unit members in assigning overtime assignments. Mr. Smith testified that permanent, full-time Highway Technicians were being denied a right of first refusal of overtime opportunities during snow and ice events. Mr. Smith stated that the overtime opportunities had instead been offered to seasonal employees, workers who are employed outside the bargaining unit. Mr. Smith stated that these overtime opportunities had previously been first offered to Highway Technicians, but those offers had ceased. Mr. Smith recalled being told by district managers that bargaining unit members were not entitled to an overtime assignment, and had asserted the Employer's right to assign the overtime opportunities to seasonal workers.

Mr. Smith pointed out that the collective bargaining agreement in effect between the parties provides that overtime opportunities are to be offered to permanent, full-time Highway Technicians first. Mr. Smith testified that in recent times first offers of overtime opportunities during snow and ice events to bargaining unit members had ceased.

Under questioning by the Employer's representative, Mr. Smith confirmed that he had never been authorized or called upon to manage the operations of a snow and ice removal event. Mr. Smith agreed that he is not responsible for staffing. Mr. Smith confirmed that he had chosen the 4:00 a. m. to 12:30 p. m. shift to be his regular hours during a snow and ice event, in addition to the four (4) overtime hours attached to that regular shift.

Chris Steed

Chris Steed is employed by the Ohio Department of Transportation as a permanent, full-time Highway Technician 3. Mr. Steed has served as a Highway Technician 3 for the past six to seven years. Mr. Steed is assigned no managerial responsibilities.

Mr. Steed stated that during a snow and ice removal event he works a twelve-hour shift that he had chosen, a twelve-hour shift comprised of eight (8) hours of regular work and four (4) hours of overtime work. Mr. Steed's twelve-hour shift during a snow and ice event had been from 12:00 p. m. to 8:30 p. m. at a regular rate of pay, and four (4) hours from 8:00 p. m. to 12:00 a. m. at the overtime rate of pay.

Mr. Smith testified that when overtime opportunities during snow and ice removal events were offered, employees were expected to accept at least seventy-five percent (75%) of these overtime opportunities. An acceptance rate of less than seventy-five percent (75%) opens a non-compliant employee to disciplinary action. Mr. Smith noted that in the past he had been offered eight (8) hours of overtime work during a snow and ice removal event, but in recent times he has been offered only four (4) hours of overtime on each shift worked during a snow and ice event.

Under questioning by the Employer's representative, Mr. Smith stated that the Employer had failed to offer overtime opportunities first to Highway Technicians as required by the parties' collective bargaining agreement, and asserted that the Employer was offering these overtime opportunities to secondary employees, that is, employees not usually called upon to perform ice and snow removal duties, employees assigned to the traffic or engineering departments.

Thomas Corey

Thomas Corey is the Deputy Director responsible for administering District 11 of the Ohio Department of Transportation. Mr. Corey has been employed by the Ohio Department of Transportation for twenty-six (26) years. Mr. Corey began his employment by the Ohio Department of Transportation as a seasonal employee in 1995. Mr. Corey was hired as a full-time permanent employee of the Ohio Department of Transportation in January 1996 in a Highway Worker 2 position assigned to Columbiana

County. Mr. Corey was promoted to Transportation Manager 1 in 2000, was promoted to Transportation Manager 2 in 2002, and was promoted to Transportation Administrator in 2004. In 2011 Mr. Corey was promoted to Highway Management Administrator for District 11. In 2016 Mr. Corey became an Operations Deputy assigned to the Department's central office. In 2019 Mr. Corey became the Deputy Director responsible for District 11, his present position.

Mr. Corey explained that in snow and ice removal events it is customary that Transportation Managers 1 and 2 who are responsible for a county take the managerial lead in snow and ice removal events. Mr. Corey noted that District 11 is comprised of seven (7) counties. Mr. Corey noted that there are twelve (12) Highway Management Administrators in the state of Ohio, with each Highway Management Administrator responsible for oversight of all operations in an assigned district, including snow and ice removal.

Mr. Corey emphasized the importance of effective snow and ice removal in safeguarding the public, in avoiding negative economic impacts, and in providing a transportation lifeline to millions of people. Mr. Corey noted that, by agreement of the parties, during snow and ice removal events, employees will work twelve (12) hour shifts, comprised of eight (8) hours of work at the regular rate of pay and four (4) hours of work at an overtime rate of pay.

Mr. Corey explained that snow and ice removal on a statewide scale is not an activity that lends itself to contracting out. The amount of equipment needed for this coverage and the very high cost of this equipment require a state sponsored effort underwritten by public funds. Mr. Corey stated that the snow and ice removal required of employees can be dangerous as it involves the operation of very heavy trucks weighing, when fully loaded, 45,000 to 70,000 pounds. Mr. Corey also stated that driver fatigue is an issue that is always a concern, especially when drivers are called upon to work sixteen (16) hours in a twenty-four (24) hour period. Mr. Corey stated that having drivers work sixteen (16)

hours in a twenty-four (24) hour period is a circumstance that is not consistently safe. Deputy Director Corey conceded that sixteen (16) hours of work in a twenty-four (24) hour period had been tolerated when an insufficient number of drivers were present to avoid extending twelve (12) hour shifts to sixteen (16) hour shifts, although only with the assent of the employee. Mr. Corey believes twelve (12) hour shifts during a snow and ice removal event to be efficient and safe.

Under questioning by the Union's representative, Mr. Corey confirmed that the snow and ice removal event agreement provides for the additional four (4) hours of work at an overtime rate to be worked immediately before or immediately after the regular eight (8) hour shift selected by the employee. Deputy Director Corey stated that District 11 required thirty (30) to thirty-five (35) seasonal workers during snow and ice removal months. Deputy Director Corey confirmed that during a snow and ice removal event, seasonal workers work twelve (12) hour shifts. Deputy Director Corey stated that the additional work provided by seasonal workers during winter months is essential to completing the work of the district in snow and ice removal.

Lisabeth “Jill” Dible

Lisabeth Dible, known as Jill, is a Labor Relations Officer responsible for ODOT Districts 5 and 10. Ms. Dible has provided thirty (30) years of state of Ohio service. Ms. Dible began her employment by the State of Ohio as an intern at the Ohio Department of Liquor Control in 1992, moved to the Department of Mental Retardation and Developmental Disabilities in 1993, moved to the Ohio Department of Transportation in 1996 assigned to District 6 where Ms. Dible remained for sixteen (16) years, and then, in 2012, moved to the Department's central office for one and one-half (1½) years. Ms. Dible was then assigned responsibility for labor relations in Districts 5 and 10, went back to the Department of Mental Retardation and Developmental Disabilities, after which Ms. Dible returned

to the Ohio Department of Transportation as a Labor Relations Officer 3.

In her present position Ms. Dible is responsible for discipline, grievances, drug testing, and labor/management relations in Districts 5 and 10. Ms. Dible participates as an Employer representative in negotiations intended to fashion a successor collective bargaining agreement.

Ms. Dible stated that the parties had agreed that twelve (12) hour shifts would be worked during snow and ice removal events. Ms. Dible stated that the use of twelve (12) hour shifts had been sustained in subsequent reviews by arbitrators of this practice under snow and ice event agreements by the parties. In this regard Ms. Dible referred to Joint Exhibit 4, the decision and award of Arbitrator Washington on a grievance brought by grievant Romine. The decision in that case denied the grievance and held that although a maximum of sixteen (16) hours of work could be worked in a twenty-four (24) hour period, the grievant was not entitled to sixteen (16) hours of work in a twenty-four (24) hour period.

Gail Lindeman

Gail Lindeman has worked for the Ohio Department of Transportation for nineteen (19) years. In 2011 Ms. Lindeman filled a Labor Relations Officer position. In 2019 Ms. Lindeman was promoted to Assistant Labor Relations Administrator. In 2022 Ms. Lindeman was appointed Labor Relations Administrator for the Ohio Department of Transportation. Ms. Lindeman's present responsibilities include oversight of labor relations in all twelve ODOT districts. Ms. Lindeman participates in negotiations of successor collective bargaining agreements on behalf of the Department.

Ms. Lindeman stated in her testimony that the joint issue statement to be resolved in this case had been addressed in two separate, prior grievances, by two separate arbitrators. In both cases the grievances had been denied. One arbitration decision was issued on January 27, 1996 by Arbitrator

Nels E. Nelson in the Matter of Arbitration Between OCSEA/AFSCME, Local 11, AFL-CIO and the Ohio Department of Transportation, grievance number 31-02-951103-0013-01-06, a class action grievance. An arbitration decision was issued on April 25, 2008 by Arbitrator Dwight Washington in the Matter of Arbitration Between OCSEA/AFSCME, Local 11, AFL-CIO and the Ohio Department of Transportation, grievance number 31-05(022707)0007-01-07, grievant: Thomas Romine. Ms. Lindman noted that the Employer prevailed in both arbitration cases, with both arbitrators finding that the use of twelve-hour shifts during snow and ice events did not violate the parties' collective bargaining agreement.

Ms. Lindeman stated in her testimony that under the snow and ice removal event agreement between the parties, bargaining unit members were allowed to work a maximum of sixteen (16) hours in a twenty-four (24) hour period, but only twelve(12) hours of work could be demanded, with the remaining four (4) hours of overtime work to be determined by the Employer.

Ms. Lindeman identified the last page of the exhibits binder, page 180, as a listing of changes to ODOT Overtime policy from 1997 to 2024, as exhibited in succeeding collective bargaining agreements from 1997 through 2024. Ms. Lindeman noted that the sixteen (16) hour maximum language first occurred in the 2009-2012 contract, language that was changed in the 2015-2018 contract to provide that employees shall not work in excess of sixteen (16) consecutive hours unless prior approval is obtained from the appropriate Deputy Director or designated administrator.

POSITIONS OF THE PARTIES

Position of the Union

The Union notes that bargaining unit members working in ODOT's District 4 began their winter shift schedule on December 21, 2021, with the exact date determined by the weather. After County

Managers have determined staffing levels for each facility, bargaining unit members bid on their preferred shifts, with the shifts awarded based on seniority and the requirements of each facility.

The Union points to the testimony from Highway Technician Matthew Gould, the grievant, in which it was recalled that during the snow and ice season it had traditionally been the case that when overtime was offered, it was offered first to permanent Highway Technicians, and only the overtime not accepted by permanent Highway Technicians was then offered to seasonal Highway Technicians and auxiliary employees. When bargaining unit members and Union officials noticed that overtime opportunities during a snow and ice event were being offered to seasonal and auxiliary employees without first offering the overtime opportunities to permanent Highway Technicians, a grievance was filed on February 26, 2021.

The Union points out that it seeks through its grievance only that which has been promised in the parties' collective bargaining agreement, specifically in Article 13, section 13.07, Overtime. Article 13, section 13.07(B) provides:

> * * *
>
> During snow and ice operations employees are expected to work overtime. Consistent charged refusals to work overtime may be grounds for discipline. Snow and ice overtime opportunities shall be offered in the following order:
>
> a. All HTs, RM, BW, HMW & PIs (with CDLs) whose daily work assignment is at a county facility as they have grievance rights under Article 25...

The Union notes that seasonal employees do not possess grievance rights.

The Union asserts that if the language of the parties' Agreement is followed, permanent employees are to be offered overtime assignments first, before such opportunities are offered to seasonal or auxiliary employees. The Union acknowledges that the parties have entered into a snow and ice agreement which specifies the work shifts to be carried out during a snow and ice event and limits

permanent employees to no more than sixteen (16) hours of uninterrupted work during a snow and ice event. The snow and ice agreement, however, is silent on how overtime assignments are to be made and provides no basis upon which to nullify agreed language in the parties' collective bargaining agreement that specifies how such overtime assignments are to be made.

The Union points out that while permanent employees may be subjected to discipline if a seventy percent (70%) rate of acceptance of overtime opportunities during snow and ice events is not maintained, seasonal and auxiliary employees are not subject to the 70% overtime acceptance standard.

The Union states that it seeks only the priority in overtime assignments expressed in Article 13, section 13.07(B), a priority that includes a right of first refusal among permanently employed Highway Technicians, by seniority, followed by offering what remains to the other permanent employees listed in order in Article 13, section 13.07(B). The Union argues that only if overtime assignments remained unfilled at the conclusion of the canvassing of all permanent employees listed in Article 13, section 13.07(B), in the order listed, would the overtime opportunities that remained be appropriately offered to seasonal and auxiliary employees.

The Union has no quarrel with the twelve-hour shifts called for under the snow and ice agreement, and does not contest the sixteen (16) hour maximum limit on uninterrupted snow and ice work.

The Union urges the arbitrator to enforce through the arbitrator's award the language of Article 13, section 13.07(B) as that language relates to priorities to be followed in assigning overtime opportunities during a snow and ice event among bargaining unit members.

Position of the Employer

The Employer notes that each winter the Ohio Department of Transportation performs extensive snow and ice removal across the state, utilizing full-time permanent employees and part-time (seasonal) employees who are certified to operate ODOT equipment. During snow and ice season 12-hour shifts are utilized in providing 24-hour snow and ice removal coverage. The parties have entered into an agreement that sets the 12-hour shifts to be utilized during a snow and ice event.

The Employer argues that the Union's focus on Article 13, section 13.07, the language that calls for overtime to be offered first to permanent employees, is too narrow a focus and disregards the snow and ice event agreement as to 12-hour shifts. At page 3 of the Employer's post-hearing brief the Employer argues that the Union:

> ... failed to take in to account the operational need to provide efficient and safe snow and ice removal by the agency. The union's position conflicts with the ability to move into 12-hour shifts if each employee can then choose when and how long they would like to work. This violates contract interpretation fundamentals to read the contract as a whole.
>
> Employer's post-hearing brief, page 3.

The Employer claims that the Union has failed in this case to prove that the Employer arbitrarily ignored the language of the parties' collective bargaining agreement by not offering overtime to permanent Highway Technicians. The Employer reminds the arbitrator that no witness called by the Union in this case specified any particular date upon which a bargaining unit member had been disadvantaged as a result of an overtime assignment, nor did any witness specify the overtime hours to which the employee had been entitled. The Employer claims that the Union has failed to prove the overtime status of seasonal or auxiliary employees, and points out that all of the Union witnesses confirmed that they worked overtime within their 12-hour shifts.

The Employer describes as illogical the schedule of work hours that would result if permanent employees assigned to the P. M. shift were to be called back to work a couple of hours of overtime before the A. M. shift. The Employer also claims that such a circumstance could require paying call back pay in accordance with Article 13, section 13.08, because the overtime hours do not abut a regularly scheduled shift.

At page 4 of the Employer's post-hearing brief the following is presented:

> … The union has testified that they do not oppose the use of 12-hour shifts, but they want management to offer up to four (4) additional hours of overtime to permanent employees from the opposite shift before allowing seasonal and auxiliary drivers to work their assigned shift. It is important to understand that those two concepts cannot work together. If management is required to offer permanent employees up to 16 hours (12+4) then the concept of two (2) shifts has essentially been abolished; a process that both the union and management negotiated in good faith and have been using for many years. The seasonal and auxiliary drivers on the opposite shift will not have a designated start time and will only be used if the permanent employees decline to work the additional four (4) hours. * * * ODOT has and will continue to call permanent HTs to work the opposite shift, and/or any overtime outside of their normal 12-hour shift if the alternate shift is short on staff and/or the operational need exists. Essentially, when "management determines the need for overtime" as the contract dictates. In this case the union did not present a scenario where a permanent employee did not get some overtime and a seasonal did. The usage of seasonal and auxiliary drivers to fulfill ODOT's 12-hour shift assignments is a long standing, mutually understood practice for operational need. It was not arbitrary and capricious.

The Employer refers to the testimony provided by Thomas Corey, the ODOT Deputy Director responsible for the management of ODOT District 11. As noted by the Employer, Mr. Corey provided extensive and detailed testimony about managing snow and ice removal over a district that includes areas that receive in excess of seventy (70) inches of snow fall annually. Deputy Director Corey also expressed his opinion that twelve-hour shifts were particularly well-suited to snow and ice events, while sixteen-hour shifts were less than ideal due to employee fatigue and its effect on safety. Mr. Corey confirmed in his testimony that utilizing twelve-hour shifts during snow and ice events has been

a long-standing practice between the parties.

The Employer contends that the use of seasonal and auxiliary employees in twelve-hour shifts during a snow and ice event serves to maximize personnel and equipment use, allow the workers sufficient time to rest and recover, and allows scheduling in a manner that is efficient and feasible to administer. Mr. Corey confirmed that the use of twelve-hour shifts during a snow and ice event may result in cost savings but this is not the sole reason for using twelve-hour shifts. The Employer points out that the number of work hours needed to meet operational needs during a snow and ice event remains the same whether eight-hour, or twelve-hour, or sixteen-hour shifts are worked. The Employer points out that it has not endeavored to eliminate overtime through the use of seasonal or auxiliary employees, but has used seasonal and auxiliary employees to meet the operational needs of the district.

The Employer refers to the testimony from Labor Relations Officer Jill Dible who spoke of twelve-hour shifts being used during snow and ice events as a long-standing practice. Ms. Dible also identified two final and binding arbitration decisions that addressed the use of seasonal and auxiliary employees during snow and ice events and twelve-hour shifts during snow and ice events. The first decision was from Arbitrator Nels Nelson; the latter decision was from Arbitrator Dwight A. Washington. The Employer points out that in each case the arbitrator addressed assigning twelve-hour shifts, finding no violation of the parties' collective bargaining agreement, and in the latter case finding that the Employer had the right to schedule seasonal and auxiliary employees on shifts to supplement the workforce, and found that permanent employees were not entitled to sixteen-hour shifts.

The Employer refers to the testimony from ODOT Labor Relations Administrator Gail Lindeman who recounted in her testimony the bargaining history between the parties especially as it relates to the use of twelve-hour shifts during snow and ice events. Administrator Lindeman recalled that twelve-hour shifts were first used during snow and ice events under the parties' collective

bargaining agreement in effect from 2009 to 2012. Ms. Lindeman explained in her testimony that the implementation of twelve-hour shifts during snow and ice events was as a direct result of the arbitration decision issued by Arbitrator Washington in the *Romine* case. The *Romine* decision and award found no entitlement to sixteen-hour shifts and found that utilizing seasonal and auxiliary employees in snow and ice removal was not a violation of the parties' collective bargaining agreement. The Employer points out that no evidence was presented showing a refusal of overtime to any bargaining unit member.

The Employer emphasizes that when a snow and ice event is declared, the schedule of the workforce defaults to twelve-hour shifts, for efficiency purposes. The Employer points out that the Union does not contest the validity of the agreement the parties negotiated on twelve-hour shifts being worked during snow and ice events. The Employer emphasizes, however, that nowhere in the parties' collective bargaining agreement, or in the parties' negotiated snow and ice event agreement, is a bargaining unit member empowered to determine whether an additional four (4) hours of overtime work will be performed by the employee. The Employer claims that to allow such discretion to be wielded by an employee is to contradict the intent of mutually agreed, express Contract language and the language of the negotiated snow and ice event agreement.

The Employer points out that the use of twelve-hour shifts during snow and ice events is a long-standing practice, accepted by both parties since the parties' 2000 – 2003 collective bargaining agreement. The Employer notes that this accepted practice has been reviewed by two arbitrators, neither of whom found any violation of the parties' Agreement in the use of twelve-hour shifts during snow and ice events. The Employer notes that the practice of utilizing twelve-hour shifts during snow and ice events has been openly and consistently followed for two decades, and has been a practice knowingly accepted by both parties.

The Employer contends that for the past twenty-two (22) years both parties have agreed that

twelve-hour shifts are to be used during snow and ice events, and may be supplemented as needed by seasonal and auxiliary employees. The Employer emphasizes that this use of seasonal and auxiliary employees during snow and ice events allows bargaining unit members to avoid sixteen-hour work shifts, which both parties believe border on the unsafe due to mental and physical fatigue.

The Employer reminds the arbitrator that twelve-hour shifts are imposed only during snow and ice events, a practice accepted by both parties over the past twenty (20) years. This past practice and custom, argues the Employer, is entitled to be viewed as the joint intention of the parties, and does not include an entitlement by bargaining unit members to sixteen-hour shifts.

For the reasons presented above, the Employer urges the arbitrator to deny the grievance in its entirety.

DISCUSSION

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, and the State of Ohio, Department of Transportation, were parties to two (2) prior arbitration cases addressing scheduling work during snow and ice events.

The earlier decision and award, from Arbitrator Nels Nelson, issued January 27, 1996, a class action grievance, designated 31-02-(11-03-95)-13-01-06, determined that instituting two shifts during snow and ice events may result in less overtime, but the motivation for the two-shift schedule was the improvement of operations rather than the avoidance of overtime. Arbitrator Nelson also found that the use of intermittent employees during snow and ice events did not constitute an attempt to erode the bargaining unit. See Joint Exhibit 3, pages 39 and 43, paginated 8 and 12 in the decision and award.

The latter decision and award, from Arbitrator Dwight A. Washington, Grievant: Thomas

Romine, issued April 25, 2008, designated 31-05(022707)0007-01-07, determined that twelve-hour shifts during snow and ice events was a reaction to operational need and not to avoid overtime. Arbitrator Washington found no violation of the parties' collective bargaining agreement. See Joint Exhibit 4, pages 61 and 65, paginated 17 and 21 in the decision and award.

The arbitrator in the case herein believes that when the parties engaged in the two prior arbitration procedures, both knew that the decision of the arbitrator would be final and binding upon both parties. The arbitrator in the case herein therefore believes that these prior decisions are entitled to deference, thereby respecting the final and binding nature of these earlier decisions. This deference is akin to the doctrine of *stare decisis* applied in judicial cases, and in other forums such deference is known as "collateral estoppel." This arbitrator therefore keeps in mind that which has already been decided between these parties and takes no action in this proceeding that would reverse or ignore the effect of either arbitration decision.

The limitations under which the arbitrator operates in this case include the express prohibition presented in Article 25, section 25.03 of the parties' collective bargaining agreement that withholds from the arbitrator the "... power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement." Beyond this requirement that the arbitrator neither add to, subtract from, or modify any of the language of the parties' Agreement, the arbitrator is also required to respect the 2020/2021 snow and ice procedure agreement as a practice agreed by both parties and not contested by either party. When the decisions of Arbitrators Nelson and Washington are kept in mind, the scope of this proceeding becomes focused on a particular set of facts that do not contravene the parties' 2018-2021 collective bargaining agreement, the parties' 2020/2021 snow and ice procedure agreement, or the two prior arbitration decisions on snow and ice event scheduling.

In describing the subject matter relevant to this grievance, it may be instructive to begin with what is clearly not part of this proceeding. As described above, this case is not about whether to enforce the language of the parties' collective bargaining agreement. The arbitrator is not empowered to ignore any of the provisions of the parties' Agreement, nor is the arbitrator empowered to determine that the former arbitration decisions are somehow mistaken and therefore not worthy of enforcement. Such a determination destroys the finality of the former decisions, leaving the parties without decisions that they had formerly agreed were to be binding upon both parties. The provisions of the 2020/2021 snow and ice agreement have also been agreed by both parties and no one has contested this agreement. The 202/2021 snow and ice agreement is therefore viewed by the arbitrator as valid and enforceable.

Issues not in dispute in this case include whether assigning twelve-hour shifts during snow and ice events violates the parties' collective bargaining agreement, it does not; whether intermittent, temporary, seasonal, or auxiliary employees may be employed during a snow and ice event, they may; and whether the Employer retains the right to decide when overtime opportunities are to occur, it does.

With the above referenced prior decisions in mind, it bears restating here the joint issue statement agreed by the parties to be resolved by this proceeding: “Did the employer violate the contract when they assigned seasonal and auxiliary employees to 12 hour shifts before offering overtime to permanent employees from an alternate shift[?].

The permanent employees referenced in the joint issue statement are themselves assigned to twelve-hour shifts at the inception of a snow and ice event. These twelve-hour shifts contain eight (8) hours of regular work and four (4) hours of overtime work, and leave permanent employees, while working these shifts, unavailable for other work assignments, including overtime work assignments, during the course of the twelve-hour shift being worked.

Overtime opportunities are available at the discretion of the Employer, and in the case of

permanent employees completing their twelve-hour shifts, only four (4) more hours of overtime may be offered because the snow and ice agreement sets sixteen (16) hours as the maximum work hours allowed within a twenty-four hour period.

It is the four (4) hours of overtime that could be offered to a permanent employee by the Employer at the conclusion of the permanent employee's twelve-hour shift that the joint issue statement addresses. At the beginning of the snow and ice event the twelve-hour shifts are already assigned through prior bidding resolved through seniority. At the time a twelve-hour shift begins, the permanent employee working that shift is not available for an additional overtime assignment because he or she is otherwise assigned and is already, during this shift, working four (4) hours of overtime. During these twelve-hour shifts the Employer is empowered to supplement the workforce through the employment of seasonal and auxiliary employees on eight-hour or twelve-hour shifts as previously found by Arbitrators Nelson and Washington. These assignments to non-permanent workers occur after all permanent employees are assigned their twelve-hour shifts and on the basis of operational necessity.

The arbitrator herein does not find in the sources of authority applicable to this proceeding that prior to assigning seasonal or auxiliary employees to a twelve-hour shift, overtime must first be offered to permanent employees. Beyond the lack of expressed language to this effect, such scheduling would, as argued by the Employer, prove to be impractical, requiring the Employer to foretell the future. The arbitrator finds such a scheduling practice would work against the operational necessities of managing a snow and ice event. The arbitrator does not find the assignment of twelve-hour shifts to seasonal or auxiliary employees to be arbitrary or capricious but rather in response to an operational need.

What remains are four-hour overtime assignments assigned by the Employer at the conclusion of a bargaining unit member's twelve-hour shift. Such a bargaining unit member has become available for overtime with the conclusion of the assigned shift, and the bargaining unit member is allowed

another four hours of work, if the Employer finds that this additional work assignment is needed. The Employer determines when overtime is to be assigned, as specified in the parties' collective bargaining agreement in Article 13, section 13.07. The Employer having determined that overtime work is to be offered at the conclusion of a twelve-hour shift, the parties' collective bargaining agreement tells us to whom the overtime assignment is to be offered, and expressly provides the order in which the offer is to be made. In this regard the first employee to be offered the overtime is a permanently employed Highway Technician, followed in order by other permanent employees. When an overtime opportunity is made available by the Employer and bargaining unit members are in a position to work the overtime assignment, the offer of overtime must first be offered to bargaining unit members in the order specified by agreed language in the parties' collective bargaining agreement, before such an offer may be made to an employee not in the bargaining unit.

The Union has not specified a particular occasion when four (4) hours of overtime had been offered at the conclusion of a twelve-hour shift but not offered to a permanent employee first. Under the circumstances described above, about no more than four (4) hours of overtime being offered at the conclusion of a bargaining unit member's twelve-hour shift, the Union's position as to first offering it to bargaining unit members available for such an assignment is well-taken. The arbitrator understands Article 13, section 13.07 requires this priority in offering overtime under the circumstances described above. The arbitrator therefore finds for the Union in how bargaining unit members are to be treated when such overtime is offered and bargaining unit members are available for the assignment, but orders no monetary award in compensation in the absence of a proven monetary loss.

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AWARD

1. The grievance is determined to be arbitrable under the language of the parties' collective bargaining agreement and properly before the arbitrator for review and resolution.

2. The Employer did not violate the parties' collective bargaining agreement when the Employer assigned seasonal and auxiliary employees to twelve-hour shifts before offering overtime to permanent employees.

3. It is a violation of the parties' collective bargaining agreement to offer overtime hours, for which bargaining unit members are eligible and available, to non-bargaining unit members before offering the overtime hours to bargaining unit members.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
P. O. Box 14092
Columbus, Ohio 43214
hsilver@columbus.rr.com

Columbus, Ohio
September 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, and the State of Ohio, Department of Transportation, Grievant: Matthew Gould, Grievance Number DOT-2021-00713-07, was served, in electronic form, upon the following this 29th day of September, 2022:

Bruce Thompson
Staff Representative
OCSEA/AFSCME, Local 11, AFL-CIO
390 Worthington Road, Suite A
Westerville, Ohio 43082
bthompson@ocsea.org

and

Jay Hurst
Labor Relations Administrator 1
Ohio Department of Transportation
1980 East Broad Street
Columbus, Ohio 43223
jay.hurst@dot.ohio.gov

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
P. O. Box 14092
Columbus, Ohio 43214
hsilver@columbus.rr.com

Columbus, Ohio
September 29, 2022