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ARBITRATION DECISION

May 28, 1996

In the Matter of :

State of Ohio	)	02.10(96.01.11)0015.01.00
	)	Case Nos. ~~02-10-960104-01-00~~ and
and	)	02-~~10-960111-01-00~~ 02.10(960104)0014.01.0
	)	Weather Emergencies
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Rachel Livengood, Manager of Dispute Resolution, Office of Collective Bargaining
Mike Duco, Second Chair, Assistant Chief Legal Counsel

For the Union:

Brenda Goheen, Staff Representative
Pat Howell, Witness
Judy Roberts, Witness
Betty Bidgood, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

Article 13, Section 13.15 of the agreement between the State of Ohio and Ohio Civil Service Employees Association, AFSCME Local 11 deals with emergencies due to weather or other conditions. It provides that employees who are not required to report to work or are sent home due to an emergency are to be granted paid leave; essential employees who are required to work are to be paid time and one-half; and employees who work overtime are to be granted double time. The contract states that "an emergency shall be considered to exist when declared by the Employer."

The state has a weather emergency procedure dated March 15, 1994. It designates the Director of the Department of Public Safety as the person responsible for declaring a weather emergency for state employees. The directive states that "a weather emergency shall be declared when the Director of Public Safety declares travel hazardous on state roadways and highways." It also provides for the designation of essential employees who are required to work regardless of weather conditions and directs that employees be compensated as provided for in any relevant collective bargaining agreement.

County sheriffs in Ohio have the authority to declare a snow emergency. Opinion No. 86-023 of the Ohio Attorney General states that a sheriff may declare a snow emergency and temporarily close county and township roads and that an individual who violates a sheriff's order may be subject to criminal prosecution under Section 2917.13 of the Ohio Revised Code. Pursuant to this ruling, the Buckeye State Sheriff's Association established three levels of snow emergencies. A level three snow emergency closes all roadways to non-emergency personnel and indicates that no one should be on the roadways during this condition unless it is absolutely necessary to travel. Under a level three snow emergency, those traveling on the roadways are subject to arrest.

Between January 1 and 8 of 1996 two major winter storms struck Ohio. Sheriffs in approximately 55 counties declared level three snow emergencies which closed county and local roads to non-emergency travel and subjected those on the roads to arrest. Many

state employees did not report to work; some did make it to work; and others were held over to cover for absent employees.

Despite the snow emergencies declared by the county sheriffs, no weather emergency was declared by the Director of Public Safety. As a result, employees who did not report to work were required to use their leave balances to cover their absences; employees who worked were paid straight time; and employees who worked overtime received time and one-half. Many employees complained that emergency conditions existed during the two storms and that employees who did not work should not have had to use their leave balances to cover their absences and that employees who worked were entitled to premium pay under Article 13, Section 13.15.

Because of the potential for the filing of a large number of grievances, the union filed two grievances at step four of the grievance procedure. The first grievance states that on January 1, 1996 and for a number of succeeding days a major snow storm paralyzed numerous counties. It charges that the failure of the Director of the Department of Public Safety to declare a weather emergency was an abuse of discretion and was arbitrary and capricious. The second grievance made the same allegations regarding a snow storm on January 7 and 8 of 1996. Both grievances charged that the state violated Article 13, Section 13.15 of the collective bargaining agreement and requested employees be paid at the applicable rates under the contract and be made whole.

The step four response is dated January 12, 1996. It indicates that under Article 13, Section 13.15 the Director of the Department of Public Safety has the sole discretion to declare a weather emergency. The response further claims that the Director's decision not to declare an emergency was based on its "need to effectively carry out its missions and upon the need to act responsibly and prudently for the taxpayers" and was neither arbitrary nor capricious.

The grievances were appealed to arbitration. The arbitration hearing was held on April 22, 1996. The parties opted not to file post-hearing briefs and the record was closed at the conclusion of the hearing.

ISSUE

The issue as framed by the Arbitrator is as follows:

> Did the state violate Article 13, Section 13.15 of the collective bargaining agreement? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13-WORK WEEK, SCHEDULES AND OVERTIME

* * *

13.15- Emergency Leave

Employees directed not to report to work or sent home due to weather conditions or another emergency shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the emergency. Employees required to report to work or required to stay at work during such emergency shall receive pay at time and one-half (1 1/2) for hours worked during the emergency. Any overtime worked during an emergency shall be paid at double time.

An emergency shall be considered to exist when declared by the Employer, for the county, area or facility where an employee lives or works.

For the purpose of this Section, an emergency shall not considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee.

Essential employees shall be required to work during emergencies. Essential employees who do not report as required during an emergency must show cause that they were prevented from reporting because of the emergency.

UNION POSITION

The union argues that the state violated Article 13, Section 13.15 during two winter storms in January of 1996. It claims that due to emergency conditions employees

who did not work were entitled to paid leave; employees who were required to work or were required to stay at work were entitled to time and one-half; and employees who worked overtime were entitled to double time.

The union contends that there is no doubt that both storms resulted in emergencies. It points out that sheriffs in approximately 55 counties declared level three snow emergencies which means that only emergency travel is permitted and that others on the roads are subject to arrest. The union notes that conditions were so severe that the governor declared Belmont, Darke, and Preble Counties disaster areas.

The union charges that the failure of the state to declare an emergency was an abuse of discretion. It states that it negotiated Article 13, Section 13.15 based on the good faith expectation that an emergency would be declared when one existed. The union maintains that when the state failed to declare the emergencies in January of 1996, employees faced the difficult choice of whether to stay off the roads as directed or to attempt to report to work.

The union relied on the doctrine of detrimental reliance in support of its position. It points out that Gordon D. Schaber and Caude D. Rohwer in Contracts in a Nutshell states:

> The most far reaching application of detrimental reliance has been recognized in a few cases in which a right of action has been found to arise where a party was reasonably induced to rely on general statements and indefinite promises ... During the course of negotiation, one party made promises which were not sufficiently certain to constitute the basis for an enforceable bargaining agreement. However, the promises were sufficient to induce the other party to change position in reasonable reliance. When this foreseeable reliance occurred, an enforceable right was found to exist. (page 107).

The union notes that Schaber and Rohwer further indicate:

> Prevention of injustice is the stated underpinning of detrimental reliance cases. In determining where it might be applicable in a given fact situation it is necessary to determine where injustice will result if remedy is withheld. (page 108).

The union concludes that the state violated Article 13, Section 13.15. It asks that employees who were unable to work have their leave restored, employees who worked or were held over be paid time and one-half, and employees who worked overtime be paid double time.

STATE POSITION

The state argues that there was no violation of Article 13, Section 13.15. It points out that this section sets forth rights negotiated by the union concerning overtime, compensatory time, call-back pay, and other items. The state acknowledges that the union secured certain benefits regarding compensation in an emergency but contends that the union did not acquire any rights regarding the declaration of an emergency. It stresses that the right to declare an emergency is an inherent management right which it specifically retained in Article 13, Section 13.15.

The state claims that the Arbitrator should ignore the evidence presented by the union. It states that an established tenet of contract interpretation holds that the use of parol evidence is appropriate only when contract language is ambiguous. The state emphasizes that the contract language at issue is clear.

The state indicates that Article 13, Section 13.15 has been interpreted by Arbitrator Harry Graham. It points out that in OCSEA/AFSCME Local 11 and State of Ohio, Department of Rehabilitation and Correction; Case No. G87-1764; May 14, 1991 he stated:

> 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. (page 6).

The state contends that the Arbitrator would be exceeding his authority under Article 25, Section 25.04 if he were to grant the grievance. It claims that if the Arbitrator

were to determine that an emergency existed, he would be adding to the contract since it clearly states that the employer determines when an emergency exists.

The state makes two observations regarding the declaration of a level three snow emergency by a county sheriff. First, it notes that the jurisdiction of a sheriff is limited to county and local roads so that a road closure does not apply to state or interstate highways. Second, the state points out that under a level three snow emergency it indicates that "employees should contact their employer to see if they should report to work."

The state dismisses the union's claim that it made a promise to declare an emergency. It states that the union provided no testimony regarding the basis of such an agreement or the intent of the negotiators. The state maintains that such testimony would be irrelevant because the dispute is not about fairness but its reserved right to declare an emergency.

The state concludes that the grievances should be denied.

ANALYSIS

Article 13, Section 13.15 provides for emergency leave. It states that employees who do not work because of weather conditions are to be granted emergency leave at their regular rate, employees who work are to be paid time and one-half, and employees who work overtime are to be paid double time. The section further states that "an emergency shall be considered to exist when declared by the Employer."

It is clear that two winter storms in January of 1996 created very hazardous driving conditions. Sheriffs in approximately 55 counties declared level three snow emergencies. This means that only essential travel is permitted and that those on the roads are subject to arrest.

Despite the severity of the two storms and the declarations of level three snow emergencies, the state did not declare an emergency. The union charges that the state's

failure to declare an emergency was arbitrary, capricious, and in bad faith. The state contends that the clear contract language as interpreted by Arbitrator Harry Graham establishes that the state has the sole discretion to declare an emergency.

Arbitrator Graham's decision involves the same circumstances as the instant case. On April 4, 1987 a heavy snow fell on Marion County leading the sheriff to close roadways to all but necessary travel. When no weather emergency was declared by the employer, correction officers at the Marion Correctional Institution filed a grievance requesting emergency leave and higher rates of pay for working during an emergency.

Arbitrator Graham denied the grievance. He stated:

> 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. (page 6).

The effect of prior awards has been the subject of considerable attention. The fourth edition of Elkouri and Elkouri's How Arbitration Works states:

> ...An award interpreting a collective agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.
>
> This was emphasized by Arbitrator Whitley P. McCoy, who declared that where a "prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision...
>
> Arbitrator Russell A. Smith urged that a proper regard for the arbitration process and for stability in collective bargaining relations requires acceptance by an arbitrator, even though he is not technically bound, of any interpretation of the parties' contractual relations rendered by a previous arbitrator, if on point and if based on the same agreement.
>
> It seems obvious that the binding force of any award ordinarily should not continue after the provision upon which it is based is materially changed or is eliminated entirely from the parties' agreement. However, if the agreement is renegotiated without materially changing a provision that has been interpreted by arbitration, the parties may be held to have adopted the award as a part of the contract. Indeed, the binding force of an award may even be strengthened

by such renegotiation without change. In this regard, Arbitrator Edgar A. Jones, Jr., explained:

> [T]he arbitration process would hardly survive the erosion of confidence in its effectiveness were second-thought arbitrators freely to set aside first-impression arbitral awards so that awards would lose their acceptability as being final and binding. It is not surprising, therefore, that it is unusual, indeed rare, for a later arbitrator to find the earlier award not final and binding. Even so, however, there do arise circumstances in which the occasion seems compelling to the later arbitrator to disregard or modify the earlier award. After all, it is the integrity and intelligence of each arbitrator that are commissioned by the disputants who jointly select each to make his or her own appraisal and decision.
>
> But this dilemma for the second arbitrator largely if not wholly disappears once the agreement has expired after issuance of the prior award. For upon its expiration the opportunity exists in negotiations to alter, amend or modify any arbitral interpretation deemed to have warped or otherwise sufficiently mutilated the intent of the earlier draftsmen as to warrant that effort by the disadvantaged party. Of course, such an effort has its costs too and they may militate against undertaking it. But that is a decision for the bargainer to make in terms of its own priorities in the overall bargaining relationship. That the earlier award remains untouched by later negotiations, or even demonstrably unmentioned in them, in no wise signifies that a cost-benefit appraisal has not been made, however crude or casual it may have been.
>
> So an arbitrator who is summoned to office by the parties in the course of a subsequent term of their agreement, and is importuned by one of them to overturn that earlier award, should feel considerably relieved of any concern for possible error having done violence to the intent of the parties by the earlier arbitrator. That latter's award has now had the ultimate review of subsequent collective bargaining negotiations and has survived the test for whatever reason. (pages 425-427 - Emphasis added)

While the Arbitrator believes on the basis of the above quoted passage he cannot sustain the two class action grievances before him, he recognizes that circumstances may exist in certain cases which call for relief to individual employees or a specific group of employees. The Arbitrator, therefore, will allow employees ten working days from the date of this decision to file individual grievances and will retain jurisdiction for 30 days to consider any disputes not resolved by the parties.

AWARD

Grievance nos. 02-10-960104-01-00 and 02-10-960111-01-00 are denied. Individual employees will have ten working days from the date of this decision to file grievances alleging a violation of Article 13, Section 13.15 during the two storms in early January of 1996. The Arbitrator will retain jurisdiction for 30 days to consider any disputes not resolved by the parties.

Nels E. Nelson
Arbitrator

May 28, 1996
Russell Township
Geauga County, Ohio