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VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 17-00-020319-11-01-14
and	*	Timothy J. Cashin, Grievant
	*	Case No. 17-00-020319-12-01-14
INDUSTRIAL COMMISSION	*	Corey A. Sines, Grievant
OF OHIO	*	
	*	Stand-By Pay

* *

APPEARANCES

For the Ohio Civil Service Employees Association:

Lori R. Collins, Staff Representative
Ohio Civil Service Employees Association

For the Industrial Commission of Ohio:

Richard G. Corbin
Andrew Shuman
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on April 1, 2003, at the offices of the Ohio Civil Service Employees Association in Columbus, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association (the "Union") were the Grievants, Cory A. Sines and Timothy J. Cashin. Also in attendance for the Union were Director of Arbitration Herman Whitter and Chapter Steward Tim Huntsman. Testifying for the Industrial Commission of Ohio (the "State") was Network Administration Supervisor Robert Osborne. Also in attendance for the State was Human Resources Manager Laurie Worcester. A number of documents were entered into evidence: Joint Exhibits 1-4, Union Exhibits 1-3 and State Exhibit 1. The oral hearing was concluded at 1:30 p.m. following oral argument, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns whether certain employees of the Industrial Commission of Ohio are entitled to stand-by pay for the time they are "on call" outside normal working hours.

At the time the grievances were filed, Corey Sines and Timothy Cashin worked in the Information Technology Section. As Network Administrator 3 ("NA3") and Network Services Technician 3 ("NST3"), their duties included troubleshooting, responding to server downtime, providing customer support and performing upgrades on the network which encompasses sixteen sites across Ohio. Some of these duties are performed outside normal working hours on an as-needed basis. The position descriptions for each, which the grievants were given at the time they interviewed for their positions, state, "Responds to 'production down' problems on a 24 hour basis." Grievant Sines testified he knew he would be working stand-by when he saw this on his position description. Both grievants testified that at their pre-employment interviews the

importance of responding to primary server downtime on a 24-hour basis was stressed. Upon being hired, Grievant Sines in December 2000 and Grievant Cashin in January 2001, each was given a pager, cellphone and laptop computer to facilitate their responses. After Cashin came on board there were times all four people on the call list responded (both grievants, their supervisor Robert Osborne and another NA3) and times both grievants bumped into each other. A system was therefore worked out at the grievants' suggestion whereby the two of them alternated weeks as first responder. They also coordinated vacations to assure coverage. The other NA3, though on the call list, has less Novell network expertise than the grievants and so was not included in the rotation. Both grievants testified they got many more calls than their time records show because they did not record small amounts of time. The State submitted time sheets for the period of March 9 through December 28, 2002, which it says shows fifteen occurrences where the grievants dialed in and took pay for it. The time they did claim was compensated under Article 13.08 of the Collective Bargaining Agreement.

Both grievants testified about the effect on their lifestyles. Sines said he would postpone some activities such as travel because it was his week to cover. However, he did take vacations and traveled frequently. If he was outside the paging area he would tell his supervisor and Cashin would take over. Characterizing himself as a social drinker, he stated he did not change his drinking habits when he thought he was on stand-by which he believed was the entire time. Sixty to seventy-five percent of the on-call work was done from home via his laptop.

Grievant Cashin testified he was not placed on restrictions such as how far he could travel. He did travel some and there are cellphone blackout areas. He was never refused vacation, compensatory time, or personal leave. He does drink occasionally. He was not told

one way or the other about drinking but he understood he was to hold himself ready to work. Lifestyle changes for him were the interruptions while at a restaurant, visiting with friends or sleeping when he would have to get to a computer, dial in, find out what, if anything, was wrong, and fix it. Most of the time he was able to use his laptop at home. He said he felt restricted, but knew that if he did not respond someone else would. If he got a second page, he would call to see if it was covered.

Neither grievant was ever disciplined for not responding and neither was ever told they would receive discipline if they failed to respond. On the other hand, they were never told until after the grievances were filed that no discipline would result from failing to respond. But they were also told, they said, that if they never responded they would not be fulfilling their duties. Cashin thought this meant their performance evaluations would suffer. Both grievants stated that until that point they believed discipline was implied in the position description and statements such as "If the primary server goes down you better respond" and "I don't care who responds but...." Sines testified there were times he did not respond and he was not disciplined for it.

Robert Osborne, Network Administrator Supervisor and supervisor of the grievants, testified that he did the same work as the grievants from May 1990 until his promotion in November 1998. Never once, he said, was he disciplined for failing to respond to a page and there were never any travel or physical condition restrictions placed on him. He agreed that responding to downtime is a responsibility set forth on the grievants' position descriptions and stated that he conveyed this when he interviewed them by asking if they were able to respond on a 24/7 basis. However, one option for keeping the network functioning is a supervisor's response. He, himself, has responded when neither of the grievants did and sometimes he

responded just to see what was happening. Some pages have not been answered and he is not aware of any bargaining member ever being disciplined for it. Most of the fixes are enabled by a laptop or home computer with compensation under the call-back pay provision of the Collective Bargaining Agreement. He testified he has never stated in writing or orally that the grievants were on stand-by. Neither has he told them they "better respond," nor has he ever placed any travel, distance, physical condition or time-to-respond conditions on them. He tries to be flexible on their leave requests, he said. He further stated his group has operated this way since 1990. Osborne agreed that after the grievants bumped heads early on and asked if they could rotate as first responders, he agreed. His goal was to make sure the system was responded to, but the grievants' plan does not mean others cannot take the call. After the grievances were filed he met with the grievants and stated that the section operates on a call-back basis and that he has not and never will discipline for failing to respond. He then covered how to respond to pages, he said, saying that one option is a supervisor's response. If necessary, the cellphones could be turned in at the end of the day. He testified that Cashin said he preferred the present arrangement because it was working.

Grievances were filed on behalf of both grievants on March 19, 2002, about a year after Cashin told Sines they were working stand-by as he did when he performed similar work at the Ohio Environmental Protection Agency and was given stand-by pay for it. These grievances were thereafter fully processed to arbitration where they presently reside for final and binding decision on the following issue: *Are the Grievants entitled to stand-by pay in accordance with Article 13.12 of the Collective Bargaining Agreement? If so, what is the remedy?*

III. PERTINENT CONTRACT LANGUAGE

13.08 - Call-Back Pay

Employees who are called to report to work and do report outside their regularly-scheduled shift will be paid a minimum of four (4) hours at the straight time regular rate of pay or actual hours worked at the overtime rate, whichever is greater providing such time does not abut the employee's regular shift. Call-back pay at straight time is excluded from the overtime calculation. Work which is to be performed at the employee's residence shall not be subject to call-back pay, but shall be paid at the applicable regular or overtime rate for the time worked.

An employee called back to take care of an emergency shall not be required to work for the entire four (4) hour period by being assigned non-emergency work.

13.12 - Stand-By Pay

An employee is entitled to stand-by pay if he/she is required by the Agency in writing to be on stand-by, that is, to be available for possible call to work. If it is not practical to notify an employee in writing regarding stand-by status, the Employer may utilize oral or telephone means. Stand-by status may be canceled by telephone, providing written notice of such cancellation is provided to the employee within forty-eight (48) hours. An employee entitled to stand-by pay shall receive twenty-five percent (25%) of his/her base rate of pay for each hour he/she is in stand-by status. Stand-by time will be excluded from overtime calculation.

IV. ARGUMENTS OF THE PARTIES

Argument of the Union

The Union's position is that by the criteria set forth and applied in two previous panel decisions[1], the grievants qualify for stand-by pay. The position description constitutes written notice, implying that the incumbents are obligated to respond. The class series, it points out, applies to all agencies, not just the Industrial Commission. Management implied that failure to respond would result in discipline and the grievants truly believed this. The grievants took to heart Article 13.12's language "to be available for possible call to work" and changed their

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[1] *Ohio Department Mental Retardation/Developmental Disabilities v. OCSEA/AFSCME Local 11, D. Cutlip, Grievant.* G-86-0249 (1988) (Pincus, Arb.) and *Ohio Environmental*

lifestyle to accommodate the requirement. The primary responsibility for responding to downtime fell on the grievants because the third man did not have the required knowledge. The only reason they were not given the pay called for in Article 13.12 is because Management did not know about stand-by pay. All they knew until the grievances were filed was call-back pay and then they tried to clean up the violation by telling the grievants some new rules of engagement. The Union submits that the State violated Article 13.12. It asks that the grievances be granted and the grievants awarded stand-by pay back to ten days prior to the grievance dates.

Argument of the State

The State contends that the Union failed to carry its burden to show a contractual violation. The only evidence it presented consisted of implied understandings and beliefs long before the grievances were filed.

The State submits that the Contract sets three different standards with three different levels of pay for work outside normal hours. Stand-by pay has the highest standard because it is the highest pay. It is not based on belief but specific notification. The *Gerber* decision set the criteria. Applying them to the grievants' situation shows that they do not qualify: They were not restricted to one location, they were not required to remain well-rested and sober, and they were not warned of nor subject to discipline for failing to respond. Being "on call" does not constitute stand-by status. The second highest standard is that for call-back pay of fours hours at straight time or actual hours at the overtime rate. Since the *Gerber* decision, the parties added the third standard of work performed at home, which is compensated at the applicable regular or overtime

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Protection Agency v. OCSEA/AFSCME Local 11, J. Gerber, Grievant. 12-00-900518-0018-01-13 (1992) (Smith, Arb.)

rate. The State submits that this exactly fits the Industrial Commission's network administration operation.

The State goes on to argue that the class specification and position descriptions are not written notification of stand-by status for all of the class. They merely set the expectation that an incumbent may be placed on stand-by. Whether a person is on stand-by has to be evaluated on a case-by-case or agency-by-agency basis.

The State believes this is just a misunderstanding of two employees who initially did not even know stand-by pay was in the Contract, read about it, and erroneously decided it applied to them based on Cashin's experience at the EPA. The State agrees they are entitled to compensation for responding to pages, but submits that they were properly compensated. It says that it has the right under FLSA to issue pagers to employees and expect them to respond. If they do not, they are not subject to discipline as shown by thirteen years of history.

The State concludes that unless they had major restrictions placed on them while they were away from work, they were not entitled to stand-by pay. Since they did not, there was no violation and the grievances should be denied.

V. OPINION OF THE ARBITRATOR

As in the *Cutlip* and *Gerber* decisions, this case requires the arbitrator to determine whether the grievants were engaged to wait or were waiting to be engaged. If the former, they were in stand-by status and were entitled to the compensation. If the latter, compensation under the call-back pay provision was appropriate. Inasmuch as the meaning of "stand-by" has been

addressed before, the Arbitrator need only apply the tests set forth in those decisions to the facts at hand.

The first of these is whether the employee was required to be in stand-by status. The Contract says the command is to be in writing, but permits oral and telephonic means where written is impractical. However, as found in *Gerber*, the employer cannot avoid stand-by compensation by simply using terms other than "stand-by" if its communication (by whatever means) clearly conveys a command to be ready and available to work. The phrase in the position descriptions and class specifications here do not do that. They merely place an employee on notice that they may be required to be on call or available for work 24/7. In some agencies NA3s and NST3s may be on stand-by 24/7 during their turn, in others, they may not. It would depend on the particular agency's needs and alternatives for meeting those needs. Similarly, I am unable to find that the supervisors' questions during the interview and their later comments constituted notice. One might draw the inference the grievants did from what was allegedly said, especially if one were coming from a 24/7 stand-by environment, but the words allegedly used do not necessarily convey an order as the Dalton memo in the *Gerber* case did. In the interview, for example, it is at least equally likely that the supervisors were conveying to the prospective employees the importance of the network functioning around the clock and verifying whether they were willing to take requests and to act on orders when and if issued when "on call." This conclusion, that there was never any requirement for readiness, is supported by the fact that never, in at least thirteen years, has the Commission ever disciplined anyone, including the grievants, for failing to respond.

The second element is availability for call-out. An employee who is engaged to wait is not free to use this time for his own purposes. If he is so restricted in his movements or his physical condition, or if calls come so frequently that he cannot pursue his own personal interests and activities in a reasonably free manner, he is working for his employer. Although the grievants did alter their lifestyles to some degree to accommodate the work needs and were sometimes inconvenienced, they were nevertheless largely free of any but self-imposed restraints based on their mistaken belief and their commendable work ethic. They were not required to be sober and neither one felt compelled to alter their drinking habits, unlike Gerber who was required to remain sober. They did not have to return pages within a certain period of time, or even at all, and even went out of cellphone range. They were not tied to a specific location or required to stay within thirty minutes of critical work tools, as Gerber was. They traveled freely and even, for one grievant, frequently and did not have to get permission to do so. I am unable to determine the frequency of interruptions because one grievant resigned before the case came to arbitration and the other was on disability leave for a period of time. The most that can be said is that pages, at least, were more numerous than compensable occurrences and sometimes repeatedly disrupted sleep or other personal activity. The short rotation and call lists weigh against the Employer. Despite these inconveniences and concerns, the grievants were largely able to lead their normal lives and were thus not subject to such restrictions that they were engaged in their employer's business rather than their own during their turns in the rotation.

VI. AWARD

For the reasons given, the grievants are not entitled to stand-by pay under Article 13.12. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
April 23, 2003

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