

CONNECTICUT STATE EMPLOYEES ASSOCIATION
(P-4 Bargaining Unit, CSEA #: 13,441; State # 15-3436)
(DOT Institutional Grievance – Alternate Work Schedule Program)
AND
STATE OF CONNECTICUT
Department of Transportation

Post Hearing Brief
For the Connecticut State Employees Association

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ISSUE

What shall be the disposition of the grievance concerning DOT Alternative Work Schedules (OLR# 15-3436/Union# 13,441) including the enumerated items as set forth the on the grievance form and amendment dated January 9, 2006 pursuant to Article 28 of the P-4 Contract?

SIDE STIPULATION

The Union shall not seek, nor shall the arbitrator grant a retroactive remedy.

RELEVANT CONTRACTUAL PROVISIONS (From Joint 1)

ARTICLE 28 – LABOR MANAGEMENT COMMITTEE

Section Three. Topics for the Labor Management Committee to consider for agenda items are improvement of the parties' relationship, and efficiency and increased productivity. The parties recognize that the introduction of flex-time may facilitate this goal. Accordingly, they agree that one of the specific subjects to be discussed is the feasibility of the development and implementation of flexible work schedules, including a four-day work week, at the agency level. Consideration for implementation will be predicated on the principle that schedules must meet the mutual needs of the agency and employees and involve no cost or expenses other than existing base wages and benefits.

The topic of career mobility shall be an appropriate topic for the labor management committee.

Section Four. The parties agree to continue using the labor management committee for establishing alternate work schedule programs including pilot programs. In the event there is not a satisfactory resolution by the labor management committee regarding alternate work schedule programs, the outstanding dispute may be submitted to arbitration pursuant to Article 14 – Grievance Procedure.

EXHIBITS

Joint

1. The Engineering, Scientific, and Technical (P-4) Contract between the State of the Connecticut and the CSEA.
2. The grievance, the grievance amendment, and the step 3 answer.
3. Alternate Work Schedule Agreement between the Union and DOT dated January 2004.
4. E-mail dated June 3, 2005 from DOT Human Resources Administrative Assistant Kim Gibilisco to Union Representative David Glidden and P-4 President Ned Statchen. Gibilisco indicates that an attached document is the “Alternate Work Schedule that will best suit its needs while trying to accommodate employees.” In addition she indicates that, if the Union does not agree, the signature line will be deleted.
5. Alternate Work Schedule Program for P-4 employees unilaterally implemented by the DOT on June 13, 2005.
6. Slightly revised Alternate Work Schedule Program for P-4 employees unilaterally implemented by the DOT on June 28, 2005.
7. Report of Meeting documents for Labor/Management meetings held on January 21, 2005, January 26, 2005, and March 2, 2005.
8. Packet of the P-4 job descriptions that are most utilized by the DOT.
9. CSEA/P-4 Institutional grievance dated August 1, 2002 and filed against the DOT regarding Alternate Work Schedules.
10. Excerpt of Arbitrator Robert M. Glasson’s 2001 P-4 interest arbitration award. The excerpt is in regard to the issue of Alternate Work Schedules.

11. Agreement dated January 1993 between the Union and DOT regarding a four-day workweek in Surveys.
12. Agreement dated August 1990 between the Union and DOT regarding alternate work schedules in Planning, Public Transportation, and Rights of Way.

Union

1. State Alternate Work Schedule Program proposal dated March 2, 2005.
2. Union Alternate Work Schedule Program proposal for the DOT main building dated March 31, 2005.
3. Union Alternate Work Schedule Program proposal for the DOT District Offices and Lab dated March 31, 2005.
4. Alternate Work Schedule Program for P-4 employees in the Department of Information Technology.
5. Alternate Work Schedule Program for P-4 employees in the Department of Environmental Protection.
6. Work schedule summary for P-4 DOT employee Peter Macher.
7. Macher's performance appraisals covering the period between September of 2000 and September of 2006.
8. Alternate Work Schedule Request forms submitted by P-4 DOT employee Jacob Weiss covering the period between January of 2004 and June of 2005.
9. Weiss's performance appraisals covering the period between September of 2003 and August of 2005.
10. E-mail dated June 15, 2005 from Sandra Richardson to P-4 DOT employee Steven Bates and several others. The e-mail outlines "Construction Rules for AWS Participation."
11. Packet of all of the 2005 employee appeals submitted by P-4 DOT employees that had their Alternate Work Schedule request denied.

12. Letter dated July 21, 2005 from Union Staff Representative David Glidden to DOT Personnel Administrator Vicki Arpin inquiring regarding the appeal process for schedule request denials.
13. E-mail and attachment dated August 25, 2005 from P-4 President Ned Statchen to DOT manager Lewis Cannon. Statchen indicates that, pursuant to their previous discussion, he has attached a draft of the appeal process for schedule denials.
14. E-mail exchange from February of 2006 between Statchen and Arpin and pertaining to the appeal process for schedule denials.
15. E-mail dated March 6, 2006 from Statchen to employees that had appealed a schedule denial. Statchen informs the group about how the appeal process will be conducted.
16. Document dated March 22, 2006 and generated by Statchen. Statchen indicates his observations regarding the conduct of the appeal process.
17. Agreements dated June 1993 between the Union and DOT regarding a four-day workweek in Bridge Safety.
18. Alternate Work Schedule Request forms submitted by P-4 DEP supervising engineer Stephen Anderson covering the period between June of 2006 and June of 2008.
19. Phone directory for the DEP Bureau of Air Management. Supervisors are color coded according to their work schedule.
20. Organizational charts from the DEP's Bureau of Air Management.
21. Alternate Work Schedule Request forms submitted by P-4 DOT employee Michael Hogan covering the period between January of 2004 and December of 2007.

State

1. Union Initial Proposals for the P-4 Contract Negotiations dated December 6, 2004.
2. Documentation showing that the Union withdrew three of its 2004 contract proposals pertaining to alternate work schedules.

3. Excerpt of Arbitrator Peter A. Prosper's 2006 P-4 interest arbitration award. The excerpt is in regard to the issue of Alternate Work Schedules.
4. Documentation showing that, during contract negotiations, the State and the Union agreed to extend P-4 contract language contained in Article 28, sections 3 and 4.
5. Letter dated July 27, 2005 from DOT Personnel Director Administrator Vicki Arpin to Union Staff Representative David Glidden regarding the appeal process for alternate work schedule denials.
6. Document titled "Example of a biweekly for day work week schedule with a holiday."
7. Breakdown of P-4 DOT supervisory employees by job title as of July 17, 2007.
8. Breakdown of P-4 DOT employees by bureau as of July 17, 2007.
9. Excerpt from the DOT webpage listing the agency's missions and goals.
10. Alternate Work Schedule Request form submitted by P-4 DOT employee John J. Brown Jr. covering the period between January of 2006 and June of 2006.
11. Alternate Work Schedule Request form submitted by P-4 DOT employee John R. Giannini covering the period between July of 2005 and December of 2005.
12. Alternate Work Schedule Request form submitted by P-4 DOT employee Randolph P. Libatique covering the period between July of 2005 and December of 2005.
13. Alternate Work Schedule Request form submitted by P-4 DOT employee Julie M. Annino covering the period between July of 2005 and December of 2005.
14. Alternate Work Schedule Request form submitted by P-4 DOT employee Elizabeth Leiss covering the period between July of 2005 and December of 2005.

15. Alternate Work Schedule Request form submitted by P-4 DOT employee Mark Bourque covering the period between July of 2005 and December of 2005.
16. Memorandum dated September 21, 2005 from OLR Director Robert L. Curtis to DOT Human Resources Managers Wanda Seldon and Vicki Arpin. The memorandum is in regard to the appeal process for schedule denials.
17. Packet of memoranda, each dated April 11, 2006, from DOT manager Lewis Cannon to employees that had previously appealed the denial of their alternate work schedule request. Cannon informs each that the appeal has been denied.

DISCUSSION

I. Background of the grievance

The instant dispute is in regard to the Alternate Work Schedule (AWS) Program for P-4 bargaining unit members employed by the Department of Transportation (DOT). At the arbitration, current P-4 president and union steward John Vitale provided extensive testimony regarding the background of the dispute.

Vitale testified that there are approximately 1,100 P-4 bargaining unit members employed by the DOT. They are stationed at six different work locations. Approximately half of the employees are stationed at the DOT Headquarters building in Newington. The remaining half is divided among the four District Offices (Rocky Hill, Norwich, New Haven and Thomaston) and the Rocky Hill Lab. The largest group of employees is classified in the Transportation Engineer Series. To a lesser degree, the

DOT employs P-4 members in the Transportation Planner, Property Agent, and Information Technology series (Joint 8).

Article 16 of the P-4 contract deals with hours of work (Joint 1, p. 13). In P-4, employees work a thirty-five hour workweek. According to the contract, the standard schedule is Monday through Friday with starting and ending time between 8:00 a.m. and 4:30 p.m. for office personnel and 7:00 a.m. and 5:00 p.m. for field personnel. Article 28, section 3 of the contract allows for the issue of AWS to be addressed through labor/management committee discussions (Joint 1, p. 20).

In the early 1990s, the Union and the DOT entered into a handful of unit specific AWS programs. The first of these, dated August of 1990, provided a menu of 5 day schedules for P-4 employees in the Planning, Rights of Way, and Public Transportation units (Joint 12). Another agreement, signed in January of 1993, provided a four-day workweek option for P-4 employees in Surveys (Joint 11). Finally, in June of 1993, the parties entered into an agreement that provided the four-day workweek option to employees working in the Bridge Safety and Evaluation section (Union 17).

Vitale testified that, starting in the late 1990's, the Union began to push for a wider AWS program for the DOT Headquarters. He indicated that the Union was motivated by the success and popularity of the unit agreements in combination with the fact that the largest P-4/DOT group, highway design, did not have an AWS program. Vitale testified that the DOT was completely unreceptive to the idea of expanding AWS options to additional units. For the Union, this meant that the issue was dead because, at the time, the P-4 contract did not include a provision allowing the Union to grieve the matter.

Vitale explained that, as a result of the DOT's unwillingness, the Union decided to seek better AWS contract language during the 2001 P-4 contract negotiations. At interest arbitration, on the issue of AWS, Arbitrator Robert Glasson ruled in favor of the Union's last best offer. In the text of his award, Glasson cited DOT's unwillingness to even meet with the Union on AWS matters as the justification for his conclusion that the Union's

position was more reasonable (Joint 10, p. 112). As a result of the Glasson ruling, a new section 4 was added to Article 28. That provision allows the parties to arbitrate disputes over AWS. Further, it is the contractual provision at issue in the instant matter.

Vitale testified that, armed with this new language, the Union again approached the DOT regarding the issue of expanding AWS options to other units within the DOT. Again, the agency was not receptive to the concept. As a result, the Union filed a grievance under the new language (Joint 9). Vitale testified that, one month prior to a scheduled arbitration on that grievance, the agency relented in its position. In January of 2004, the parties agreed to a new AWS Program for all P-4 employees stationed at the DOT Headquarters building (Joint 3).

The new program provided several AWS options including a four-day workweek option, a 5/4 option (meaning a four-day workweek every other week), and a menu of 5-day workweek options. The Agreement did not, however, provide a guarantee that employees would be granted a requested schedule. Item 1a of the Agreement established that any schedule request would be subject to supervisory and management approval “in consideration of agency operating needs” (Joint 3 p. 1). That same provision also included an acknowledgement that some employees “may not be able to participate in this program or in certain schedules.” Further, item 10 of the Agreement established that any denial could only be appealed to the agency labor/management committee for a non-binding recommendation.

Item 16 of the agreement set a duration of one year for the AWS Program. That provision also required the parties to meet within sixty days of the expiration to discuss revisions. Vitale testified that, throughout that year period, very few employee schedule requests were denied. Vitale further testified that, to his knowledge, there was not a single appeal filed challenging a denial.¹ The Labor/Management Committee, of which Vitale is a member, met for the first time in October of 2004. Prior to that date, there had been no indication from management about any problems or concerns with the Program.

¹ State witness Wanda Seldon testified that there was one appeal filed during the first year of the Program.

In fact, at the October meeting, management only raised one concern with the Program. Specifically, according to Vitale's testimony, management representative Wanda Seldon raised a concern about how holiday weeks were being handled. Consistent with Item 14 of the agreement, some employees were maintaining their four-day or 5/4 schedule during a holiday week rather than reverting to a standard five day schedule. Employees were able to do this by using accrued vacation, personal, or compensatory time to augment the holiday. For instance, an employee on a four day work week works four 8 and _ hour days and has a set day off. During a week with a holiday, that employee only receives 7 hours of pay for the holiday, thus leaving him or her short of the 35 hour week by an hour and _. By adding an hour and _ of accrued time to the holiday, said employee can maintain the same schedule and number of hours in addition to having the holiday and the set day off. At the October Labor/Management meeting, Seldon objected to this practice arguing that the agreement did not provide for it. No other issues, however, were raised.

The Labor/Management Committee met again on January 21, 2005. At that meeting, and for the first time, DOT management indicated that it had major problems with the four-day workweek. Management indicated its desire to curtail the option so that employees above the Transportation Engineer 2 level could no longer participate (Joint 7, p. 2). The Union countered by indicating its desire to maintain the popular option for all employees. In light of the disagreement, the parties agreed to extend the Agreement to June of 2005 while continuing to discuss the matter.

The committee met again on January 26, 2005 (Joint 7, p. 4). At the meeting, management outlined some of the reasons behind its desire to curtail the four-day workweek option. Specifically, management representatives indicated that the scheduling of meetings had become difficult and that reduced coverage on Mondays and Fridays was a problem. Management also questioned whether or not the agency had seen the benefit from the program that the Union had indicated would be forthcoming. Specifically, management questioned whether there had been an increase in productivity and a decrease in sick leave usage. Finally, management representative Mike Lonergan expressed that it

would be easier to bar certain job classification from participation than it would be to start denying individual schedule requests (Joint 7, p. 4).

Vitale testified that the Union tried everything possible to maintain access to all of the schedule options. Regarding the problem with scheduling meetings, the Union pointed out that employees often switched their scheduled day off in order to attend a meeting. In fact, item 11 of the original agreement required employees to do so (Joint 3, p. 3). The Union suggested additional language requiring employees to mark their scheduled day off as “tentative” in the shared electronic Outlook calendar. Regarding the coverage issue, the Union suggested that individual units could establish a daily minimum percentage staffing level. Such a requirement would force some employees to choose a day other than Monday or Friday as the set day off. The Union also offered to modify the language so that employees would be required to revert to a five day schedule during a holiday week.

At the next Labor/Management Committee meeting on March 2, 2005, management presented a written proposal (Union 1). The proposal completely removed the four-day workweek option, added the Union’s suggestion regarding the use of Outlook (Union 1 - Item 11), and removed the holiday language allowing employees to maintain a compressed schedule during a holiday week (Union 1 - Item 14).

The parties met for the last time on March 31, 2005, at which time the Union presented two written counter-proposals (one covering the DOT Headquarters and one covering the District Offices and the Lab) (Union 2 and 3). The Union’s “Headquarters Proposal” included language allowing management to establish unit by unit minimum per day staffing percentages (Union 2 - Item 1). The proposal also included a change requiring employees to reapply for their schedule every three months rather than every six months (Union 2 – Item 4). In addition, the proposal included the Outlook language (Union 2 – Item 10). Finally, the Union Proposal struck the holiday language that previously allowed employees on a compressed schedule to maintain that schedule during a holiday week (Union 2 – Item 13). The Union’s “Districts Proposal” was essentially

identical to the “Headquarters Proposal” except that it included a strict prohibition against any construction inspector being able to participate in a compressed schedule (Union 3 – Item 1).

On June 3, 2005, the agency e-mailed a revised Program document to the Union. In the communication, the agency made it clear that there would be no further discussion regarding the matter. The agency simply indicated that this latest iteration would be implemented whether the Union agreed with it or not (Joint 4). The Union did not agree. On June 13th, the agency circulated the new Program to all P-4 employees (Joint 5). On June 28th, the agency re-released the Program with a few additional changes (Joint 6).

The final, unilaterally-imposed Program covers both the Headquarters building and the District Offices/Lab. The opening section of the Program document includes new language restricting certain types of access. It states, “Employees with construction responsibilities will be limited in their AWS participation” (Joint 6, p. 2) In addition, the opening section includes a provision barring employees in certain job classifications from certain schedule options. Specifically, Principal Engineers may not work a four-day or 5/4 schedule. Further, employees at the “Supervising” level are barred from working a four-day schedule. Item 1 of the new Program requires employees to complete a “Suitability Form.” Using this form, the employee must illustrate how the request for AWS will benefit the efficiency, effectiveness and/or productivity of their job, unit, or Bureau. The new Program also includes the language requiring employees to note their scheduled day off as “tentative” in Outlook (Joint 6, Item 10). Finally, the new Program requires all employees on a compressed schedule to revert to a 5 day schedule during any holiday week.

On July 1, 2005, the Union filed the instant grievance stating that it objects to several aspects of the new Program (Joint 2). On January 9, 2006, the Union amended the grievance, adding two additional issues (Joint 2, p. 3). The grievance was not resolved during the earlier steps of the procedure. Subsequently, it was properly filed to arbitration.

II. The issues in dispute

The instant grievance is significantly different than most grievances that are heard at arbitration. That is true mainly because, in this case, the Union is not alleging a violation of the contract. Rather, the Union is applying Article 28, section 4 of the contract which states:

In the event there is not a satisfactory resolution by the labor management committee regarding alternate work schedule programs, the outstanding dispute may be submitted to arbitration pursuant to Article 14 – Grievance Procedure (Joint 1, p. 20).

In the instant matter, the Labor/Management Committee met but was unable to reach a satisfactory resolution. Subsequently, the agency unilaterally imposed a Program. In response, the Union filed the instant grievance objecting to several aspects of the new Program. The resultant arbitration proceeding, therefore, resembles more of an “interest” arbitration than a “rights” arbitration. Neither party has the burden to prove that the contract was or was not violated. Rather, the parties submitted evidence and testimony regarding each of the areas of dispute and now it is the arbitrator’s responsibility to rule on the disputes. In order to make a ruling on any given issue of dispute, the arbitrator must determine which party’s position is the more reasonable.

A. Issue # 1: “Excluded certain classifications from participation in certain schedules.”

The first issue listed on the grievance is, without a doubt, the most paramount issue for the Union. The issue has to do with the agency's decision to bar certain supervisory titles from participation in certain compressed schedule options. Specifically, the agency's Program blocks Transportation Principal Engineers from even applying for the four-day or 5/4 options. Similarly, the Program blocks any employee in a "Supervising" title (Transportation Supervising Engineer, Transportation Supervising Planner, Transportation Supervision Rail Officer and Supervising Property Agent) from applying for the four-day option. It is the Union's position that an employee in any one of these classifications should be able to apply for any of the Program's schedule options and have his or her request considered on its merits by the employee's supervision/management. To blanketly block all such employees from proper consideration is patently unfair and unreasonable.

The Union's position is supported by the fact that, under the previous, agreed-upon AWS Program, many supervisors worked compressed schedules without issue. Several such employees testified at the arbitration. Both Ginny Carpino and Brian Marchi were Supervising Property Agents during the 18 month period that the agreed upon program was in place (Carpino has since accepted a voluntary demotion to Property Agent 2). Because the Program required employees to apply for a schedule option every six months, both Carpino and Marchi applied for the four-day workweek three times. They were approved every time. Both testified that, during their time on the four-day workweek, no one in the chain of command indicated that there was any problem. In fact, both witnesses testified that the compressed schedule had a positive impact on their work. Carpino noted that the longer days provided for valuable quiet time at the beginning and the end of the workday, thereby allowing her to concentrate on certain more complex aspects of her work. Marchi noted that, because his work requires him to travel to field locations, the longer days allowed him to accomplish more work and cut down on travel time. Of course, Carpino and Marchi described how the compressed schedule provided personal benefits as well. Specifically, they both indicated that it

helped them deal with childcare issues. Marchi added that the one fewer day of commuting to work was valuable.

In addition to the testimony of Carpino and Marchi, the Union provided the testimonies of Sebastian Puglisi and Mike Hogan. Puglisi is a Transportation Supervising Planner. He is responsible for supervising a staff of twelve, half of which are in the clerical bargaining unit. Like Carpino and Marchi, during the period of the agreed-upon AWS Program, Puglisi applied for and was granted his request for the four-day workweek three times. He too was never told that there was a problem with him being on the schedule. He testified that, in fact, the longer days were beneficial for him as a supervisor because they more closely matched the schedule worked by his clerical subordinates.² Mike Hogan is a Transportation Supervising Engineer in the Hydraulics and Drainage section of Highway Design. Like the others described here, Hogan was approved to work the four-day workweek throughout the 18-month period covered by the agreed-upon AWS Program. He also received nothing but positive feedback from his management.

After the unilaterally imposed AWS Program was put into place, Carpino, Marchi, Puglisi and Hogan were denied access to the schedule that they had worked successfully for 18 months. On his June 2005 AWS schedule request, Hogan described the unfairness of the prohibition quite succinctly. He wrote:

If there were problems related to the alternate work schedules in other Department units, it is my opinion that the subject employees and supervisors should have been dealt with in an appropriate manner, rather than applying restrictions across the board to employees who conscientiously perform their job duties (Union 21, p. 10).

In one sentence, Hogan effectively communicated one of the Union's key arguments. These four supervisors worked a four-day schedule that was beneficial to both themselves and their management. Clearly, if the schedule was detrimental to operations, their supervisors would have denied their subsequent requests. Instead, they were approved. Now, because some unidentified DOT managers voiced concerns over having

² Clerical employees work a 40 hour workweek.

supervisors on certain schedules, all supervisors are barred regardless of the individual circumstances. That approach is arbitrary and unfair.

In addition to the aforementioned supervisors, the Union provided the testimony of Transportation Principal Engineer Jay Doody. In his role as Principal Engineer, Doody is responsible for overseeing the entire surveying unit in the DOT's District 3 Office in New Haven. His function involves the oversight of approximately 17 other DOT employees. Doody testified that, in 1993, the Union and the DOT entered into an agreement to allow employees in Surveys to work a four-day workweek (Joint 11). He testified that, during the entire period of time that he worked the four-day workweek, there was never any problem. He explained that the existence of a hierarchy of supervisors in the unit insured that there was always someone available to take charge. When State witness Wanda Seldon was asked if she knew of any problems with supervisors in Surveys being on the four-day workweek, she stated that no issues were brought to her attention. Now, because of the new prohibition, Doody may not work any compressed schedule.³ That, considering the fact that he worked a four-day schedule for over 10 years without management ever indicating that it was a problem, defies reason. Doody's situation provides another concrete example supporting the Union's claim that supervisors should be able to apply for any schedule option and have that option considered on an individual basis.

It is important to note that the Union is not completely against the concept of "blanket" denials. The issue rather, is whether or not the blanket denial is an operational necessity. In fact, the Union's 2005 AWS proposal for the Districts/Lab included a blanket denial for construction inspectors. The Union's proposal states:

Furthermore, it is specifically understood that any construction inspector assigned to an active construction project shall not participate in any compressed schedule (Union 3, p. 1).

³ Principal Engineers are barred from both the four-day and the 5/4 options.

The reasoning behind the Union's proposal, as acknowledged by State witness Seldon during cross-examination, is that construction inspectors may not work a compressed schedule because they must work the schedule of the contractors that they inspect. Because the contractors work a five-day week, so too must the construction inspectors. Because there is a concrete, bona fide operational reason at the core of this issue, the Union conceded (and even proposed) that the blanket denial was a necessity. In the case of the supervisors, however, no such concrete, bona fide operational reason exists. If it had, none of the aforementioned supervisors would have been allowed to work a compressed schedule in the first place. Or, if they had been allowed, the schedule would have been halted right away rather than being re-approved multiple times. The agency's blanket denial of supervisors is simply arbitrary and therefore, unreasonable.

Regarding this issue of the bar against supervisors, the State presented the testimony of Assistant Human Resources Director Wanda Seldon. Seldon testified that, when the agreed-upon AWS Program was coming to an end, she asked managers to provide feedback regarding the Program. She testified that, after she inquired, "the floodgates opened." She indicated that managers felt that the agency was too short-staffed to support the four-day workweek. She said that managers felt that too many supervisors were out on Mondays and Fridays. Further, she testified that scheduling meetings had become "a nightmare." One key problem with Seldon's testimony, aside from the fact that it is hearsay, is the fact that she did not reference a single Manager's name, nor did she provide even one concrete example from the "flood" of complaints she received. In other words, the State failed to produce a single shred of first hand evidence or testimony supporting its claim. The important benefit of access to compressed schedules for supervisors should not be removed on the basis of vague, unsupported pronouncements.

There are additional flaws in the State's claim. In its bluster over the issue of scheduling meetings, the State fails to recognize a key component of the previous, agreed-upon AWS Program. Item 11 of that agreement required employees to make

accommodations to meet operating needs, including attending meetings during scheduled time off (Joint 3, p. 3). Both Union witnesses Carpino and Hogan indicated that they had switched days off in order to attend meetings. It is reasonable to conclude that their flexibility regarding this issue played some role in their being able to continue on the four-day schedule for 18 months. Despite the clear language in item 11, the Union proposed even stronger language which was adopted by the State. Specifically, the Union proposed language requiring employees to note their scheduled day off as “tentative” in the shared, on-line scheduling system known as Outlook. The concept behind the Union’s idea is that, by noting their scheduled day off as “tentative,” each employee is acknowledging the very real possibility that they may have to come to work on that day. The State adopted the Union’s suggestion, but failed to recognize that our motivation behind proposing it was to alleviate the alleged meeting problem so that supervisors could maintain access to all compressed schedule options.

The State also failed to recognize important aspects of P-4 work. P-4 DOT employees are not assembly line workers judged by the number of widgets they pump out per minute. Rather, they are professional engineers, planners, and property agents that, by and large, do not require a supervisor to be constantly present, hovering over them every hour of the day. If and when a problem arises, there is a hierarchy of supervisory and lead employees to address it. This hierarchy creates a situation whereby, if schedules are approved in an integrated fashion, there is always an employee available to take charge. Union witnesses David Harms, Jacob Weiss, and Veronica Calin are all classified as Transportation Engineer 3’s working in Highway Design. Each indicated that they are responsible for supervising a “crew” of lower level engineers. In addition, each report directly to a Transportation Supervising Engineer. Harms testified that, during overtime hours, he is often the only employee present to provide supervision. Considering the fact that Harms is allowed to be the only oversight person present during overtime hours, it is inconsistent and unfair to then require that the Supervising Engineer must be in the office every day of the week. Again, the hierarchy

insures that there is always someone available to take charge. Of course, if the system does not work in a given unit, then management can take the initiative and deny schedule requests based on concrete operational reasons.

Through the testimony of Brian Marchi, the Union raised another counter to the State's bar against equal access. Marchi works as a Supervising Property Agent in the Office of Rights of Way. He supervises a group of Property Agents, all of which work in the field. Needless to say, he does not supervise through direct observation. Rather, he supervises by monitoring work output and quality. He testified that the longer days allow him to perform more work and spend less time traveling. Considering the facts, it is not appropriate to deny Marchi a four-day workweek because he is needed in the office all five days. The testimony suggests that he can perform his job more effectively while working a four-day workweek. Of course, if he is found to be ineffective on that schedule, his future requests can be denied.

A key point raised throughout the Union's argument is that management retains the right to deny any individual schedule request. The original, agreed-upon Program allowed for management to deny any request based on operational needs. Through the Labor/Management discussions the Union never sought to remove this key managerial right. In fact, in the Union's written proposals, the right for management to deny on an individual basis was not curtailed in any way. The reality is, if the Union prevails on this issue, management may still deny every supervisor's request on an individual basis. A denial may not be grieved, but rather, can only be appealed to the Labor/Management Committee for a non-binding recommendation. This is why the Union's position is infinitely more reasonable. Our claim is merely for supervisors to have the ability to apply and have their individual requests considered.

The fact that management refused to accept this approach defies reason. If management retains the right to deny individually, why is a blanket denial necessary? The answer stems from the fact that a blanket denial is much easier. With the blanket denial, a manager does not have to look a supervisor in the eye and tell him or her that the

request is denied. During the Labor/Management discussions, DOT Manager Mike Lonergan revealed that this “easier” issue was part of the motivation behind the agency’s position. The Report of Meeting for January 26, 2005 states:

Mike stated he did not want to be a “Hall Monitor” in regards to denying employees their chosen schedule. It would be much easier if the agreement stated that certain level employees could not be on a particular schedule. Something like TE III’s and above could not do a 4-day schedule (Joint 7, p. 4).

Lonergan’s comments help to bolster the Union’s position. Management should not shy away from the duty to manage due to issues of ease. More importantly, supervisors should not be blocked from certain schedules because managers would rather not have to deny certain individuals.

Another important aspect of Issue # 1 to consider has to do with the matter of equity within the P-4 bargaining unit. The largest P-4 employing agencies are the DOT, the Department of Environmental Protection (DEP), and the Department of Information Technology (DoIT). The AWS Programs for DEP and DoIT were submitted as exhibits (Union 4 & 5). Both agreements include a four-day and a 5/4 option. Neither agreement includes a prohibition against supervisors working certain schedules. Regarding this issue, the Union presented the testimony of DEP P-4 employee Stephen Anderson. Anderson works in the DEP’s Air Bureau as an Environmental Protection Supervising Air Pollution Control Engineer. In addition, Anderson is a P-4 Union Steward. Anderson indicated that he has worked a four-day workweek for a couple of years. No one from his chain of command has indicated that the schedule is a problem. Anderson explained that he supervises assigned engineers by tracking and monitoring the quality and quantity their work. Anderson also testified that he researched the usage of compressed schedules by Supervisors in the Air Bureau. He discovered that, of the sixteen supervisors in the Bureau, eight worked a four-day workweek, four worked a 5/4 schedule, and two worked a five-day workweek. Anderson conceded that, per the AWS Program, any employee could be denied based on agency operating needs. The Union’s argument, therefore, is

that if Supervising Engineers at the DEP have the ability to request a compressed schedule and have that request considered on its merits, so should Supervising Engineers at the DOT. At the arbitration, the State argued that the comparison to DEP is inappropriate because the agencies have different missions. This argument is flawed. The employees are in the same bargaining unit and are covered by the same contract. Both groups include professional engineers that interact with various outside entities including the public and regulated communities. The fact that access is granted at the DEP should lead to the conclusion that access should be granted at the DOT.

During her direct-examination of Wanda Seldon, the State’s advocate asked, “Why can’t everyone have their desired schedule.” Seldon replied stating, “Each unit needs to be able to look at it based on their task and mission. Rights of Way, Traffic...each need to be able to decide if some could be on it and some could not be on it.” The Union could not agree more.

We ask, therefore, that the following portion be stricken from the current AWS Program so that employees in the listed classifications have the ability to apply for any of the Program options and have their application considered on the merits.

Trans. Principal Engineer	eligibility restricted to 5 day schedule option
Trans. Supervising Engineer	eligibility restricted to 5 or 5/4 schedule option
Trans. Supervising Planner	“ “ “ “ “
Trans. Supervising Propert Agent	“ “ “ “ “
Trans. Supervising Rail Officer	“ “ “ “ (Joint 6, p. 2)

B. Issue # 2: “Required employees to complete a “suitability form.”

As part of the agency’s unilaterally imposed AWS Program, employees applying for an AWS have to complete a “Suitability Form.” It is important to note that the issue of a suitability form was not raised during the Labor/Management discussions (Joint 7) nor was it included in the agency’s initial written proposal (Union 1). Therefore, the

Union never had an opportunity to share its concerns with the agency prior to the imposition of the requirement. The form states:

The employee must illustrate how the request for AWS will benefit the efficiency, effectiveness, and/or productivity of their job, unit or Bureau (Joint 5, p. 7).

In her June 13, 2005 memorandum to all P-4 employees, Wanda Seldon added additional direction regarding the form. She wrote:

This section is most suitable for those employees selecting an option of 4/4 or 5/4, **unless** there are unique circumstances that would need to be addressed for those employees selecting one of the five (5) day schedule options. The intent is to describe how you can meet the mission of your unit and still have an Alternate Work Schedule (AWS). Using examples such as reduced vehicle miles, meeting the Department's long range goals, fewer paid breaks, etc.. are perhaps global benefits but will not be suitable illustrations to address specific job duties, responsibilities and operational demands of your job (Joint 5, p. 1).

It is the Union's position that the suitability form is unreasonable and that it represents a set-up for future denials.

Seldon's memorandum removes many of the key types of benefits that are associated with AWS. In fact many of the benefits associated with AWS are "global." Seldon's direction unfairly blocks employees from being able to cite commonly acknowledged benefits like increased morale and more effective recruitment and retention. Seldon's direction seems to indicate that the employee must provide examples that are somehow measurable. That represents a fundamental misunderstanding of AWS. In short, AWS is important today because the working world has changed. Most families require both partners to work in order to makes ends meet. Flexibility in work schedules is necessary in order to juggle the requirements of work, childcare, and eldercare. These benefits are predominantly enjoyed by the employee, but it would short-sighted to not recognize the inherent (and yes, global) benefits that AWS provides to employers. The reality is, the employer is not always going to see a measurable benefit when an employee

is on an AWS. For example, an already highly productive employee is probably not going to produce more output when working the same number of hours. Similarly, an employee who does not take much sick time probably will not be able to produce a reduced amount of sick leave usage by going on a compressed schedule. In fact, if that same employee becomes sick, he or she is going to use more sick leave. That increased leave however, would obviously have nothing to do with the schedule.

The Union's concern is that the agency will use the form as a set-up for future denials. If the employee is unable to meet the specific benefits listed, will he or she be denied? Simply, that should not happen without considering mitigating factors. It is the Union's position that the employee's performance on or off an AWS should be evaluated by the supervisor. If the schedule works, the supervisor should continue to approve it. If it does not, the supervisor should deny future requests. The suitability form is an unnecessary and potentially unfair component to this analysis.

As such, the Union asks that the following passage be removed from the current AWS Program:

“In addition, employees will be required to complete the **“Employee Suitability Statement”** as part of their request” (Joint 6, Item 1, p. 2).

C. Issue # 3: “Removed schedule options that have been available to certain employees for years.”

Issue 3 is related to Issue 1 in that they both involve the matter of supervisory access to certain compressed schedules. In the early 1990's, the Union and the DOT entered into unit-specific AWS agreements covering P-4 employees in Surveys and in Bridge Safety (Joint 11 & Union 17). Both agreements provided specifically for a four-day workweek option. According to Union witnesses Jay Doody (of Surveys) and Ned Statchen (of Bridge Safety), the agreements allowed all P-4 employees, including Principal Engineers and Supervising Engineers, to work the four-day schedule. In fact, Doody is a

Principal Engineer and testified that he consistently worked the four-day schedule over many years.

When the parties agreed to a new AWS program in 2004 (Joint 3), a provision was included that stipulated what would happen if the new schedules were terminated (Joint 3, Item 15, p. 4). Specifically, Item 15 states that, among other AWS Programs, the Surveys and Bridge Safety AWS Programs would be reinstated. However, when the agency unilaterally imposed the new, current AWS Program, Supervising Engineers and Principal Engineers in Surveys and Bridge Safety were barred from access to the four-day workweek. Considering the fact that these employees had access to the four-day option for years, this prohibition is patently unfair. Doody testified that, throughout the long period of time that he worked the four-day option, no one from management communicated that there were any problems. It is not appropriate to remove options that employees have become accustomed to over many years. It is especially inappropriate given the fact that no specific operational reason has been provided supporting the prohibition for the units in question.

As such, the Union asks that the four-day workweek option be reinstated for Supervising Engineers and Principal Engineers in Surveys and in Bridge Safety.⁴

D. Issue # 4: “Placed unreasonable constraints on the Program leading to arbitrary denials of individual schedule requests.”

In her opening statement, the State’s advocate indicated, in reference to the new AWS Program restrictions, “They are limited in scope.” She stated that only Principal Engineers and “Supervising” titles are prohibited from working the four-day workweek. Her statement was incorrect. The Union demonstrated, through the testimony of several witnesses, that certain schedule options were prohibited based on requirements that were never discussed or even included in the final Program. These requirements are arbitrary and unreasonable.

Specifically, the Union provided the testimony of four Transportation Engineer 3's from Highway Design. Each of them (Peter Macher, Jacob Weiss, David Harms, and Veronica Calin) worked the four-day option during the 18 month period covered by the agreed-upon AWS Program. Then, when the new AWS Program was imposed, each was told that they could no longer work the four-day schedule. The reason provided was that they could not be permitted to work during hours when their supervisor was not present. Because all Supervising Engineers are barred from working the four-day schedule, they must work shorter days.⁵ Because Supervising Engineers are working shorter days, they are not present for the entire 8 and _ hours worked by an employee on a four-day schedule.

The imposition of this "hour by hour" supervisory requirement is an example of bad faith. The final Program explicitly restricts only Supervising Engineers and Principal Engineers from working the four-day workweek. The hidden "hour by hour" requirement, however, places the four-day option out of reach for everyone below the Supervisor. Simply, if the Supervisor can't work 8 and _ hour days, no one can.

In addition to being an example of bad faith, the "hour by hour" requirement is also completely arbitrary and unreasonable. Both Calin and Harms testified that they regularly work overtime hours when their immediate supervisor is not present. It is arbitrary for the agency to allow the employee to work without supervision in one instance, but not the other. Furthermore, the requirement is inconsistent with the level of employee that it impacts. Again, these are professional engineers whose work is evaluated based on quantity and quality. Supervising Engineers are not standing over their staff making sure they perform every little task appropriately. In fact, the job specification for Transportation Engineer 3 states, "Works under the general direction of an employee of a higher grade (Joint 8, p. 5). Yet the "hour by hour" requirement treats the employees as if they must be watched every minute of the day. Weiss testified that

⁴ Note that if the arbitrator rules in favor of the Union on Issue #1, then Issue # 3 becomes moot.

⁵ Employees working a five-day or 5/4 schedule work shorter days.

his Principal Engineer, Bob Raiola, sought an exception to the “hour by hour” rule for his unit. Raiola’s request was denied. Raiola then asked if his unit could partner with another unit and utilize their supervisor to provide the full coverage. Again, the answer was no. This managerial response was patently unreasonable.

Such unwritten blanket denials are not limited to Highway Design. Union witness Sandra Dennis works as a claims investigator in the District 4 Office in Thomaston. When the new, unilaterally imposed AWS Program was issued, Dennis and her co-workers were told that they could not apply for any compressed schedule option. No reason was provided. Union witness Steven Bates works as a finals chief in the District 3 Construction Office. When the new Program was issued, he and his office co-workers were told that they may not apply for a four-day workweek despite the fact that they are not construction inspectors nor are they supervisors.

The Union’s claim is that these unwritten requirements must be removed. We ask that all employees be permitted to apply for any schedule option and have the merits of the request considered without being subjected to arbitrary blanket prohibitions.

E. Issue # 5: “Disallowed employees who have appealed their individual denials from submitting a modified schedule request.”

To the extent that this was an issue at the time of the filing of the grievance, it has been resolved. Therefore, no ruling is requested.

F. Issue # 6: “Refused to administer the appeal process.”

The unilaterally imposed AWS Program includes a provision that allows employees to appeal a schedule request denial. Item six states:

Any disputes arising from an employee's denial of a preferred schedule and implementation of alternate work schedules shall be addressed through the P-4 Labor Management Committee and not subject to the grievance or arbitration procedures. The Labor Management Committee shall make a non-binding recommendation regarding said denial (Joint 6, Item 6, p. 4).

At the arbitration, both Union witness Ned Statchen and State witness Lewis Cannon testified regarding the administration of the appeal process. It became clear, after hearing both men testify, that the facts associated with this issue are not in dispute.

After the advent of the new AWS Program in July of 2005, eleven employees appealed the denial of their schedule request (Union 11). Statchen and Cannon, both members of the Labor/Management Committee, met and discussed how the appeals would be heard. Based on their meeting, on August 25, 2005, Statchen sent a draft document to Cannon describing the procedure (Union 13). Management did not respond to Statchen's draft until February of 2006. At that time, Statchen was informed that both the DOT and the Office of Labor Relations objected to the draft. Management proposed that only Cannon and Statchen meet with each individual without union representation or management being present. Statchen agreed to the process while maintaining the Union's objection to it (Union 14). Statchen testified that he believed this was the only way to have some action on the appeals. Cannon testified that, after he and Statchen met with each of the employees, he made the final decision on each appeal. All were denied.

The unilaterally imposed Program requires appeals to be considered by the Labor/Management Committee. That has not happened. Rather, the appeals have been considered by Cannon while Statchen observed. We ask, as resolution to this dispute, that all future appeals be considered and discussed by the full Labor/Management Committee as required by the Program document.

G. Issue # 7: "Removed the ability to remain on a compressed schedule during a payperiod that includes a holiday."

Item 14 of the agreed-upon AWS Program, allowed employees to maintain their four-day or 5/4 schedule during a holiday week rather than reverting to a standard five day schedule (Joint 3, Item 14, p. 4). Employees were able to do this by using accrued vacation, personal, or compensatory time to augment the holiday. For instance, an employee on a four day work week works four 8 and _ hour days and has a set day off. During a week with a holiday, that employee only receives 7 hours of pay for the holiday, thus leaving him or her short of the 35 hour week by an hour and _. By adding an hour and _ of accrued time to the holiday, said employee can maintain the same schedule and number of hours in addition to having the holiday and the set day off. Any employee seeking to make this adjustment could only do so if approved by his or her supervisor.

At the arbitration, State witness Wanda Seldon indicated that the agency had a major problem with the fact that employees were adjusting their schedules in this way. She also indicated that the holiday issue, along with the supervisor/four-day workweek issue, were the two biggest obstacles preventing an agreement from taking place. It should be noted, however, that the Union's proposal deleted the controversial holiday language (Union 2, p. 4). In other words, the Union heard management's concerns about the holiday issue and was willing to remove the language in order to reach a deal and maintain supervisors' access to all schedules. Unfortunately, that approach did not produce an agreement between the parties because the agency would not relent on the supervisor issue.

Because the Union's proposal was rejected, the holiday issue is still viable. With the twelve holidays afforded to each P-4 member, the effect of reverting to the standard schedule during each holiday week is substantial. It waters down the compressed schedule benefit significantly.

It is the Union's request that, because the adjustment is contingent on supervisory approval, the option should remain available to all employees. If a supervisor determines that the request is contrary to operational needs, it can be denied without right of appeal.

III. The State's procedural claim

Though the State did not actually challenge the arbitrability of the instant grievance, the State did appear to raise a claim intended to circumvent a full consideration of the merits. Specifically, the State argued that the Union sought the same remedy through the 2004/2005 contract negotiations and failed. As such, the State argues, the Union can not now obtain through the grievance what it failed to obtain through contract negotiations.

A review of the State's exhibits as well as the relevant contract language reveals that the argument is without merit. It is true that, in December of 2004, the Union presented proposals during P-4 contract negotiations. It is also true that the Union sought with "Issue 31" to extend all current AWS programs through the successor collective bargaining agreement (State 1, p. 5). It is important to note, however, that the Union made this proposal prior to any of the DOT Labor/Management discussions (see Joint 7). At the time of the proposal, therefore, the Union was not even aware of any potential problems with the DOT AWS Program. Moreover, the Union's contract proposal was both general and bargaining unit wide, not DOT-specific. Therefore, the Union's generic proposal cannot be used as some sort of bar against considering the merits of the instant matter.

By the time the contract negotiations in question reached interest arbitration, the DOT Labor/Management discussions had occurred. In fact, the DOT had unilaterally implemented the new program. It is true that, had arbitrator Peter Prosper ruled in favor of the Union's last best offer, the original agreed upon DOT AWS program would have been extended (along with many others). Instead, Prosper ruled in favor of the State

(State 3, p. 146). The fact that Prosper ruled against the Union's generic proposal (which was conceived prior to the DOT dispute) does not and should not have any impact on this grievance.

Article 28, section 4 of the P-4 contract states:

In the event there is not a satisfactory resolution by the labor management committee regarding alternate work schedule programs, the outstanding dispute may be submitted to arbitration pursuant to Article 14 – Grievance Procedure (Joint 1, p. 20).

In the instant matter, the Labor/Management Committee met but could not agree. The Union properly submitted the outstanding issues to arbitration and is therefore entitled to a review and ruling on the merits. The State's argument is a baseless attempt to get around the language in question. This is a viable grievance that must be considered on the merits.

IV. Closing

In her opening statement, the State's advocate stated that it was not likely that the parties ever could have reached an agreement regarding AWS at the DOT. Her comment is both unfair and untrue. The existence of a prior agreed-upon Program (Joint 3) is proof that her statement was incorrect. It was possible. The Union made many concessions in an attempt to retain what it saw as a key feature: equal access for supervisors.

The Union never sought to curtail the right of management to deny employees on an individual basis. Our issue has been with blind blanket prohibitions that fail to provide each employee the opportunity to have his or her schedule request considered. We believe that our approach to these issues is far more fair and reasonable.