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October 26, 1988

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Del Evans
Hearing 6-10-88

RE: Case No. 27-01-880127-001-01-03
Roll-Call Disciplinary Regulation
Rehabilitation and Correction

In accordance with instructions, I have enclosed one copy to each of you of the Opinion and Award in the above case.

Additional copies were sent by regular mail to N. Eugene Brundige, Nicholas G. Menedis, and Bruce Wyngaard.

Sincerely,

Jonathan Dworkin

Enclosures:

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Rehabilitation and Correction - State Unit 3	*	Case Number: 27-01-880127-0001-01-03
-and-	*	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AFSCME, AFL-CIO Local 11	*	Decision Issued October 26, 1988

APPEARANCES

FOR THE STATE

Nicholas G. Menedis	Chief Negotiator, Corrections
N. Eugene Brundige	Witness
Arnold Jago	Witness
Donald Elder	Witness

FOR OCSEA

Daniel S. Smith	General Counsel
Russell G. Murray	Executive Director
Butch Wylie	Staff Representative
Gene Freeland	Staff Representative
Marilyn Putnam	Local President

ISSUE: Article 36, Section 36.05 -- Did the roll-call discipline regulation of the Department of Rehabilitation violate the Agreement?

Jonathan Dworkin, Arbitrator
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9461 Vermilion Road
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THE GRIEVANCE AND ITS BACKGROUND

The issue in dispute is whether or not the Ohio Department of Rehabilitations and Corrections had contractual authority to implement a Department-wide policy of disciplining Correction Officers for failing to report on time for roll call. Correction Officers employed by the Department are members of a Bargaining Unit represented by Local 11 of the Ohio Civil Service Employees Association. Their terms and conditions of employment are governed by an Agreement with the State of Ohio, which became effective on July 1, 1986, for a term of three years.

The provision on roll call is in Article 36, the "Wages" Clause of the Agreement. Section 36.05 provides:

> 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. [Emphasis added.]

Section 36.05 guarantees thirty minutes' pay for Officers who report "prior to the beginning" of a shift, but does not indicate how long before shift starting time an individual must report to

receive the stipend. That question was left for post-contract negotiations. Resolving the issue was not an easy task, because the parties did not have similar expectations. The Employer regarded roll call as a valid and important function. It expected attendance in return for the thirty minutes' pay. The Union saw the roll-call stipend as a wage supplement designed to meet its bargaining-table demands for hazardous-duty. The provision was buried among the ordinary wage provisions of the Agreement by design, to avoid close scrutiny. But its true meaning was clearly understood by the bargaining teams. Moreover, there was no uniformity in the way that the twelve existing correctional facilities handled roll calls. Some started them as much as fifteen minutes in advance of the beginning of a turn and disciplined employees for habitual tardiness and absence. In other institutions, roll call was voluntary; correction officers could attend on time, late, or not at all without risking discipline.

In September, 1986, approximately two months into the contractual term, the parties settled most of their differences. They adopted a standardized roll call starting ten minutes before the beginning of every shift. Correction Officers were to receive treble wages -- thirty minutes' pay for ten minutes of roll-call attendance. Concomitantly, they were to be docked three minutes' pay for every minute they were tardy.

One issue remained unresolved: whether or not employees could be disciplined for roll-call attendance deficiencies. It was not an undisclosed issue -- it was raised and argued in the communications between the Union and the Ohio Office of Collective Bargaining which led to the September, 1986 settlement. On August 28, 1986, the Union's Executive Director sent a letter to the State's Chief Negotiator in which he stated:

> The Union sets forth this reaction to your proposal regarding the docking of correction officers who are late for roll call. You have proposed those officers who are late shall be charged three (3) minutes for every one (1) minute late. In this case, if any officer misses the entire ten (10) minutes, he or she shall not receive roll call pay for that shift. The Union is prepared to accept your proposal with the additional understanding that officers cannot be disciplined for failing to stand for roll call. Roll call duty is not part of an officer's regular shift and therefore, an officer cannot be disciplined for failing to stand for it. Disciplinary action can only be taken if an officer is late for his/her regular eight hour shift.

The Employer responded by letter on September 16, 1986. A portion of the letter addressed the Union's contentions relative to discipline. It acknowledged that further discussions on the matter were needed, but confirmed that the State was committed to the concept that attendance at roll call was a critical duty and failure to attend could and should be disciplined. The letter stated in part:

> 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 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 operations 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.

Apparently, the parties chose to leave the question of discipline alone for nearly two years while each institution followed its own practice. A majority of the institutions continued to discipline employees for roll call attendance violations. The five institutions in which roll-call attendance had been voluntary before the Agreement followed the same pattern in the post-contract period. In January, 1988, however, the Department of Rehabilitation and Correction determined that the prevailing inconsistency impaired efficiency and created disparate conditions of employment in the Correction Officer Classification. The Department's Chief of Labor relations sought to correct the problems by standardizing roll call requirements. On January 21, 1988, he promulgated a regulation requiring all Correction Officers except those assigned special duty to report for roll call on time. Violators were to be disciplined

in accordance with the established attendance policy. The regulation, which was to become effective February 7, 1988, was communicated in the following letter addressed to the Regional Director of Local 11:

> It has come to our attention that several institutions were not requiring employees to stand roll call, while most institutions were requiring attendance and even imposing discipline for repeated failure to stand roll call. Therefore, please be advised that effective February 7, 1988, all (emphasis added) institutions will enforce a required roll call procedure. The roll call will be required for first, second, and third shifts only. Special duty will not be required to stand roll call.
>
> As to roll call pay, all correction officers shall be paid roll call pay in accordance with the current policy, including special duty officers; however, special duty officers who do not report for work ten minutes before the beginning of his/her shift may only be docked three minutes for every one minute not worked. A special duty officer is not tardy until the beginning of his/her shift, whereas the correction officers on shifts one, two, and three are tardy if they are late for roll call.
>
> The Office of Labor Relations will consider all disciplinary grievances that involve roll call tardiness filed before February 7, 1988, and may (emphasis added) modify the discipline depending on the total circumstances (e.g., is tardiness the only offense or did the institution make it clear that roll call was required?)
>
> The Department feels that given the nature of our business, a meaningful roll call (emphasis added) is in everyone's best interest. It provides for an extra measure of security and the timely release of bargaining unit employees. As to the special duty officers, given the varied starting times for special duty shifts, it is not practical to require roll call.

Your cooperation in making this policy known to your membership is greatly appreciated.

On January 27, 1988, the Union initiated a grievance on behalf of all affected members of the Bargaining Unit. It requested not only that the regulation be set aside, but also that the Department be required to declare "that all Correctional Officers II's employed by the Department of Rehabilitation and Correction, are not required to report ten minutes before the beginning of their regular shift." In addition, the grievance demanded expungement of all discipline for roll-call tardinesses and absences.

The grievance was premised on the Union's perception that Section 36.05 was regarded mutually from the start as creating a supplemental benefit, not mandatory overtime. In the Union's view, the pending regulation placed new conditions on the benefit and dramatically altered conditions of employment to an extent never contemplated or sanctioned by the negotiators when they affirmed Management's rule-making authority.

The grievance was submitted to contractual dispute-resolution procedures, but remained unresolved. The Employer held firm to its conviction that it had the contractual prerogative to standardize requirements throughout the Agency and that the proposed regulation was both necessary and reasonable. According to the Employer, it

was, in fact, more reasonable than the disparate treatment caused by individual facility practices. The State's reasons for rejecting the grievance were perhaps best stated in its Step 3 decision:

> The Union's remedy sought is unconscionable. The importance of a "roll call" period for safety forces is long established. It has never been intended as a "gratuitous function," and there would be a serious disruption in services if every one suddenly decided not to stand roll call. Furthermore, a correction officer who repeatedly fails to stand roll call in a timely manner creates several problems in that this correction officer cannot be given all the necessary information shared at this time, and by not being able to relieve his fellow correction officer in a timely manner, an overtime problem is created as well as a morale problem [of] the correction officer who did not get relieved.
>
> The grievance is denied for the reasons stated above.

The Union appealed the grievance to arbitration. A hearing was convened in Columbus, Ohio on June 10, 1988. At the outset, the Employer stipulated that the appeal was timely procedurally correct. The Arbitrator was authorized to issue a conclusive award on the merits of the dispute. Following their presentations of testimony and evidence, the parties obtained additional time for post-hearing briefs.

THE UNION'S POSITION

Both parties emphasize the history of the roll-call-pay provision. The Union's bargaining-table demand on behalf of Correction Officers for hazardous-duty pay was a "hot issue" in negotiations which nearly prevented adoption and ratification of the Agreement. The matter was partially settled by a last-minute effort by leaders of the bargaining teams. Section 36.05 was accepted with the understanding that it would need to be fleshed out after commencement of the contractual term. The parties knew that the language was incomplete and the full nature of the supplemental benefit had yet to be agreed upon.

The Union concedes that the accord which emerged from their post-contract negotiations did not meet all of its expectations. It did not create a pure, unqualified wage supplement in lieu of hazardous-duty pay. The benefit was conditional. In order to obtain triple wages for the ten-minute, pre-shift session, employees had to attend. And they were penalized if they did not attend; they were docked three minutes' pay for each minute they were tardy. In other words, their attendance was required if they were to receive the add-on wage premium. But the Union insists that Section 36.05 clearly was not meant to impose a daily overtime obligation on Correction Officers. Such purpose, if it were intended, would contra-

dict the contractual guarantee that normal overtime is voluntary for all members of the Local 11 Bargaining Unit. It would fly in the face of the following language in Article 13, Section 13.07 of the Agreement:

> Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities.
>
> . . .
>
> An employee who is offered but refuses an overtime assignment shall be credited on the [overtime-equalization] roster with the amount of overtime refused.
>
> . . .
>
> In the event of an emergency as defined in Section 13.15 notwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency requirements, regardless of the overtime distribution.

The Union argues that the roll-call language was not included among the overtime provisions precisely because it was not intended as an overtime allowance. It was inserted in the Article pertaining to wages because the triple pay rate was a supplemental wage. The only condition placed on it was that employees would be "penalized" for imperfect attendance by docking on the same three-for-one basis that defined the stipend. Post-contract discussion of discipline

took place, but without settlement. The parties essentially agreed to continue disagreeing and to preserve each institution's practice.

The Union concurs with the Employer that the practices should be made uniform. It urges, however, that there should be no roll-call attendance discipline at all. When the State agreed to pay triple wages for overtime attendance and the Bargaining Unit authorized the docking mechanism, the matter should have ended, according to the Union. It is argued that the September 1986 settlement finalized rights and obligations, and the Employer is "estopped" from unilaterally imposing new conditions and penalties changing the substance of its negotiated commitment. As the Union contends in its post-hearing brief:

> The Union earnestly attempted to accommodate the State's concerns in this regard . . . First the Union agreed to the department-wide standardization of the roll call at a period of ten (10) minutes. The Union, however, opposed the imposition of discipline for lateness to roll call. As [Local 11's Executive Director] testified, it was impossible for the Union to agree that employees could be disciplined where they were not before. Instead, in the August 16 letter, it proposed to treat the roll call pay supplement as if it were premium overtime by implementing a "3 for 1" time docking arrangement. Because the roll call pay supplement added a significant sum to each employee's paycheck, the docking arrangement would provide considerable incentive for employees to attend roll call.
>
> In light of the intent of the parties about the roll call pay supplement, the Union's offer to have a "3 for 1" docking system must be seen as a significant concession. Thus, the State must be consid-

> ered to be estopped from disciplining employees for lateness to roll call. Estoppel is considered an equitable doctrine and arbitration is an equitable forum. The department by its actions accepted the Union's proposal. It should not be permitted to get something in addition . . . which was not bargained for. [Brief, 5-6.]
>
> . . .
>
> Because roll call pay is not pay for time worked, it stands to reason that the Department cannot discipline for lateness to roll call. One cannot be "late" for non-work time. This construction of Section 36.05 also fits logically with the placement of Section 36.05 in the wage section instead of the overtime provisions of the collective bargaining agreement. [Id., 6.]

Without retreating from its contention that no employee should be disciplined for roll-call attendance, the Union urges that, at the very least, the practice at each institution is contractually preserved. This argument refers to the concluding sentence of Section 36.05 -- "Current practice on reporting time shall continue unless mutually agreed otherwise." By the State's own admission, the protested regulation dissolves current practices at some facilities, and it is contended that such action is barred unequivocally by the explicit contract language.

In conclusion, the Union maintains that the grievance should be sustained in its entirety. In its judgment, any other award would be demonstrably inequitable as well as extra-contractual.

THE EMPLOYER'S POSITION

The State implies that the Union's presentation is a deliberate attempt to mislead the Arbitrator concerning the recognized definition of the word, "practice." According to the State, the negotiators were of one mind in acknowledging that institution-by-institution -- office-by-office -- practices should not prevail once the Agreement became binding. Prior practices in all State agencies were notable for their lack of uniformity. Neither the Union nor the Employer intended to project these inconsistencies into the contractual term. To the contrary, they intended to abolish all pre-collective-bargaining practices and begin anew to fashion their "silent contract" (governing practices). To that end, they adopted Article 43, Section 43.03 which confirms the Employer's qualified rule-making authority and states that past practice shall not bind the future relationship. Section 43.03 states:

> After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement. [Emphasis added.]

The Employer is forced to concede that some practices survived Article 43, Section 43.03, but in all cases they were intended to be departmental practices. One of the predominating purposes of negotiators on both sides of the bargaining table was to eliminate the provincialism and inequalities created by practices observed only in departmental subgroups. In accordance with that purpose, facility-by-facility practices ceased to exist once the labor-management relationship was governed by the Agreement. It follows, according to the Employer, that no cognizable roll-call discipline practice existed. This created a vacuum which had severe impact on both employment and Management Rights. The roll-call requirement, so essential to the Department's functioning, was being ignored by a few members of the Bargaining Unit; and Correction Officers were subjected to disparate treatment depending upon the institution at which they happened to be employed. The State determined that it was necessary to exercise its rule-making authority to fill the vacuum. It also determined that it had a contractual right to do so both under Article 43, Section 43.03 and Article 5, the Management Rights Clause. In the Employer's judgment, Article 5 confirmed its inherent rights, including the authority to control the work-force and the prerogative to make reasonable rules to assure that the Department's mission would be carried out efficiently. Article 5 provides:

> Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 [(C)] numbers 1-9.

The contractual reference to Ohio Revised Code Section 4117.08 incorporates a statute which specifically vests Management with the rights to "Direct . . . employees" and "Maintain and improve the efficiency and effectiveness of governmental operations."

The State's concluding remarks in its post-hearing brief remind the Arbitrator of the defined scope and limitations of his powers. Article 25, Section 25.03 of the Agreement limits arbitral authority to interpreting and applying contractual language; it states specifically that arbitrators shall have "no power to add to, subtract from or modify any of the terms of this Agreement." It is contended therefore, that the Union can prevail in this grievance only if it demonstrates that the regulation at issue violated some contractual provision. It is clear, even to the Union, that the proposed rule did not breach the reasonableness requirement of Article 43, Section 43.03. It was not only reasonable, it was

essential to standardize Departmental practices. In the Employer's view, an arbitrator might search the Collective Bargaining Agreement with extraordinary thoroughness, and still not be able to uncover a single contractual provision supporting the Union's claim. In the final analysis, according to the State, the claim is based on an extraneous plea for "equity." But equity cannot supersede what was negotiated. Moreover, if the Arbitrator were to decide the equities, he would be in error were he to ignore the elemental fairness supporting the Employer's position. It is clear beyond debate that the Department acted in good faith to correct a glaring inconsistency in its treatment of employees. The State regards the Union's position that such inconsistencies should continue as a striking departure from its assumed role as the protector of fairness and equality.

In sum, the Employer urges that the grievance be denied. It views a contrary award as a contractually prohibited curtailment of Management Rights.

OPINION

The Arbitrator agrees with the State's argument concerning the role of equity in the decision-making process. Arbitration is not "an equitable forum," contrary to the Union's suggestion (except perhaps, in discipline cases where the arbitrator is licensed to

interpret "just cause"). The arbitral task in contract disputes is to interpret and apply the contract. Equity is a bargaining-table issue, not a foundation for arbitration awards. The United States Supreme Court established this precept nearly thirty years ago in one of its "Trilogy" decisions. The Court held in United Steelworkers of America v Enterprise Wheel and Car Corp., 363 US 593, 597 (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.

The Enterprise Wheel decision is as compelling today as it was in 1960. It is the universally recognized principle governing arbitral authority in the private employment sector, and is equally applicable to the public sector.

The explicit restrictions on arbitral authority cut both ways. Even if one subscribes strictly to the theory that employers retain all rights not specifically circumscribed by negotiated language (the Residual Rights Theory), the Department still was prohibited from enforcing a regulation which was contractually proscribed. However, if the rule was not contractually proscribed, Management had authority to promulgate it regardless of any inequities.

In the Arbitrator's judgment, the last sentence of Article 36, Section 36.05 disposes of this controversy. It states: "Current practice on reporting time shall be continued unless mutually agreed otherwise." It must be presumed that the language was not thrown into the Agreement for its appearance -- that the negotiators used it for the substantive purpose of preserving roll-call practices. In other words, Section 36.05 is an exception to the abolishment of practices brought about by Article 43, Section 43.03.

The Employer contends that Section 36.05 refers only to departmental practices, not institution-by-institution practices. An examination of the realities of roll call disproves the contention. There simply are no roll-call practices that are not those of individual facilities. Prior to adoption of the Agreement, roll-call starting times varied widely among the institutions; but those practices were abolished by the side agreement which required roll calls to commence ten minutes before the beginning of each shift. Likewise, payment and docking procedures were made uniform. The only conceivable practice remaining was one the parties were unable to resolve -- whether or not roll-call absences and tardinesses would be disciplined. That question was answered differently by the superintendent of each facility. Five of the institutions followed a custom in which roll call attendance was voluntary and discipline was not imposed. Seven institutions did impose discipline for roll-

call attendance infractions. Each correctional facility adhered to its practice for one and one-half years of the contractual term, until the Department introduced the unilateral change.

The Arbitrator has no alternative but to leave the parties where they were before the protested regulation was announced. The concluding sentence of Section 36.05 must be given meaning, and it would be meaningless if it did not preserve the practices of each institution. An award upholding the Department's regulation would sanction the unilateral abolishment of practices Section 36.05 was meant to preserve. By the same token, an award granting the Union's request for a declaration that no employee can be disciplined for failure to report to roll call in a timely manner, would constitute an impermissible amendment of Section 36.05.

The award will set aside the regulation and perpetuate a condition both parties find unacceptable. It is clear that the Union and the Employer made a mutually undesirable bargain when they agreed to the concluding sentence of Section 36.05. They created working conditions infused with inequality, unfairness, and inefficiency. But the Arbitrator is powerless to rescue either party from its bargain. His job is to interpret and apply the Agreement, and the fact that the result proves to be unfair and detrimental to both the Union and the State is irrelevant. If a negotiating mistake was made, the parties are free to correct it, but they can do so

only by negotiating. They cannot legitimately look to an arbitrator for a release from their contractual commitments.

AWARD

The grievance is partly sustained and partly denied.

Article 36, Section 36.05 of the Agreement preserves and carries forward the practices of individual correctional facilities on discipline for roll-call attendance deficiencies. The regulation of the Department of Rehabilitation and Correction which attempted to establish a uniform departmental practice of disciplining roll-call absenteeism and tardiness was in conflict with Article 36, Section 36.05. Accordingly, the State is directed to expunge the regulation.

The Union's request for a declaration that no employee can be disciplined for failing to report to roll call on time is denied. If it were granted, it would be a repudiation of Section 36.05 and, therefore, in manifest derogation of the contractual limitations on arbitral authority.

The Union's request to expunge all discipline imposed under the regulation is sustained only in part. It is incumbent upon the parties to identify the institutions which observed disciplinary practice and those which did not. The State is directed to expunge discipline and make employees whole for losses resulting from the application of the regulation only at those institutions where the pre-regulation practice was not to discipline for roll-call atten-

dance infractions. Discipline which was consistent with the practices of the disciplining institution will be permitted to stand.

In the hearing, the Union's Staff Representative identified the following five institutions as those which, by practice, did not apply discipline for missed roll calls or late roll-call report-ins:

Lancaster
Mansfield
Ohio Women's Reformatory
Marion
Chillicothe

In its brief, the State disputed the accuracy of the list. The parties are directed to meet and settle their disagreement on this issue. The Arbitrator hereby reserves jurisdiction solely on the question of which institutions are bound by non-disciplinary practices. In the event the State and the Union are unable to agree, either party can invoke the retained jurisdiction by notifying the Arbitrator and the other party.

Decision Issued:
October 26, 1988

Jonathan Dworkin, Arbitrator