

#165

IN THE MATTER OF THE
ARBITRATION BETWEEN

OCSEA, Local 11,
A.F.S.C.M.E., AFL-CIO

and

Ohio Department of Rehabilitation
and Corrections

Grievance No.: G-86-110
(Grievant: Gray)

Hearing Date:
February 5, 1988

For the Union: Dan Smith, Esq.

For the Employer: Nick Menedis

Present: Dan Smith (OCSEA advocate), Butch Wylie (OCSEA staff representative), Michael Gray (Grievant), Russell Murray (OCSEA negotiator: witness), Andy Murkley (witness), Nick Menedis (Employer advocate), William Dahlman (ODRC Superintendent Lebanon Correctional Institution: witness), Arnold Jago (ODRC Superintendent London Correctional Institution: witness), Ed Flynn (OCB Intern).

Preliminary Matters:

The Arbitrator received permission from both parties to tape record the hearing for the sole purpose of refreshing her memory and on condition that the tapes are destroyed on the day that the decision is rendered. The parties also give the Arbitrator permission to submit the opinion for publication. The parties

jointly stipulated that the matter was properly before the Arbitrator. Neither side requested the sequestration of witnesses. All witnesses were sworn.

Issue:

The parties jointly agreed to this issue:

Did the Department of Rehabilitation and Correction violate Section 36.05 of the contract by not paying "Special Duty" correction officers and correction officers participating in in-service training roll call pay for the period of time between July 1, 1986, up to and including August 16, 1986, as stipulated in Stipulations 1. and 2.?

Stipulations:

The parties jointly stipulated:

1. The period of time in question as to whether a special duty correction officer was entitled to roll call pay, is from July, 1986, up to and including August 16, 1986. All special duty officers did not receive roll call pay for this period of time in question.
2. The period of time in question as to whether a correction officer participating in in-service

training is entitled to roll call pay, is from July 1, 1986, to _____ [a date to be jointly determined]. All officers participating in in-service training did not receive roll call pay for the instances within the period of time in question.

The parties agreed to the following joint exhibits:

1. The Contract,
2. The grievance trail,
3. August 6, 1986 memo from Seidler (OCB) to Elder (OCB),
4. August 28, 1986 letter from Murray (OCSEA) to Seidler (OCB),
5. October 16, 1986 letter from Seidler (OCB) to Murray (OCSEA),
6. September 16, 1986 letter from Seidler (OCB) to Murray (OCSEA).

Contract Section

Article 36 - Wages

\$ 36.05 - Roll Call Pay

Correction Officers in the Department of Rehabilitation and Corrections shall be entitled to thirty (30) minutes of roll call pay for reporting prior to the beginning of their shift. Current practice on reporting time shall continue unless mutually agreed otherwise.

Relevant Sections of Joint Exhibits

Joint Exhibit No. 2 Grievance Trail: Letter from D.E. Elder, Chief Labor Relations (ODRC) to Michael Grey, Grievant.

"Dear Mr. Gray:

This is in response to your Step 3 grievances numbered 001, 002, . . ." (Para #1)

"Grievances 001 and 002 are resolved on the basis that all correction officers will receive roll call pay." (emphasis added) (Para #3)

Joint Exhibit No. 3. Memo from E. Seidler, Director, Office of Collective Bargaining to Don Elder, Chief of Labor Relations (ODRC), dated August 6, 1986.

Pursuant to a number of conversations with you and others in the Department of Rehabilitation and corrections, the following are procedures to be used in implementing section 36.05 Roll Call Pay in the AFSCME contract. It is vitally important that these procedures be implemented uniformly throughout the system.

1. Special assignment correction officers - it was the intention that the roll call pay would be available to all corrections officers on the assumption that all correction officers had roll call. To bring everyone into line please standardize a system of 10-minute early report time before the shift for all correction officers. This will prevent any disparity among different groups of correction officers. (Emphasis added)

Joint Exhibit No. 4. Letter from Russell Murray, Executive Director, OCSEA, to Edward Seidler, Director, Office of Collective

Bargaining, dated August 28, 1986.

Pursuant to a telephone conversation with you on August 8, 1986 regarding the issues surrounding roll call pay, I called a meeting of the leadership of the OCSEA Corrections Chapters to discuss the proposals you had put forward to settle our disputes on the interpretation of Article 36.05 - Roll Call Pay.

Set forth below are the principles of settlement acceptable to the leadership of the more than 2,600 Correction Officers represented by OCSEA.

1) Roll call pay for special duty officers:

It is the Union's position that all correction officers are entitled to the roll call pay provided in the contract. The leadership agreed, however, that it was fair to have all officers responsible for reporting in to work a standard ten (10) minutes before the beginning of the shift in order to receive the roll call pay. Therefore, it would be acceptable to the Union if the Department standardized roll call throughout its institutions at ten (10) minutes for all officers.

Roll call pay was negotiated for all correction officers. Given the fact that the Department unilaterally took action to take away a negotiated benefit from correction officers, it is the position of the Union that those special duty officers who were deprived of the roll call pay should receive their roll call pay retroactive to July 1, 1985.
(emphasis added)

Joint Exhibit No. 6. Letter from Edward Seidler to Russell Murray, dated September 16, 1986.

In regard to your letter of August 28, 1986 on the subject of Roll Call Pay, there are still

some areas of difference which remain.

1. The issue of retroactive roll call pay it is somewhat of a misstatement to argue that the department took away a benefit. Employees who attended roll call received roll call pay, those that did not, did not receive pay. This continued with the practice that was in use before the contract. There is no reason at this point to allow retroactive pay for time not worked.
2. Your third point about roll call not being part of a regular shift while being technically correct does not address the entire problem. Discipline and failure to report to roll call will definitely need more discussion at the department labor management meeting level. Roll call is not some gratuitous function that has been instituted for the purposes of pay. It is a necessary part of the overall operation of the shifts in an institution. Its purpose is to ascertain the final employee count for the next shift and to facilitate the transition from one shift to another. An individual's failure to report on time to roll call can cause another employee to be needlessly held over until the employee arrives.
3. In regard to your last point, the State has taken great pains to insure that the roll call pay supplement be paid uniformly to all of the correction officers. We have modified our pay roll programs so that no entries have to be made for roll call. This was because we view it as a supplement and its placement in the wage section rather than the overtime section was intentional in that regard. (emphasis added)

Union Exhibit No. 1

Fiscal Summary for Bargaining Units 3, 4,
5, 6, 7, 9, 13, and 14

This note summarizes the fiscal impact of the Agreement finalized by the State of Ohio and AFSCME/OCSEA, Local 11, on May 10, 1986.

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Section 36.05 - Roll Call Pay

Description: The Agreement standardizes the roll call reporting practices for correction officers in the Department of Rehabilitation and Correction. Each correction officer shall be entitled to 30 minutes of roll call pay for reporting prior to the beginning of shift.

Fiscal Effect: The estimated cost of this provision, adjusted to reflect the wage package provided to the Union, is as follows:

FY 1987	\$2,767,141
FY 1988	\$2,901,693
FY 1989	\$3,113,099

These cost estimates do not include an estimated 1,000 additional correction officers that will be hired over the life of the contract. The costs associated with the roll call pay provision will be absorbed by the agency.

Procedural Facts

The Grievant filed his grievance on 2-8-86. The Grievant maintained that all Corrections officers were entitled to 36.05 pay, including CO's on special duty. This Grievance was joined with Grievance 002 filed on 7-24-86 also by the Grievant on behalf of the local and particularly on behalf of CO's on in-service training. Step 1 was signed by the Employer on 7-8-86 and indicated that the Grievance "cannot be answered at this level."

Step 2 was dated 8-7-86 and indicated that the Grievance was already at Step 3. On August 21, 1986, D.E. Elder wrote the Grievant (See p. 4) "in response to your Step 3 grievances" In that letter Mr. Elder agreed that "all correction officers, regardless of their shift or work assignment should receive thirty minutes of roll call pay pursuant to Section 36.05 of the OCSEA/AFSCME agreement." (emphasis added) In the next paragraph, Mr. Elder stated "Grievances 001 and 002 are resolved on the basis that all correction officers will receive roll call pay." (emphasis added).

Subsequently, the Grievant acting as President of the Local wrote Mr. Seidler of OCB. He said that "According to Mr. Elder's letter dated 21, 1986 (sic) Grievances 001 and 002 are resolved but after talking with him on the phone I find the roll call pay will not be retroactive therefore grievances 001 and 002 are unresolved."

Substantive Facts

On July 1, 1986, the contract containing Art. 35.06 went into effect. Starting July 1, 1986, Correction Officers assigned to the three shifts were paid roll call pay of 30 minutes while Correction Officers assigned to special duty or training were not. Correction officers assigned to shifts continued to report 10 minutes prior to their shift for roll call. Special duty CO's and CO's in training reported to their assignments at their assigned

times.

Prior to July 1, 1986, CO's assigned to shifts in most institutions reported 10 minutes early and were paid time and half for those 10 minutes. Prior to July 1, 1986, Special Duty CO's and CO's in-training reported to their duties on time and received no extra pay. These facts are not disputed by either of the parties.

Roll Call for CO's on shift is a long standing practice. The purpose of roll call is to make sure that sufficient officers exist to cover the posts, to give orders for the coming shift, to facilitate the transition from one shift to another. Such purposes were testified to by Superintendents Dahlberg and Jago. Mr. Murray, the Executive Director of the Union, agreed in his testimony that for CO's on shift roll call had an appropriate business purpose.

All parties agreed that as of 8-17-86 all correction officers regardless of work assignment were paid roll call pay of thirty minutes. Simultaneously, all corrections officers regardless of assignment were to report 10 minutes prior to their shift. Both Superintendents testified that prior to 7-1-86 shift correction officers received 15 minutes pay for 10 minutes roll call. Both men also testified that after 7-1-86 shift correction officers received 30 minutes pay for 10 minutes on roll call. Lastly, both men agreed that after 8-17-86, special duty and in-training CO's received 30 minutes pay for no work prior to their shift. Superintendent Dahlman testified that the 10 minute report-in for

non-shift CO's had no management reason.

The Union offered the testimony of Russell Murray who was the chief negotiator for the Union. He testified that 36.05 was negotiated to give all Correction Officers a supplemental wage benefit. The Union's aim was to secure this wage benefit as a trade off for other items, to placate the Corrections locals, and to standardize the benefits for CO's. He agreed that he knew before and during the negotiations that special duty CO's and CO's in training did not stand roll call. He says he did not discuss this situation with Mr. Seidler, the state's negotiator, and does not know that state of Mr. Seidler's knowledge. Murray testified that sentence number 2 of 36.05 was designed to prevent the state from changing the reporting times of the various types of CO's without the Union's agreement, so that all CO's could continue to report at their previous reporting times and receive the 30 minutes pay.

The Union also offered as evidence of the meaning of the contract the report of Office of Budget and Management, prepared after May 10th but before the Legislature voted. (See: pp. 6-7)

The contract went into effect on 7-1-86.

The Employer offered no testimony on the negotiation. Neither Superintendent/Witness participated in the negotiations. The Employer offered as evidence of Employer intention during contract negotiation the letters of Chief Negotiator Seidler written after the contract was in effect while the Union and Employer were attempting to resolve this grievance. In

particular, the Employer points to Joint Exhibit #3 where Mr. Seidler in an internal memo to Mr. Elder states "it was the intention that the roll call pay would be available to all corrections officers on the assumption that all corrections officers ~~had~~ roll call. (emphasis added) The Employer also relied on Mr. Seidler's word in Joint Exhibit #6 "This continued with the practice that was in use before the contract."

Employer's Position

The section of the contract is "clear on its face." Sentence One of 36.05 required that only Corrections Officers who reported "prior to the beginning of their shift" be paid the 30 minutes pay. The employer maintained that "prior to the beginning of their shift" referred to 10 minute roll call. The second sentence as interpreted by the Employer allowed the Employer to continue its current practice of not paying special duty CO's or in-training CO's until such time as the Union and Employer mutually agreed. The Employer argues that 36.05 is not an economic benefit. The principle underlying 36.05 according to the employer is "it will not pay employees for time they did not work." Thus, to pay special duty CO's and in-training CO's is unconscionable. Lastly, the Employer argues that Mr. Seidler's letters support their position.

Union's Position

Article 36.05 is clear on its face but if the Arbitrator finds that it is not, the testimony of the Chief Negotiator gives a reasonable explanation of the meaning and the intention of the parties.

The first sentence of § 36.05 mandates (shall) that all Correction Officers receive the thirty minutes pay as of 7-1-86 regardless of whether they stand roll call or not. Sentence Two mandates that current reporting times be continued on 7-1-86 and does not apply to the continuation of then current wage practices.

If the Arbitrator is unpersuaded that the above position is not clearly mandated by § 36.05, the Union argues that the testimony of Mr. Murray is unrebutted as to the intentions of the parties, that the Employer offered no testimony on intention, and lastly that Mr. Seidler's letters were written post-contract, during grievance settlements. Lastly, management's agreement on 8-17-86 to pay all corrections officers the 30 minutes pay is persuasive of the Union's position.

Discussion

The interpretation of contract language is an old art and has

well-settled principles. The first job of the interpreter is to decide if the contract is "clear on its face." Two approaches exist to accomplish this task. The older method required the interpreter to examine the words at issue and decide if the "plain meaning" of the words were clear to him. The interpreter applied what he felt to be the "plain meaning." "Clarity" was thus dependent on the knowledge, experience, characteristics, and values of the person who decided the "plain meaning" and found the document to be "clear on its face." The more modern approach is to realize the words seldom have a "plain meaning" without context and that "clarity" is often in the eye of the beholder. Thus, the modern approach is for the interpreter to listen to evidence about the "meaning of the words" and the intentions of the parties. Then the interpreter decides if the words are "clear" on their face (i.e., susceptible to only one reasonable meaning) or if the words are susceptible to two reasonable interpretations. If the interpreter finds that the words are susceptible of two reasonable meanings, she uses the evidence to decide which meaning was intended by the parties.

In this case, both Union and Employer claim the words are clear on their face. The claim of the Employer stands or falls on this position because the Employer offered no evidence of the intention of the parties during negotiations. The letters of Mr. Seidler were written after the contract was in effect and in the midst of this Grievance. Such letters are from an evidentiary

point of view objectionable as self-serving. Moreover, the letters are not internally consistent nor persuasive. In the memo of August 6, 1986, Seidler states "it was the intention that the roll call pay would be available to all CO's on the assumption that all CO's had roll calls." Here Mr. Seidler admits that all CO's were to be paid roll call pay. The fact that Mr. Seidler negotiated such an agreement under a false assumption allegedly unknown to him does not change what he agreed to in the contract. Moreover in Joint #6, Seidler's letter of September 16, 1986, he argues in paragraph No. 1 that the roll call pay is not a "benefit" and then in paragraph No. 3 calls it a pay supplement twice. Second, in paragraph No. 1 he says that not paying non-roll call employees was justified because this continued the practice before the contract. Sentence No. 2 of 36.05 permits the continuation of reporting TIME practices not pay practices.

Is 36.05 clear on its face? Is 36.05 susceptible of only one reasonable meaning? The first sentence of § 36.05 says that Correction Officers shall be entitled to 30 minutes of roll call pay for reporting prior to the beginning of the shift. Correction officers implies all correction officers, no specific group of correction officers is excluded, i.e., special duty CO's. However, the pay is to be given "for reporting prior to the beginning of the shift." The word "for" as found in Webster's New Collegiate Dictionary at p. 448 means "used as a function word to indicate a purpose" e.g., "a grant for studying medicine. Another

meaning is "used as a function word to indicate equivalence in exchange" e.g., \$10 for a hat." Thus the roll call pay is to be given for the purpose of "reporting prior to the beginning of the shift" or as an equivalent exchange for reporting prior to the shift. Employer says reporting prior means 10 minute roll call; the Union says that 1 second before the shift is "prior". Literally, the Union's interpretation is a correct one. However, the Employer's meaning has a basis in the light of the history of roll calls. Does the second sentence clarify the meaning of the first sentence? The second sentence mandates that current reporting times continue on 7-1-86. This sentence does not support the Employer's position because continuing reporting times does not mean continuing reporting pay. When read in conjunction with the first sentence, the reader can conclude that sentence one changes reporting pay while sentence two keeps reporting times the same. The Employer argues the shift CO's get more money and that is the only pay change mandated. The Union argues all CO's should get more money and that is the mandated change. (A number of other possible arguments are possible which shall remain unstated.) The Arbitrator finds that the section is not clear on its face and is susceptible of two reasonable meanings.

Which meaning is to prevail? The Employer offered no relevant evidence to guide the Arbitrator in this decision. The two Superintendents were not present at the negotiations. Mr. Seidler's letters and memo are objectionable as evidence of

intent. Mr. Murray's testimony is irrebuted. Moreover, Mr. Murray's testimony standing alone was credible and reasonable. Therefore, on the merits, the Union's position must stand.¹

Award

Grievance Sustained.

March 7, 1988
Date


Arbitrator

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1. This result could probably have been reached procedurally. However, the Union did not raise this argument. In his Step 3 response to Grievances 001 and 002, Mr. Edler stated that those grievances were "resolved on the basis that all corrections officers will receive roll call pay." Since the grievances were specifically for pay starting from 7-1-86, one reasonable interpretation is that at Step 3 the employer agreed to pay as per the Union's interpretation and hence retroactive pay was implicitly awarded. Thus, the Arbitrator could have found that the Grievance was resolved at Step 3. However, this conclusion is made without the benefit of argument, and since the issue was not raised by the Union is moot.