

ARBITRATION DECISION NO.:

343

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation

and Correction

Marion Correctional Institution

DATE OF ARBITRATION:

May 7, 1991

DATE OF DECISION:

May 14, 1991

GRIEVANT:

Frances Reisinger

OCB GRIEVANCE NO.:

G-87-1764

ARBITRATOR:

Harry Graham

FOR THE UNION:

Dennis Falcione

FOR THE EMPLOYER:

Thomas E. Durkee

KEY WORDS:

Emergency Pay

Estoppel

Apparent Authority

ARTICLES:

Article 13-Work Week,

Schedules and Overtime

§13.15-Emergency Leave

FACTS:

There is no dispute surrounding the facts of this grievance. The Marion Correctional Institution is located in Marion County. On the evening of April 4, 1987 there was a heavy snowfall in Marion County which closed local traffic. The County Sheriff closed the roads to all but necessary travel; the roads were later reopened in the early afternoon on April 5, 1987. Some Corrections Officers were asked to work overtime since various shifts were understaffed. Some Corrections Officers thought that they were entitled to emergency pay overtime pay for working in an emergency situation.

The employer declined to pay overtime at time and one-half for employee's straight time hours and

double time for their overtime hours. A grievance was filed and was properly before the arbitrator.

UNION'S POSITION:

It is the Union's position that there was definitely an emergency. The snowstorm was of exceptional intensity and was unusual for that area at that time of the year. The Sheriff of Marion county closed the highways to all nonessential travel. The Correctional Officers were deemed to be essential employees. Sergeant Wilson of the institution's staff characterized the situation as an emergency. An employee who worked in the library was denied entrance to the facility since he was a non-essential employee. The employer did not pay the employees correctly. All employees working their regular shift should be paid time and one half and employees working overtime should be paid double time.

EMPLOYER'S POSITION:

There is no violation of the Agreement. No emergency was ever declared by the employer. Section 13.15 of the Agreement provides that "An emergency shall be considered to exist when declared by the employer." The heavy snowfall was not declared an emergency by the employer and for this reason it fails the first test. The appropriate person in the State government who declares an emergency for travel purposes is the Director of Highway Safety. The County Sheriff may have closed the roads; the State found this fact immaterial. The County Sheriff does not have the authority to commit the State to pay the employees emergency pay. The second test is that the occurrence is not "normal or reasonably foreseeable to the place of employment and/or position description of the employee."

ARBITRATOR'S OPINION:

The arbitrator first distinguished a previous case in which he decided an emergency pay issue. In that case a high official of the Department of Highway safety, the Deputy Director, referred to the existence of an emergency in directing snow plow crews to report to duty. A Sergeant at the Marion Correctional Institution does not occupy an equivalent place on the organizational chart of the State as in the previous case. The Sergeant cannot be said to be thought of as the "employer" within the meaning of Section 13.15 of the Agreement. Similarly the action of the County Sheriff cannot serve to bind the State. The employer must declare the emergency. Since the employer did not declare an emergency the grievance is denied.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between**

OCSEA/AFSCME Local 11

and

**The State of Ohio, Department
of Rehabilitation and Correction**

Case No.:
G87-1764

Before:
Harry Graham

Appearances:**For OCSEA/AFSCME Local 11:**

Dennis Falcione
 Staff Representative
 OCSEA/AFSCME Local 11
 1680 Watermark Dr.
 Columbus, OH. 43215

For Department of Rehabilitation and Correction:

Thomas E. Durkee
 Labor Relations Officer
 Department of Rehabilitation and Correction
 1050 Freeway Dr. North
 Columbus, OH. 43229

Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on May 7, 1991 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute. The record in this case was closed at the conclusion of oral argument on May 7, 1991.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Employer violate Section 13.15 of the Contract between the parties when it refused to pay time and one-half (1 1/2T) for correction officers regularly scheduled (and) double time (2T) to correction officers who worked overtime and restore leave to correction officers at Marion Correctional Institution when no weather emergency was declared by the Department of Highway Safety for Marion County? If so, what shall the remedy be?

Background:

No controversy exists about the events that prompted the grievance which led to this arbitration proceeding. The Department of Rehabilitation and Correction operates numerous facilities in the State of Ohio. Included among them is the Marion Correctional Institution in Marion, OH. Marion is within the confines of the County of the same name. On the evening of April 4, 1987 a heavy snow commenced falling in the County. The intensity of the snowfall was such that the County Sheriff closed local roadways to all but necessary travel. As might be expected in April, the storm was short-lived and by early afternoon on April 5, 1987 the Sheriff had reopened the roads in the County.

Due to the intensity of the snowfall the Employer found it necessary to ask some Corrections Officers to work overtime. Various shifts were short of staff due the fact that some officers had taken leave on April 4, 5, 1987. In addition, some officers who worked their regular shifts were of the opinion that they were due overtime pay for working in an emergency situation.

In view of the fact that the employer declined to pay overtime at time and one-half (1 1/2T) and double time (2T) in the fashion judged to be appropriate by Union members at Marion a grievance was filed. It was processed through the procedure of the parties without resolution and the parties agree that it is properly before the Arbitrator for determination on its merits.

Position of the Union:

There is no doubt that a snowstorm of exceptional intensity struck the Marion area on April 4, 5, 1987. Newspaper accounts indicate that to be the case. Testimony from longtime area residents at the arbitration

hearing can leave no doubt to the unusual nature of the storm for that area and time of year. There was undoubtedly a great deal of snow.

In response to the storm the Sheriff of Marion County, John H. Butterworth, closed highways in the county at about 9:00 PM on April 4, 1987. Nonessential travel was prohibited. Essential travel was permitted by the Sheriff. Among employees who are designated as being essential are Correction Officers at the Marion facility.

On April 4, 5, 1987 a number of Correction Officers reported for work as scheduled. others worked overtime. In the opinion of the Union they were not paid correctly. Section 13.15 of the Agreement provides that employees who must work during an emergency "shall receive pay at time and one-half (1 1/2T) for hours worked during the emergency. Any overtime worked during an emergency shall be paid at double time." As is shown by the action of Sheriff Butterworth in closing county roads to all but essential personnel, an emergency existed in the area on April 4, 5, 1987. Furthermore, Sergeant Wilson of the institution's staff used the word "emergency" in characterizing the conditions faced during the snowstorm. An employee who worked in the library was denied entrance to the facility as he was a nonessential employee. In the Union's opinion there was clearly an emergency on April 4, 5, 1987. Employees were advised of it. The local sheriff's actions support the contention that an emergency existed. The Employer did not pay correctly under the provisions of Section 13.15 of the Agreement. The Union seeks an award in its favor and a make-whole remedy.

Position of the Employer:

The State insists that there occurred no violation of the Agreement in the manner in which it paid employees who worked at the Marion facility on April 4, 5, 1987. Section 13.15 of the Agreement provides that "An emergency shall be considered to exist when declared by the Employer. . ." Elsewhere in Section 13.15 is found language indicating that "an emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee." No emergency was declared by the Employer. The appropriate person in State government who declares an emergency for travel purposes is the Director of Highway Safety. He did not declare an emergency. That the County Sheriff may have closed the roads is immaterial according to the State. He does not have authority to commit the State to make pay under the emergency pay section of the Agreement. Only a State official may declare an emergency for pay purposes. Even if Sergeant Wilson used the word "emergency" in the course of conversation, he does not have authority to bind the State to pay under Section 13.15. Whether or not an emergency should have been declared is not at issue in this proceeding. The Union is seeking emergency pay for an emergency that was not declared. As no emergency existed, pay is not required the State insists.

Employees who reported were paid at the appropriate rate. Employees who did not report and who sought leave received it. Those employees who worked overtime were paid correctly. No employee was harmed. No violation of the Agreement occurred in this instance the State insists. It urges the grievance be denied.

Discussion:

In Case No. G87-1380 I determined that the Employer had failed to pay grievants who had worked during the same snow storm as the one involved in this proceeding. In reaching that decision I was guided by the fact that a high official of the Department of Highway Safety, the Deputy Director, had referred to the existence of an "emergency" in directing snow plow crews to report for duty. In the circumstances of the extraordinary snowfall it was reasonable for the employees involved in that proceeding to believe that an emergency had been declared. Hence, pay was awarded in that dispute.

This case is substantially different from the proceeding referenced above. In that case the Deputy Director of the Department of Transportation clearly informed employees that an emergency existed. In this case a Sergeant at Marion Correctional Institution used the term. Obviously the Sergeant does not occupy an equivalent place in the organization chart of the State as does the Deputy Director of the Department of Transportation. Under no stretch of the imagination may a Sergeant at the facility be thought of as the

"employer" within the meaning of Section 13.15 of the Agreement.

Similarly, the action of the County Sheriff cannot serve to bind the State. The Agreement is specific on this issue. It provides that an emergency exists "when declared by the Employer. . .". The Sheriff of Marion County is not the employer of the Grievants. The State is the Employer. It is the State that must declare an emergency. It did not do so in this instance. Hence, no premium pay of the sort provided in Section 13.15 is due.

Award:

The grievance is denied.

Signed and dated this 14th day of May, 1991 at South Russell, OH.

Harry Graham
Arbitrator