

STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA
-and-
STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION

In the Matter of Arbitration

Between

STATE COUNCIL OF PROFESSIONAL EDUCATORS
OHIO EDUCATION ASSOCIATION
NATIONAL EDUCATION ASSOCIATION

- and -

STATE OF OHIO, DEPARTMENT OF
REHABILITATION AND CORRECTION

OPINION AND DECISION

OCB Grievance No: G86-0414

Dilip Ghosh, Grievant

SAMUEL S. PERRY, IMPARTIAL ARBITRATOR

The Impartial Arbitrator, Samuel S. Perry, was appointed by the Ohio Department of Administrative Services, Office of Collective Bargaining to hear and decide this matter.

The oral hearing was held on Tuesday, July 28, 1987 in a Conference Room at the Ohio Education Association Office, 5026 Pine Creek Drive, Westerville, Ohio 43081.

The following appearances were made for each of the Parties:

FOR THE ASSOCIATION

NAME
Henry L. Stevens
Dilip Ghosh
Carrie Smolik
Richard M. Cantzler
Wayne McDowell

POSITION
Uniserv Consultant
Grievant
Grievant Chairperson
SCOPE Treasurer
O.S.R. Site Representative

FOR THE STATE

NAME
Jennifer Dworkin
Robert E. Race
Felicia Bernardini
Frankie Combs

POSITION
Labor Relations Specialist
Regional Education Administrator
Labor Relations Specialist
O.C.B. Intern

The Parties agreed that the matter was properly before the Arbitrator for a decision on the merits. The Parties waived a separation of witnesses and requested that the oath be administered to each person called to testify.

The Union and the State have each requested two (2) copies of this Opinion and Decision. At the conclusion of the oral hearing, each Party stated they would file a post-hearing brief.

The oral proceedings in this matter were concluded on July 28, 1987.

The post-hearing brief of both the Association and the State were received on September 9, 1987. The Arbitrator declared the hearing closed as of September 9, 1987 and the Arbitrator shall render his Opinion and Decision pursuant to Section 6.07, Article 6 of the Agreement (Joint Exhibit #1) existing between the Parties.

The Arbitrator made a request to the Parties on October 13 and 14, 1987 for an extension of time within which to submit his Opinion and Decision. This request for an extension of time was approved by both Parties.

THE GRIEVANCE

The Grievance and related documents (Joint Exhibit #2) were offered and admitted into evidence and state as follows:

SEE NEXT SIX (6) PAGES

Joint Exhibit #2

Richard Hall

RECEIVED
DEPT. OF REHAB. & CORR.
DIV. OF PEOPLE &
COMMUNITY SERVICES

UNIT 10

EDUCATION AND LIBRARY SERVICES SEP 23 9 49 AM '86

EMPLOYEE GRIEVANCE FORM

Department Rehabilitation & Correction Grievance No. _____
Institution Ohio State Reformatory Date September 23, 1986
Employee Name Dilip Ghosh S.S. No. 170-36-9192
Classification Librarian
Work Location Ohio State Reformatory Work No. _____
Nature of Grievance: The denial of pay adjustment.

The actions of the State of Ohio/Administration, Eric Dahlberg, Super violates,
misinterprets, or misapplies the Agreement between SCOPE/OEA and the State of
Ohio.

Explanation: see attached

Specific Violation of Article 123:1-37-07 (A) of the Ohio Administrative Code
Specific Violation of Article 24 of the SCOPE 1986-89 Agreement and any other
Specific Violation of Article pertinent articles or state laws.

Remedy Sought 1. a pay adjustment. 2. job audit 3. temporary and/or
permanent promotion.

Informal meeting resolution (if applicable) Date _____

Employee Signature Henry Stevens Date Sept. 23, 1986
Dilip Ghosh

The remainder of this form is to be completed by appropriate Management
Representative.

Step I Date of receipt _____ Date of meeting _____
Step II Date of receipt _____ Date of meeting _____
Step III Date of receipt _____ Date of meeting _____
Step IV Date of receipt _____

JOINT
EXHIBIT

2

When Mr. Don Nash, librarian, Ohio State Reformatory, retired, Mr. Dilip Ghosh Librarian, Ohio State Reformatory, was assigned Mr. Nash's duties and responsibilities. Pursuant to Section 123:1-37-07(A) of the Ohio Administrative Code and Article 24 of the July 1986-89 Agreement between the State Council of Professional Educators/OEA/ and the State of Ohio, the Association contends that Mr. Ghosh is entitled to a pay adjustment.

As a remedy, the Association seeks (1) a pay adjustment, (2) job audit and (3) temporary and/or permanent promotion. There have been several letters sent to Director Sykes, Department of Administrative Services, Director Seidler, Office of Collective Bargaining, Sybil R. Griffin, Office of Collective Bargaining and a telephone call to Superintendent Eric Dahlberg. Mr. Dahlberg and I mutually agreed to move this grievance to your level.

Your immediate attention to this matter will be appreciated.

JOINT
EXHIBIT

2



October 14, 1986

Mr. Edward H. Seidler, Director
Office of Collective Bargaining
375 S. High Street, 17th Floor
Columbus, OH 43215

Dear Mr. Seidler:

Pursuant to Article 5, Section 5.05 (E) of the 1986-89 Agreement between the State Council of Professional Educators and the State of Ohio, this letter will request the review of an unanswered grievance by the Office of Collective Bargaining. The grievance concerns the violation of Article 24 of the 1986-89 Agreement, Section 123:1-37-07 (A) of the Ohio Administrative Code and any other pertinent articles and state laws, by the Department of Rehabilitation and Corrections/Ohio State Reformatory.

The Association contends that the Department of Rehabilitation and Corrections Ohio State Reformatory violates Article 24 of the 1986-89 Agreement and Section 123:1-37-07 (A) of the Ohio Administrative Code, when it does not adjust Mr. Ghosh's, Librarian, salary.

Mr. Dilip Ghosh was assigned to Mr. Don Nash's duties upon Mr. Nash's retirement. Mr. Ghosh has dutifully continued those responsibilities until the present time.

The Association seeks, as a remedy, the promoting of Mr. Ghosh to the higher position on either a temporary or permanent basis.

Please contact me if you have further questions.

Very truly yours,



Henry L. Stevens
UniServ Consultant

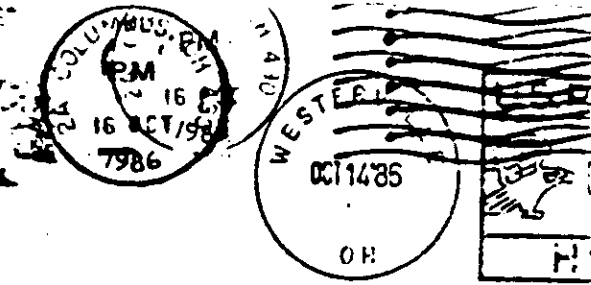
HLS/asw

cc: Mr. Eric Dahlberg
Mr. Dilip Ghosh
Mr. Steve Sunker

JOINT
EXHIBIT

oea

5026-28 Pine Creek Drive, Blendonview Office Park, Westerville, Ohio 43081



Mr. Edward Seidler, Director
Office of Collective Bargaining
375 S. High Street, 17th Floor
Columbus, OH 43215

JOINT
EXHIBIT

2



Ohio Department of Administrative Services

375 S. HIGH STREET, 17TH FLOOR
COLUMBUS, OHIO 43266-0585

RICHARD F. CELESTE, GOVERNOR

OFFICE OF COLLECTIVE BARGAINING

November 6, 1986

Dilip Ghosh
96 W. Second Street
Mansfield, Ohio 44902

RE: Step 4 Grievance Review
OCB Grievance Number G86-0414
Rehabilitation and Correction
Ohio State Reformatory

Dear Mr. Ghosh:

We are in receipt of your Step 4 appeal of the above-referenced grievance. Unfortunately, a backlog in the grievance process at your agency has resulted in no response from the Agency Head or designee in conformance with Article 5, Section 5.05, Step 3 of your collective bargaining agreement. Without such a response, the Office of Collective Bargaining is unable to review the grievance, and this letter will instead serve as the Step 4 response: denial of the grievance. The Association therefore has the right to appeal the grievance to arbitration within fifteen days of the issuance of this letter.

Nevertheless, a labor relations representative from your agency will be in touch with you to schedule a Step 3 hearing upon which the agency may base a response and/or possible resolution of the grievance. You may choose to schedule this hearing in the hope that the grievance may be resolved without resort to arbitration. The hearing will have no effect on the arbitration time lines, in any event.

If you have questions regarding the foregoing, please contact your union representative.

Sincerely,

Edward H. Seidler
Edward H. Seidler
Deputy Director

EHS:JD:lc

cc: Joseph Shaver, Labor Relations Coordinator
Rehabilitation and Correction

Henry L. Stevens, UniServ Consultant
Ohio Education Association

JOINT
EXHIBIT

2

Don Wilson, President
Marilyn Cross, Vice President
Rod Hineman, Secretary-Treasurer
Glenn D. Darr, Executive Director



October 27, 1986

Mr. Edward Seidler, Deputy Director
Office of Collective Bargaining
375 S. High Street - 17th Floor
Columbus, OH 43266-0585

Dear Mr. Seidler:

Pursuant to Article 5, Section 5.05 (F) and Article 6 of the 1986-89 Agreement between the State of Ohio and the State Council of Professional Educators, this letter requests that the items below be submitted to the arbitration panel.

1. Arbitration Panel Selection
2. Dilip Ghosh - Ohio State Reformatory
3. Broadview Developmental Center - RIF - GR. NO. G86-268
4. Alice Stover - Grievance Procedure - GR. NO. G26-86

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Henry L. Stevens". The signature is written in dark ink and is positioned above the printed name and title.

Henry L. Stevens
UniServ Consultant

HLS/asw

JOINT
EXHIBIT

2

THE ISSUE

The issue as framed by the Association:

Did Management violate the 1986-89 Agreement between the State Council of Professional Educators/OEA/NEA and the State of Ohio when they assigned Mr. Dilip Ghosh to the duties of Librarian II without giving Mr. Ghosh a Temporary Work Adjustment? If so, what shall the appropriate remedy be?

PERTINENT PROVISIONS OF THE AGREEMENT (JOINT EXHIBIT #1) AND RELATED CODES UPON WHICH THE PARTIES HAVE RELIED.

The Agreement: Article 16-Position Audits

Article 24-Temporary Working Level

Ohio Revised Code: 123:1-37-01

123:1-37-07

124.14 (E)

124.181

Ohio Administrative Code: Chapter 123:1-3

FACTS AND BACKGROUND

The Parties to this arbitration are the State Council of Professional Educators, Ohio Education Association, National Education Association (hereinafter referred to as the Association) and the State of Ohio, Department of Rehabilitation and Correction (hereinafter referred to as Management). The Grievant is Dilip Ghosh.

The Grievant has been employed at the Ohio State Reformatory as a Librarian since 1982. The Grievant has several degrees including a Masters Degree in Library Science.

On April 30, 1985, Don Nash, a Librarian II also at the Ohio State Reformatory, retired. As Librarian II, Mr. Nash was responsible for operating a legal services section within the library, that consisted of legal reference and legal services. The duties of providing legal services included supplying various legal forms and advising inmates on legal matters such as probation and parole.

The State did not hire another Librarian II after Mr. Nash retired. Rather, the Grievant was asked to assume some of the duties of that position. In an inter-office memo dated April 24, 1985, Robert Race, the Grievant's immediate supervisor, recommended to Norm Hills, the Deputy Superintendent, that the Grievant be placed in the position of Librarian II. Mr. Race testified at the hearing that when the memo was drafted, he was proposing that the Grievant be promoted and the structure of the library changed; that Mr. Ghosh should be placed completely in charge of the library services, including the legal reference section (Legal Services as a separate and distinct department will no longer exist). Providing legal services is now supposed to be the responsibility of staff social workers, although the Grievant stated that he is also providing legal services to inmates except in domestic areas.

The Ohio Classification Specification, revised 6/83, for Librarian II excludes that classification in law libraries found within adult correctional facilities. The job description for legal services librarian - librarian II, dated 3/84, however, directs that 40% of the time should be spent in assisting inmates in filing writs, providing information on retainers, shock probation and shock parole and providing other such legal services.

The Grievant has not been compensated for performing the additional duties in the legal section of the library. On July 17, 1986, the Grievant wrote a letter to William Syles, Director of the Department of Administrative Services, informing him of the fact that since Mr. Nash's retirement, the Grievant had been performing Mr. Nash's duties as well as his own and requested to be promoted to the position of Librarian II on a permanent basis. The Grievant also requested 10 weeks back pay in accordance with Section 123:1-37-07 (a) & (b) O.A.C.

On July 25, 1986, Henry L. Stevens, OEA/NEA Uniserv Consultant, wrote a letter to Edward H. Seidler, the Director of the Office of Collective Bargaining, requesting a pay adjustment for the Grievant since he had been performing additional duties

since 1985 and had not been compensated. Mr. Stevens further requested that the Grievant be promoted to a higher position on a permanent basis in accordance with Section 123:1-37-03 (B) O.A.C.

On August 12, 1986, Sybill Griffin, Manager of Contract Administration OAS, responded that the Grievant should request a position audit to determine the proper classification to which the Grievant should be assigned. This would be in accordance with Article 16 of the Agreement. A letter to the similar effect was sent to the Grievant on August 20, 1986 from Linda Walton, Deputy Director at OAS, in response to his letter.

On August 22, 1986, the Grievant requested a job audit form. The Grievant does not remember whether he received the form. In any event, the form was not completed and the audit was cancelled on December 3, 1986.

The Grievant also requested a job audit form on or about October 1, 1985. The results of this audit, if any, were not known by the Parties.

POSITION OF THE ASSOCIATION

The Association argues that the Grievant was assigned all of Mr. Nash's duties as well as his other work in the general services area. Since the Grievant has been assigned to a temporary working level and has performed these duties continuously, he should receive a pay adjustment in accordance with Article 24 §24.01 of the Agreement. Moreover, since the Grievant has worked for more than 10 weeks, and has not been returned to his regular position, he should be promoted to the position of Librarian II. The Association asks that the Grievant be given backpay from the beginning of the assignment and promoted to the position of Librarian II.

POSITION OF MANAGEMENT

Management contends that the Grievance is not arbitrable because the Librarian retired in 1985 and the Grievant began assuming additional duties in that year. The Agreement between the Association and Management however, did not go into effect until 1986. The appeal is untimely, therefore and is not within the scope of the Agreement. The Agreement cannot be applied retroactively.

The only section that can grant the Grievant relief is Article 16, a remedy that the Grievant has failed to exhaust. Without exhausting all procedures for resolution, a case is not arbitrable. This has not been done in this case.

On the merits, Management argues that the Grievant does not perform all of the duties that Mr. Nash performed. The Grievant only handles legal reference as a new duty. The duties that the Grievant performs are all within this present classification and he was therefore not assigned duties in a position with a higher pay range. Even if he was, the classification specification for Librarian II that was in effect at the time the grievance was filed states that the classification is not to be used in law libraries within adult correctional facilities. Therefore, there is no classification of legal services librarian - librarian II.

Management further argues that a temporary work level is used to compensate an employee who temporarily fills a position in the event of illness, disability or some other leave of absence. An employee then receives an assignment to a higher position not by an accumulation of job duties, but by an appointing authority and the approval of the Director of Administrative Services. This has not happened in this case.

Finally, since the 10 week period has been exceeded and the Office of Collective Bargaining has not approved an extension, the assignment should be cancelled.

Management asks that the grievance be denied.

DISCUSSION AND OPINION

At the outset, it is necessary to address the arbitrability issue. Management argues that since the facts giving rise to this grievance occurred before the Agreement went into effect, the appeal is untimely and not within the scope of the Agreement.

The Association argues that the case is arbitrable because Mr. Nash was classification as a Librarian II at the time of his retirement. That fact is not disputed. What is disputed is whether the Grievant assumed the duties of that position, thereby allowing him to receive a pay adjustment and to be classified accordingly.

Both Association and Management have introduced parts of the Ohio Revised Code and the Ohio Administrative Code to support their respective positions. Clearly, these sections existed prior to the Agreement, but the Arbitrator is limited under Article 6, §6.04 to deciding disputes involving the interpretation, application or alleged violation of provisions of the Agreement, not outside sources unless considered supplemental to the Agreement.

In this case both Parties have made parts of the Ohio Revised Code and the Ohio Administrative Code a part of this arbitration.

Under the narrow "interpretation and application" arbitration clauses, disputes which arise prior to execution of the Agreement have been held nonarbitrable, even though the grievance is filed after execution of the agreement, Elkouri and Elkouri, How Arbitration Works, Fourth Edition, Page 115.

In Camden Indus. Co. v Carpenters Union, 60 LRRM2183 (USDC, 1965), the Court took the view that arbitration should be ordered if there is a possibility that an Arbitrator may be able to resolve the dispute by interpreting existing provisions of the Agreement; if the Arbitration subsequently finds that the dispute cannot be resolved by interpreting existing provisions, it is his responsibility then to hold the dispute to be nonarbitrable.

Management introduce Exhibit 1 to indicate that the classification of Librarian II no longer exist in an adult correctional facility. While that may be the case today, that position did exist in 1985 when Mr. Nash retired and the Grievant began assuming the duties.

The Grievant testified that the only areas that he did not perform in that Mr. Nash had performed in were the areas related to divorce, child support and other domestic areas. The Grievant even stated that he had been performing "legal services" in that he had been giving inmates forms and had answered letters about legal matters for inmates who were unable to come into the library. The Grievant further testified that he was not told what specific duties to do, but was just told to do the work.

For fear of being found insubordinate, the Grievant did everything that he could do.

Management argues that the Grievant's present classification covers the duties that he claims he assumed when Mr. Nash retired. According to the classification of Librarian I, 5% of this time is to be spent "performing other related duties as required." Arguably, performing legal reference may be included here. The Grievant however, appears to be directing more than 5% of this time to this duty and others assumed in 1985.

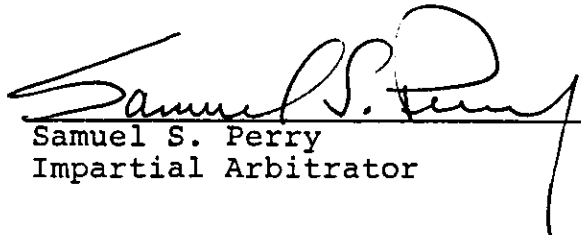
Robert Race stated that his intention in writing the inter-office memo was to recommend that the Grievant be promoted to the position of Librarian II. This indicates that the duties assumed by the Grievant pending approval were probably a substantial part of those performed by Mr. Nash. The Grievant therefore, should be compensated for that work in accordance with Article 24.

The Arbitrator concludes however, that since the Office of Collective Bargaining has not given prior approval to extending the assignment and the position is not vacant as a result of an approved disability leave, the Grievant should only be paid for 10 weeks.

The Arbitrator further concludes that the determination of job classification is to be made by the Ohio Department of Administrative Services, not the Arbitrator. That being the case, the Grievant should follow the proper procedure for position audit. The Grievant, however, was probably aware that this was the proper procedure to follow since a request for position audit forms was made in 1985 and again in 1986 after being so advised by Ms. Griffin and Ms. Walton.

The grievance is dated September 23, 1986. The Agreement (Joint Exhibit #1) became effective July 1, 1986. Mr. Ghosh began to perform the duties of Mr. Nash upon his retirement on April 30, 1985 and has continued to perform those duties after the effective date of the Agreement.

Therefore, the Arbitrator finds this grievance to be arbitrable and it is sustained as set forth in the Decision of the Arbitrator.



Samuel S. Perry
Impartial Arbitrator

STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA
-and-
STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION

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STATE OF OHIO, DEPARTMENT OF)	
REHABILITATION AND CORRECTION)	

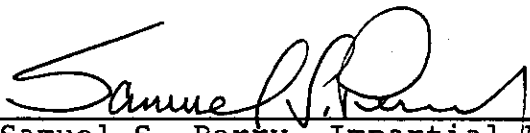
DECISION OF ARBITRATOR

The Undersigned Arbitrator, having been duly appointed by the Parties, in accordance with the Agreement entered into by and between the Parties, and having duly heard the allegations and proofs of the Parties, Decides as follows:

The Grievant shall be paid for a ten (10) week period as a Librarian II. The Grievant shall request a Position Audit as set forth in Article 16 of the Agreement.

The determination of job classification shall be made by the Ohio Department of Administrative Services.

Opinion rendered, Decision signed, Issued and Dated at Beachwood, Cuyahoga County, Ohio this 17th day of November, 1987.



Samuel S. Perry, Impartial Arbitrator
Four Commerce Park Square #600
23200 Chagrin Blvd.
Beachwood, OH 44122-5468
216/292-8220