

OPINION AND AWARD

In the Matter of Arbitration)	OCB# G87-0549 &
)	G87-2113
Between the)	
STATE OF OHIO)	Grievances of:
DEPARTMENT REHABILITATION &)	L. Baxter &
CORRECTIONS)	W. McDowell
And)	
THE STATE COUNCIL OF)	Hearing: November 15, 1988
PROFESSIONAL EDUCATORS,)	Award: March 3, 1989
OHIO EDUCATION ASSOCIATION)	Paul F. Gerhart, Arbitrator

Appearances

For the State of Ohio, Department of Rehabilitation & Corrections:

Meril J. Price, Chief, Administrative Support, Office of
Collective Bargaining
Fr. David K. Foxen, Deputy Supt./TIE OSR
Thomas E. Durkee, Labor Relations Officer
Dean Millhone, Labor Relations, Marion Corr. Inst.
Merrill Williams, Unit Manager, Marion Corr. Inst.
John W. Morrison, Chief Corr. Supv. (Major), OSR

For the State Council of Professional Educators, OEA:

Henry L. Stevens, UniServ Consultant, Ohio Education
Association
Carrie Smolik, Grievance Chairperson
Steven Sunker, President, SCOPE
Wayne McDowell, grievant

Background

The State Council of Professional Educators, affiliated with the Ohio Education Association and National Education Association (the Association) is the bargaining representative for, among others, teachers at the Marion Correctional Institute which is operated by the Ohio Department of Rehabilitation and Corrections (the Employer). During the term of their labor agreement dated July 1, 1986 through June 30, 1989 (the Agreement), the parties were unable to resolve a grievance involving work assignments to Lowell Baxter and Wayne McDowell, members of the bargaining unit. Under the provisions of the Agreement, Article 6, Arbitration, the undersigned was assigned by the parties to issue a final and binding decision in the matter.

Upon the mutual agreement of the parties, a hearing was held in the conference room of the Association's offices in Westerville, Ohio on November 15, 1988. At that time, the parties stipulated that the matter was properly before the arbitrator. During the course of the hearing, each party was accorded the opportunity to examine witnesses and present other evidence. Witnesses were sworn and separated. The parties waived oral argument and, instead, submitted post-hearing briefs which were exchanged through the arbitrator on December 21, 1988, at which time the record in the matter was closed.

On January 3, 1989, however, Meril Price, on behalf of the Employer, objected to a reference to a personnel procedure memo in the Association's brief. Henry Stevens, on behalf of the Association, responded on January 9, that such reference was merely by way of explaining earlier exhibits introduced by the Employer. Nonetheless, by letter of January 14, 1989, the arbitrator held that the reference and memo were not admissible inasmuch as they constituted new evidence.

Grievances

Baxter grievance (JX 2B). Mr. Baxter apparently spoke informally with his supervisor, Merrill Williams, following which Mr. Williams addressed this reply to him:

Mr. Lowell Baxter

1-6-87

Issue Discussed: On 1-5-87 at 12:30 pm. Mr. Baxter did discuss with me in my office, that he was upset with my assigning him to mail room duty during the Christmas break.

Resolution offered: As a result of the memo dated 12-17-86, from Mr. McDonald, Mail Room Supervisor, I did ask for volunteers to help in the mail room. This was done out of necessity to help ease the Christmas package rush. No one did volunteer so I did assign teachers to help out. All education staff members were ask (sic) to help if they possibly could. Those that could not were in the process of interviewing new students.

No one person worked more than any other in the mail room. We all chipped in and did what we could. I realize it was a busy time for most teachers, but we managed to get most of our work done and still help out another department. Also, we all had vacation opportunities if so desired.

Such co-operation is much appreciated by Mr. McMackin, Mr. Marsino, Mr. Phillians, and others, as well as the inmates. The safe, orderly operation of this facility is still the number one priority of all staff members.

On 7 January 1987, the following grievance was addressed to Mr. Tim Phillians, Principal:

Please consider this an official grievance at Step 1 - Next Level Supervisor with respect to the response of Vocational Supervisor Merrill Williams to Teacher Lloyd Baxter's preliminary grievance this date, copy attached.

To provide some background and give a full explanation of our concern, what we have here is more or less a "class action" grievance on behalf of several SCOPE members about duties of a non-school nature.

As we see it, the problem lies with that part of the job description which reads, "perform other duties as required". Management has apparently decided that means whatever management wants that to mean; however Labor has decided that means duties only of a school-related nature.

Teachers are being assigned to the mail room. Teachers are being assigned to inspect incoming electrical items. Teachers are being assigned supervisory duties that are clearly administrative in nature. We observe that these are in violation of the negotiated contract and also in contradiction to established DR&C [Department of Rehabilitation & Correction] practice; equally important, these unilateral assignments work against a favorable working climate and furthermore are clearly

in violation of a "cooperative and harmonious" philosophy.

During the regular day, non-teaching time is essential for school planning; during the quarter break, non-teaching time is essential for school organization. We are Teachers, not Mail Clerks, yet we respect those fellow employees; we are Teachers, not electrical inspectors, yet we respect those fellow employees; we are Teachers, not Educational Supervisors, and we respect this level of management too.

We ask for your response as per the terms of the contract, and we hope that this will include written assurances against similar assignments in the future.

McDowell grievances (JX2A). Mr. McDowell actually filed two grievances which were combined for processing although they involve separate incidents. The first is dated 1/14/87:

Explanation of Grievance: I am hereby grieving the practice of management's assigning teachers "out of classification" work in the mail room. Since we are educators, our job is to teach and perform only education related tasks. Working in the mail room is not related to education. Also, since mail room duties entail the handling on (sic) cash, checks, money orders, etc., we have to incur additional liability (also for inmates tangible personal property). We are also subjected to increased potential to contract diseases from incoming packages to inmates.

Specific Violation of Article: 7, 9, 14.

Remedy Sought: Cessation of the practice of requiring teachers to work in the mail room (outside our classification). Cessation of management's practice of requiring teachers to assume increased liability and health hazards regarding inmate property.

Mr. McDowell's second grievance is dated March 2, 1987:

Explanation of Grievance: On February 17, 1987, I was required to perform work outside my classification, namely, shaking down cells which is a correction officer's duty. While performing said work outside my classification, I injured my back, missed work and expended personal money as a result of said back injury. I, as well as other teachers, had previously complained about requiring us to perform this duty for which we are not qualified and/or conditioned.

Specific Violation of Article: 1.01, 1.02, 1.03, 7.01, 9.01, 13.01-13.04, 14.01-14.02, and "side bar" letter, p. 86.

Remedy Sought: Cessation of the practice of assigning teachers the task of shaking down cells (and other tasks outside of our classification); payment or compensatory time for all sick leave hours used as a result of said injury; medical expenses; and any other job benefits which are just & appropriate.

Issue

The issue in this matter was stipulated by the parties at the hearing:

Did the Department of Corrections violate the 1986-89 agreement between the State Council of Professional Educators OEA/NEA and the State of Ohio when members of the bargaining unit were asked to participate in a cell shakedown and asked to work in the mail room for a short period of time during the Christmas holidays?

At the conclusion of the hearing, there was some dispute as to whether the grievances constituted a class action. The arbitrator's decision must necessarily be limited to answering the above issue, as stipulated by the parties. The way the parties mutually choose to use this decision is obviously beyond the purview of the arbitrator.

Relevant contract provisions

ARTICLE 1 - BARGAINING UNIT

1.03 - Classifications

The following classifications are included within the bargaining unit:

69621 Teacher (including parenthetical subtitles)

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 - Management Rights

Except to the extent expressly abridged only by specific articles and sections of this Agreement, the Employer reserves, retains, and possesses, solely and exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The sole and exclusive rights and authority of

management include specifically, but are not limited to the following:

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- 2) Direct, supervise, evaluate, or hire employees;
 - 3) Maintain and improve the efficiency and effectiveness of governmental operations;
 - 4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted; . . .
 - 8) Effectively manage the work force;
 - 9) Take actions necessary to carry out the mission of the public Employer as a governmental unit;

ARTICLE 14 - WORK RULES

14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and programs.

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In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified promptly of such declared emergencies and their duration.

14.02 - Uniformity

It is the intent of the Employer that work rules shall be interpreted and applied uniformly to all affected employees.

ARTICLE 15 - CLASSIFICATION MODERNIZATION

15.01 - Study

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The Association shall be afforded an opportunity to provide input into this study by working with the consultant and the Employer in developing and facilitating the areas of information gathering from the affected employees, methodology to be used, prioritization of the classes to be reviewed, and ways to implement the results.

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15.03 - Classification Status

Except through this study or by mutual agreement of the parties, no changes shall be made in classifications or compensation levels assigned to classifications in the bargaining unit.

ARTICLE 17 - TRANSFERS AND PROMOTIONS

17.01 - Definitions

As used in this Agreement, the following definitions shall apply:

(B) *Assignment*

An assignment is the particular job to be performed within a work facility as determined by the classification specification and position description.

Side letter, May 19, 1986

The Employer guarantees that assignments of student contact time for employees in the Teacher and Teacher Coordinator classification titles shall be no more than six (6) hours per day. Student contact time is defined as time spent in classroom instructional activity or group instructional activity. The Employer reserves the right during remaining portions of the work day to assign employees to perform related duties such as but not limited to conferences, curriculum development, testing and treatment team assignment.

Evidence

Steven Sunker, President of SCOPE, identified the Classification Specification for Guidance Counselor, Code 69761 (AX 1), which is his own classification, and noted that it is referenced in the Agreement, Article 1.03. Mr. Sunker also noted that classification specifications are referenced in Article 17.01(B) [quoted above]. He agreed that Article 17.01(B) and Article 1.03, "outlined" his job duties.

Mr. Sunker testified that the issue in the Moreland case [State of Ohio, Department of Youth Services & State Council of Professional Educators, OCB #G86-0931, Gerhart, Arbitrator] was whether bargaining unit employees could be

required to apply restraints to youths in the facility. He stated there was a clear emergency in that case; there was an immediate threat to the safety of the involved youth.

Mr. Sunker testified that the Association had submitted a proposal during negotiations that would have prohibited teachers from performing security duty, but he acknowledged the Association had withdrawn the proposal because there were other sections of the Agreement that would cover the situation, particularly Article 17 and a side bar letter.

The Agreement speaks to emergencies in Article 14.01, last paragraph [quoted above]. The arbitrator in the Moreland case referred to the emergency and the Association did not contest that.

Mr. Sunker testified that representatives of another bargaining unit from the American Federation of State, County, and Municipal Employees had complained to Mr. Sunker about Unit 10 (OEA members) performing work in the AFSCME bargaining unit including recreation, secretarial duties, and others.

Job classification, Mr. Sunker testified, is considered by Article 15.01 of the Agreement. [Quoted above.] Mr. Sunker stated that the only change in the classification specification for teachers due to the state's recent modernization program was to provide different classification numbers based on level of education for payroll purposes.

Mr. Sunker testified that the Agreement also references the "related duties" that are required to be performed by the Classification Specification. The side bar letter [quoted above, in relevant part] appears at page 86 of the Agreement. The last line of the letter states,

The Employer reserves the right during remaining portions of the work day to assign employees to perform related duties such as but not limited to conferences, curriculum development, testing and treatment team assignment.

Mr. Sunker provided examples of "related duties" he preforms including planning an honor roll assembly, maintaining up-to-date grade reports for students, and giving extra tests. He stated he had not been required to "shake down" cells or to work in the mail room. He indicated that if management had identified a clear emergency, he would perform such duties, however, and encourage other members of the Association to do so.

Mr. Sunker read a posting for several bargaining unit positions:

TEACHER (ENGLISH) - Class #69621

Teach English and life coping skills to inmates in approved institutional programs. Plan and schedule daily classes. Evaluate students and other acceptable methods. Assist with other functions as necessary.

EDUCATION SPECIALIST 2 - Class #69652

Serve as liaison between institution Education Department and other institution departments and prospective employment/education placement. Conduct all aspects of the compilation of pre-institution training, education and employment portfolio. Initiate development and maintenance of pre-institution portfolio in accordance with OBES standards. Make inmate referrals to appropriate institutional departments for service and assistance and provide employment and vocational career counselling. Recommend institutional job placement to classification/reclassification committee. Coordinate current inmate institutional job descriptions with inmate personnel office. Coordinate job counsellor activities with pre-release programs including records appropriate for inmate reintegration portfolio.

He stated that the above were duties expected of Unit 10 members.

He also identified a job posting for Correction Officer 2, a position not in the bargaining unit.

Supervise inmates of all nationalities and cultures, assigned to daily activities. Make periodic rounds in assigned areas to ensure orderly movement, security and control of inmates. Enforce institution and departmental rules, policies and procedures. Make checks in assigned areas to detect contraband articles. Safeguard and protect state property and stress economic use of equipment and supplies, food, clothing, utilities, etc. Prepare forms and reports as required. Assist in providing a safe, secure environment through utilization of modern safety practices and security procedures.

Mr. Sunker stated that the above were not the duties of a teacher but were properly assigned to Bargaining Unit 3 employees not represented by the Association.

On cross-examination, Mr. Sunker stated he participated in the negotiation of the Agreement and in initial drafting of Article 17. He also stated that the modification to the Teacher Classification Specification, dividing it into four

groups based on education for payroll purposes, had been done without Union concurrence. He stated, however, that the Union grieved and after meeting with the Office of Collective Bargaining representatives, agreed to accept the changes along with an assurance that the Association would be consulted in the future before any changes were implemented.

Carrie Smolik, Grievance Chairperson, testified she had received about 15 grievances concerning "working out of classification." She identified Association exhibit 5, a letter from Susan Blakeley, Site Representative for Allen Correctional Institution concerning the fact that bargaining unit members were required to participate in the shake down of cells. She stated that no emergency was declared and no notice was given. She also stated that she would not contest working out of class if there had been an emergency and agreed that the Association would not object to such assignments in the case of emergency.

The Employer objected to the preceding testimony on grounds of relevance, but did offer a stipulation that the employer does assign bargaining unit personnel to perform security duties in both emergency and non-emergency situations.

Ms. Smolik testified that she had also been told by Mitchell Sawyer, a bargaining unit member at another correctional institution, that he had been instructed to discontinue his classes for one week and to perform miscellaneous repair work at the institution--work that he did not consider to be "related duties."

Ms. Smolik identified Association exhibit 7 as a grievance and settlement from the Department of Youth Services. That grievance stated, in relevant part,

On June 4th, 1987, the teachers were asked by the principal to report to their groups to relieve the youth leaders so that they could attend a non-emergency staff meeting.

Remedy sought: This practice immediately stopped . . .

The settlement occurred when the Director sent the following letter to the Association,

I have reviewed the recommendation of the Hearing Officer, Deneen Donough, and I am granting your grievance with respect to your request that except in emergency situations, teachers will not be assigned to cover dormitories in the absence of youth leaders. Please let this letter serve as notice of that policy.

Ms. Smolik also testified that Susan Cooley, a site representative at yet another institution, told her that teachers had generally not been asked to perform work out of classification although they had been asked to "shake down" their own classrooms after inmates had been secured in their cells.

Ms. Smolik testified regarding Mr. Baxter's grievance. She stated that the normal situation for him was that during class shutdowns, teachers had been given time to do paper-work, preparation, and other tasks related to their teaching duties. The occasion giving rise to Baxter's grievance was management's direction to him to work in the mail room during the class shutdown period. There was no declared emergency. The incident occurred at Christmas.

Ms. Smolik testified concerning a grievance by Herman Crabtree from Ross Correctional Institute. Crabtree and other teachers were given whistles and sent out to patrol the fence around the institute to watch for inmates during dense fog. The assignment is referred to as "fog duty."

On cross-examination, Ms. Smolik stated that Mitchell Sawyer was a carpentry instructor. She said he did not mention taking a crew of students to help perform the tasks. Ms. Smolik did not know whether he had. Mr. Sawyer and another instructor--the Building maintenance instructor--were sent out to perform the work.

Wayne McDowell, one of the grievants, testified that he works at the Ohio State Reformatory at Mansfield and has been there for 21 years. He is also site representative for the Association and on the Negotiating Committee for SCOPE.

Mr. McDowell stated that on several occasions he has worked out of classification in the mail room, in the kitchen, on the cell blocks, and the clinic. In these instances there were no declared emergencies. In none was the security of the institution at stake.

Mr. McDowell stated he had also filed grievances on behalf of others working out of class at the institution including Einsel, Hicks, Rensick, Robert Emrath and others. The Emrath grievance involved teachers being assigned to pick up students in a bus, shake the students down, take the students to lunch on the bus, bring them back, and ultimately return them to their dormitories. That grievance was resolved when management agreed to cease the practice.

Mr. McDowell testified he had handled the grievance of Amy Einsel, a female instructor at the high school level, and identified her letter concerning it (AX 8). She was directed to "work the ranges" patrolling outside cells where prisoners were housed. In part, her letter states,

On several separate occasions I was sexually harassed by inmates. I was whistled at, called names, and comments were made about my body. Also, several inmates complained about a female being on the ranges. When the second shift officers came on, one officer asked me if I had worked the ranges that day. I told him I had and he responded that that proved women could work the ranges. I then asked him if female correctional officers ever worked the ranges and he told me they did not.

Mr. McDowell stated that some of the inmates on the range could have been her classroom students. He said that female correctional officers did not walk the ranges even though they can reasonably expect to perform the same types of assignments that male correctional officers perform, but female teachers could not reasonably expect such assignments.

Mr. McDowell stated that when he was ordered to "shake down" cells, he did as ordered. This requires that he pull up the bed and mattress, strip the sheets, look in foot lockers, examine the toilet bowl and sink, search around any pictures on the wall, and check around vents which are generally dirty. He stated that he has dirtied and torn clothing intended for normal teaching duties. It is not possible to anticipate shake down duty because it is unscheduled. As a result he arrives to teach wearing a suit and may be assigned to shake down duty.

On some occasions when he was assigned shake down duty, Mr. McDowell has been able to look down and see the correction officers drinking coffee. On February 17, 1987, while shaking down a cell, Mr. McDowell stated that he injured his back. While reaching over the corner of a bunk to pull out a foot locker, he strained his back. He has sought medical treatment for it. He has continued to experience a problem and has been awarded an eight percent permanent partial disability from the Ohio Industrial Commission.

Mr. McDowell stated that he and his co-workers are regularly confronted by AFSCME representatives concerning the fact that they are performing duties in classifications represented by AFSCME. Association exhibits AX 11, AX 12, and AX 13 are AFSCME grievances concerning non-AFSCME employees performing AFSCME bargaining unit work. The Employer stipulated that other units had filed grievances concerning bargaining unit work.

Mr. McDowell stated that if teachers had not been assigned to shake down cells they would have been making lesson plans, preparing teaching materials, examinations,

grading homework, and other types of duties normally performed by public school teachers. Because of the nature of the students, more grading and feedback is necessary. When he is assigned out of class he then has more papers and grading to take home. Another major problem with working out of class is the affect it has the perception the students have of their teachers. In Mr. McDowell's opinion it has a negative impact on the teacher's ability to perform effectively as a teacher.

On cross-examination, Mr. McDowell testified that he had participated in shake down duties prior to February 17, 1987, and that he had participated in as many as a dozen over the past two years. He stated that when he is directed to participate in a shakedown, classes are closed down for the day. Moreover, he stated, that under such circumstances, the students actually receive less classroom instruction than is required by regulations concerning high school credit.

Mr. McDowell also testified that December, 1986 was not the first time he sorted mail in the mail room.

In the event of unacceptable student behavior, Mr. McDowell testified that he attempted to keep matters under control but that if he could not, he called for a correction officer. Procedures for handling such situations are taught at in-service training sessions periodically. He has taken self-defense training also. Mr. McDowell, when asked why the institution provides such training, responded, "Because the institution protects their buns in a number of ways by saying 'we gave you training.'" He also stated that the amount of time in training was not adequate to achieve proficiency at their use.

He agreed that he had been made aware that the school is within the walls of a penal institution and that he can anticipate that incidents might occur where he would need the type of training that is provided.

John W. Morrison, Chief Correctional Supervisor (Major) at the Ohio State Reformatory at Mansfield, testified he had held other positions at the institution over a period of 13 years. He stated that the inmate population is about 2400 including about 1800 under maximum security. The average age is 22-23 years; their offenses cover the full range of felony offenses.

Mr. Morrison stated that most employees are given security training at pre-service and in-service training sessions. He stated that the primary responsibility of all employees is safety and security.

Mr. Morrison stated that "lock and feed" situations and shake downs occur for specific reasons. It might be the result of increased gang activity, information that there are contraband weapons among the population, loss of employee keys, or general unrest in the population for some specific reason. Over the past four to five years due to a consent decree, it has become more difficult to run a shake down and there has to be a specific reason for it. Therefore, they are less predictable. There are at least two and, more often, three per year.

Unrest at the institution is highest around holiday periods, according to Mr. Morrison. He agreed that at those times the situation was "potentially explosive." He stated he had responsibility for the mail room operation. Inmates are permitted to receive one package per quarter and two food boxes per year from the outside. Packages are processed, documented, and searched for contraband. Mail room duty also consists of logging money orders, sorting mail and delivering it in a timely fashion.

If packages are not delivered on time, Mr. Morrison stated that perishable items may be damaged, the potential for theft rises and therefore so does the potential for contraband getting into the institution, and the chance of unrest also rises. If packages are not delivered, a court of claims action could be filed. Ordinarily, Mr. Morrison stated, the uniformed correction officers and one supervisor are responsible for sorting and processing mail, but at times there is a heavy influx of packages and staff is not adequate to process it in a timely fashion. Even then, only about 100 food boxes can be processed in a day.

In the past, teachers, postal workers, shop people, and other volunteers have helped to process packages. Such voluntary help has been used since Mr. Morrison arrived [13 years].

Ordinarily, Mr. Morrison stated that cells are shaken down by a team and that employees do not ordinarily perform that duty alone.

On cross-examination, Mr. Morrison testified that there had been problems with inmates not getting mail on time. He stated that there had been no disturbances because of such delays. He said specific inmates had become upset because of untimely delivery.

Mr. Morrison agreed that it takes a "special kind of person" to be a correction officer. He stated that a layman "off the street" would not necessarily know what to look for as contraband items.

Mr. Morrison did not dispute the fact that teachers had been assigned to work in the cell blocks on March 14-16, 1988. He also stated that female correction officers do not walk the range as a routine part of their jobs, but they have been known to do so. Mr. Morrison stated that supervisors are available during a shake down to instruct teachers on what to look for.

Mr. Morrison stated there were adequate numbers of correction officers at the present time. He testified that there have been declared emergencies at the Ohio State Reformatory. The last was in February, 1987. He said there was nothing in writing, simply a declared emergency. He stated that a training session for uniformed correction officers would not be an emergency. With respect to Christmas packages, Mr. Morrison stated he tried to plan ahead to handle the influx by advising his supervisors to expect it and schedule overtime to handle it.

Father David Foxen, Deputy Superintendent for Training, Industry and Education (TIE) at the Ohio State Reformatory, testified that the education function is part of his responsibilities. He identified a position description for an academic teacher, specifically for William McDowell, dated December 3, 1985 (EX 5). He testified that the position description was signed by Robert Rees on 1/5/84, as well as the grievant, William McDowell, and indicated that such signed descriptions are routinely included with evaluations of employee performance to demonstrate acknowledgement of the job the employee is doing.

Father Foxen described the teacher assignment as a full-time, full-year job. Inmates spend about six hours per day in classes. Teachers have 45 minutes guaranteed preparation time, and the rest of the time is to be used in grading, preparation of reports, and attending conferences. The calendar at the institution provides for 10-week quarters with two-week breaks between terms. When there is a contraband search, Father Foxen testified that classes are shut down and inmates are kept in their cells. Teachers are encouraged to take vacation time between quarters. Also, teachers are expected to prepare teaching materials, attend workshops, and generally use the time to further the programs of the school.

Father Foxen testified that he was aware of Mr. McDowell's being asked to work in the mail room during the two-week Christmas break. He stated there was a general shake down in February, 1987, and that in the past, teachers have been required to participate in shake downs. In the past, he also stated, it was assumed that when there was a general shake down, teachers would help. The Superintendent called the high school principal and told him to send over four or five teachers. Ordinarily the principal asks for

volunteers, but if not enough volunteer individuals are assigned.

Father Foxen described a recent shake down called because of the disappearance of a number of knives from a bread machine. Initially, when asked, no teachers volunteered, but Foxen then went to the high school, explained the situation, and asked for volunteers. Mr. McDowell volunteered at that time.

Father Foxen described the regular three-week training programs for new employees including training in unarmed self-defense, the procedures and regulations of the Department, fire arms training, and interpersonal communication. Each year, continuing employees receive forty hours in-service training covering a review of the above matters.

In addition to shake down and mail room activity, teachers are expected to help with the "field day" activities, an annual event. He added that the nature of work at the institution, because of security concerns, was unpredictable. The institution might have to be closed down at any moment. Unexpected events regularly interfere with planned activities and schedules. For example when the blades were missing from the dining hall, something had to be done immediately.

On cross-examination, Father Foxen testified that under emergency circumstances, teachers have normally cooperated. He said that situations such as the one involving the missing knives were not frequent. He stated that the incident described in the Dolores Kolic memo dated 3-9-88 (AX 16) was not an emergency situation. He said it arose as a result of in-service training for security staff and people were needed in the unit to walk around and talk to inmates. He stated it was not an emergency, but that it was an exceptional circumstance.

On re-direct, Father Foxen estimated that Mr. McDowell might have worked two days, at most, in the mail room.

Merrill Williams, Unit Manager of the Marion Correctional Institution, in charge of about 450 inmates in a living unit, testified he is Lowell Baxter's immediate supervisor. He stated Baxter's classification is a vocational teacher-masonry. He stated the school day is normally six hours per day. Teachers spend 45 minutes in preparation activity with the balance in tool inventory and other activities. He stated that shaking down the classroom area is a normal daily activity for teachers.

Mr. Williams stated that the total inmate population was about 1950 with an average age of 25-26. Most are repeat felony offenders. He estimated 385-400 attend

school. Mr. Williams stated that there is normally a ten-week quarter but the schedule is subject to change on the basis of teacher vacations, water leaks, problems in the shop area, etc. Between quarters, teachers are expected to interview and process new students, develop tests, inventory tools, perform security functions, and get ready for the next class.

Mr. Williams stated that he was aware that Lowell Baxter was asked to work in the mail room during the Christmas break in 1986. The mail room supervisor requested volunteer help from vocational instructors on 17 December 1986 (EX 8), and according to Mr. Williams' records, Mr. Baxter spent three hours, at the most, in the mail room. Mr. Williams testified that Mr. Baxter did not volunteer; Mr. Williams assigned him to the task.

Mr. Williams stated that he had been asked for help in sorting mail in the past and that at Christmas time, "You can count on it." He noted that every package must be opened and searched for contraband. Mr. Williams stated that most of the members of the bargaining unit, if they have had free time, have worked in the mail room. Because of the season, Mr. Williams stated the inmates are upset if they do not receive their packages in a timely way.

Mr. Williams stated that Mr. Baxter receives a performance evaluation each year. The position description for each employee is reviewed as part of the performance evaluation. Mr. Baxter's description (EX 9) includes an item described as "Performs other duties as required" for five percent of his time. The description contained his signature and was dated 9-6-88. Mr. Williams stated that such duties include areas management considers "non-teaching functions that need to be done to help with the security of the institution." They are performed during idle time for the employee.

Mr. Williams testified that all employees, including teachers, are required to attend training prior to starting work and also attend in-service training. Mr. Baxter attends such training as evidenced by his in-service training record (EX 10).

Mr. Williams stated that Marion Correctional Institute has an annual field day when as many as 1500 inmates may be in the yard at one time. Every employee, including teachers, are expected to assist with those activities.

On cross-examination, Mr. Williams testified that the Labor Day field day activity is not an emergency. He stated that employees volunteer to assist with the activities.

Position of the Association

The following is the arbitrator's summary of the argument contained in the post-hearing brief of the Association.

The most compelling issue to be decided in this case is whether management violates the Agreement when members of the bargaining unit are assigned to tasks that are out of the unit's classification and there is no clear or declared emergency. Section 17.01(B) states, "An assignment is the particular job to be performed within a work facility as determined by the classification specification and position description." Association exhibits 1, 2a, and 2b represent classification specifications in accordance with Chapter 124.14(A) of the Ohio Revised Code and Chapter 123:1-7 of the Ohio Administrative Code. Chapter 123:1-7-04 requires that the "specification shall include statements of the essential character of the work of the classification"

The Appointing Authority is responsible for accurate preparation of the position description and must elaborate on each categorical task statement to fully describe and explain activities and level of responsibility involved. Management's exhibit 5, while resembling Association exhibits 1, 2a, and 2b, contains a task statement, "performs other non-related duties as assigned." This was obviously added to the form after it was typed. There is no way to determine when and by whom this statement was added. This task statement and another, "performs other related duties as assigned," were not elaborated upon. The exhibit also pre-dated the Agreement.

Arbitrator Gerhart, in State of Ohio & State Council of Professional Educators, OCB #G86-0931, stated that the most compelling part of the Association's argument related to the side letter dated May 19, 1987,

. . . the arbitrator cannot dismiss lightly the words "such as." The examples given [in the side letter] are clearly meant to convey the nature or type of related duties the employer may assign. Physically restraining and escorting students is not of the same nature as attending conferences, developing curriculum, testing and working with a treatment team. On this ground, during the ordinary course of a work day, it is arguable that the Employer should not be able to assign duties such as restraining and escorting students.

The Association does not view shaking down cells, walking the range or cell blocks, and working the mail room

as related duties. These duties belong to bargaining unit 3.

Management's exhibit 9 is not signed by the Appointing Authority, but by Mr. E. P. Pereni, previous superintendent, now retired.

The second issue to be decided is whether there was an emergency. Section 14.01 states, "The Association and affected employees will be notified promptly of such declared emergencies." Both parties testified that bargaining unit members had been required to perform job assignments outside the classification when there was no emergency. Management stipulated that fact. The Association has demonstrated on several occasions their willingness to provide assistance during an emergency. None of the events described by management in this case would qualify as an emergency.

Association exhibits 5, 8 and 16 are examples of bargaining unit members being assigned work outside of the classification specification. There was no notice of a declared emergency. Individuals in the proper bargaining unit were available. Ms. Einsel, a teacher, was assigned a task beyond that normally expected of a female correctional officer, walking the range.

While the Department of Youth Services and the Department of Rehabilitation and Correction have similar missions, they appear to have different views concerning emergencies. Association exhibits 6 and 7 represent the resolution of grievances at the director's level in Youth Services. The grievances regarding working out of class were granted.

The final issue is whether the security and safety of the institution was at risk. Major John Morrison, Father Foxen, and Wayne McDowell testified that on March 14, 15, and 16, 1988, there was no emergency. Further, on February 17, 1987, July 13, 1988 and December 17, 1986, no emergencies as defined by the Employer had been declared. The Agreement, Section 14.02, gives management complete and absolute authority to declare an emergency and to determine its duration. However, the Association and affected employees must be notified promptly. Management never gave notice which shows that there was no emergency.

Conclusion. The parties stipulated that management assigned employees out of their job classifications during emergency and non-emergency situations. Management offered no testimony to substantiate that an emergency occurred on the dates in question. Section 1.03 of the Agreement places the grievants in classification 69621. The classification specification and side letter on page 86 of the Agreement

assigns the job duties. Management exhibits 5 and 9 are not relevant and would not apply in this case. At no time was the safety or security of the institution at risk.

The Association asks that the arbitrator direct management to work bargaining unit members out of their classification only when there is a clear and declared emergency as intended by the parties during negotiation.

Position of the Employer

The following is the arbitrator's summary of the argument contained in the Employer's post-hearing brief.

The mission of the Department of Rehabilitation and Correction is to insure the security of the citizens of Ohio from the inmates being held in the prisons operated by the State. Every employee's primary responsibility is security and safety. In addition, the teacher's goal is to help inmates in their rehabilitation for eventual return to society.

The circumstances being grieved in this case can be categorized as non-routine assignments. It is not routine for these teachers to be assigned to security duties outside what goes on in their classrooms. At times, however, due to the mission of the institution, it is necessary for teachers to be assigned such tasks as "other related duties."

There has been no violation of any article of the Agreement including the side letter. None of the articles cited precludes management's right to assign the duties necessary for safety and security as in the instant cases. Article 3, Management rights [quoted in relevant part above], "reserves . . . all of the inherent rights and authority to manage"

The burden of proof in this case rests on the Union to prove management violated the Agreement. They allege that this case is about teachers having the opportunity to turn criminals into productive citizens. Management contends that there was no testimony presented or implied that the teachers were worried about being impaired as to turning their students into productive citizens. Father Foxen and Mr. Williams's testimonies went un rebutted when it was shown that the teachers did not miss classroom time, that mail room duties are and have been a part of institutional life for years, and at Christmas everyone assists in that activity. Further, the mail room duties have traditionally taken place during the two week break between quarters. Thus, the members have not neglected to complete assignments which were expected of them such as grading students' work, in-service training or even taking vacations.

The Union alleges the matter does not concern security. Yet, all of management's testimony emphasized that security is the number one priority of all personnel in all penal institutions. Certainly the Association is not contending that the search for contraband is not a security function.

The Union alleges this case is different from Moreland and Green/Johnson [Ohio Department of Rehabilitation and Correction & State Council of Professional Educators, #G87-2884, Drotning, Arbitrator]. The concepts in these two cases mirror those which the arbitrator considered in Moreland where he decided that management, "may make such assignments as long as they are not routinely part of the work day." In the Green/Johnson case, the complaint was loss of planning time while doing contraband searches. Both Arbitrators Gerhart and Drotning found that contract negotiations did not eliminate all non-teaching tasks from being performed by members of the bargaining unit. The Association has not shown that these duties are assigned with regularity or worked into their schedules on a frequent basis.

The Union also alleges that the side letter on page 86 of the Agreement specifically limits management to the duties outlined therein. The side letter has not been violated. These teachers have no more than six hours of class time. The letter provides that the Employer may assign employees to perform related duties "such as but not limited to", etc. Certainly the Christmas searches and a cell shakedown performed on a non-routine basis would parallel this previous decision.

The Union alleges that these teachers are being asked to do things for which they have not been trained. Mr. Williams, Father Foxen, and Major Morrison gave unrefuted testimony describing the types of training all employees of penal institutions are required to complete. Evidence was presented to show that all teachers have numerous hours of training in such things as unarmed self-defense, security, custody and control, safety, AIDS, EEO, stress, job counseling, inmate grievances, as well as weapons.

The Union alleges that Article 15, Classification Modernization, applies to this case. Classification Modernization and the Ohio Classification Specification revisions have absolutely nothing to do with this case. Mr. Sunker's testimony tried to direct attention away from this matter by talking about how the state changed specifications without the Association's input. This is evidenced by Mr. Sunker's further testimony indicating they had reached a settlement of the matter. Further, there is no foundation laid that Mr. Sunker is an expert on state specifications.

This section of the contract is totally irrelevant to the case.

The Union alleges that there has been "modification" of an existing provision of the Agreement which would require bargaining. The Union further tried to muddy the water by bringing in issues about reopening negotiations when Mr. Sunker testified that the Office of Collective Bargaining and Rehabilitation and Correction have not reopened negotiations. There has been no modification of the Agreement which would require reopening negotiations.

Finally, the position descriptions for Baxter and McDowell each contained statements of five percent other related duties. Position descriptions are written to identify what an individual does on his or her job. The five percent place on a position description is a "catch all" as it is impossible to write every single task that an employee does into an individual position description. Further, Mr. McDowell has added another five percent "other unrelated duties" and signed his position description. In addition, their complaints do not even add up to five percent of their time.

It is important to note that the definition in Article 17, which the Union cited as an alleged violation, also says that an assignment is by the classification specification and position description.

The duties asked of Mr. Baxter and Mr. McDowell were non-routine duties that are inherent in the mission of Rehabilitation and Corrections. The amount of time being grieved is so inconsequential that an argument for de minimus should be carefully considered. Baxter and McDowell sign position descriptions which contain the "five percent other related duties" statement and are veteran employees, fully aware of the expectations of the Department.

The Union would have the arbitrator order management to cease and desist in these infrequent assignments except in a clear emergency. Management, in an effort to manage the work force, maintain and improve efficiency and effectiveness, sets forth that security duties are a part of everyone's consciousness in a penal institution. If the environment were something other than a prison, the situation might be different. Even in a public school, teachers are used as witnesses to corporal punishment, to conduct locker searches, to help break up fights, as well as for lunch room duties.

The Union's attempt to expand this grievance to include field day, fog watch, and other examples not presented in the grievance trail have not gone unnoticed. All of these duties are integral to the operations of a penal institution

where the Department is obligated to respond rapidly and with flexibility.

Management asks that this grievance be denied in its entirety.

Discussion

I. The issue before the arbitrator is whether the teachers in the bargaining unit may, under the terms of their Agreement, be assigned to cell shakedown and mail room duties. On the basis of the testimony of both Mr. Sunker (at p 7) and Ms. Smolik (at p 9), the Association does not dispute the authority of the Employer to make such assignments during emergencies since the Agreement provides, in the last paragraph of Section 14.01, that, "In emergency situations, as defined by the Employer or the employing agency, the provisions of this [Work Rules] section may not apply." Moreover, the parties agreed that no emergencies existed in any of the three grievances with which this decision is concerned. *Therefore, the specific issue here is limited to whether cell shake down and mail room duties may be assigned when there is no emergency.*

Much of the testimony proffered by the Association related to whether security duties, in general, could be assigned to bargaining unit members. Mr. Sunker's testimony (p 9) illustrates the Association's position that their members should not be required, under non-emergency conditions, to perform security duties, particularly duties normally performed by Bargaining Unit 3 members. Reference was also made to other specific duties such as "fog watch" and "walking the range." The Association is clearly of the view that such assignments are outside the teacher classification and should not be assigned when there is no emergency, or when personnel to whom the duties are normally assigned are available, such as the circumstances described by Mr. McDowell (at p 12).

The arbitrator in this case can not consider the general question of security duty assignment nor the more specific assignment of tasks which are not the subject of the instant grievances. The parties stipulated the issue to be answered, so this arbitrator is bound to limit his decision to it. Moreover, the general question of what security activities might appropriately be considered a part of the teacher's "related duties" is complex and best left to bilateral negotiation. In fact, defining the specific tasks and circumstances under which they may be assigned is, in effect, writing the agreement and therefore beyond the scope of authority the parties mutually intended an arbitrator to have under their Agreement. The Agreement provides only for an arbitrator to answer questions

regarding the appropriateness of specific assignments in the context of the circumstances surrounding such assignments, the written Agreement, and its prior application. Therefore, this arbitrator will limit his consideration to the specific issue set forth above.

II. The controlling language of the Agreement in this dispute is found in the side letter dated May 19, 1986. Specifically,

The Employer reserves the right during remaining portions of the work day to assign employees to perform related duties such as but not limited to conferences, curriculum development, testing and treatment team assignment. [Emphasis added.]

The Union asserts that the cell shake down and mail room duties performed by Mr. McDowell and the mail room duties performed by Mr. Baxter are not related duties and cannot be assigned except in an emergency. The Employer first argues that the tasks are related duties; it also relies on the decision of this arbitrator in Moreland to say that the duties are not routine, or frequently or regularly assigned, so that the related duties language is not relevant.

Quoting from the Moreland decision,

. . . the arbitrator cannot dismiss lightly the words, "such as." The examples given are clearly meant to convey the nature or type of related duties the employer may assign. Physically restraining and escorting students is not of the same nature as attending conferences, developing curriculum, testing and working with a treatment team. On this ground, during the ordinary course of a work day, it is arguable that the Employer should not be able to assign duties such as restraining and escorting students.

The arbitrator agrees with the Employer assertion that the language of the side letter does not limit "related duties" to those specifically listed. The words "such as" followed by the items in the list can not be deemed meaningless, however. They were clearly intended to limit the nature and type of duties normally or routinely assigned to teachers. Conducting a cell shake down and working in the mail room are not of the same nature as the examples of related duties listed above. There is no alternative but to conclude, therefore, that they are not related duties. Thus, there is no question that the routine assignment of teachers to mail room duty or to cell shake down activities would violate the intent of the side letter.

The fact that bargaining unit members engaged in tasks completely unrelated to teaching prior to May 19, 1986, or that job descriptions may have alluded to such non-related duties, is not relevant to this grievance. The side letter plainly limits, as of May 19, 1986, the duties which may properly be assigned to bargaining unit personnel on a routine basis. Such duties must be like those listed in the letter. Whatever happened before May 19, 1986, is therefore not relevant.

Green/Johnson is clearly distinguishable from the immediate case because the issue before Arbitrator Drotning concerned the question of compensation due to deprivation of planning time. Moreover, Arbitrator Drotning found that Green and Johnson, vocational electronics instructors, were particularly well suited to inspect incoming electronic devices. Given their specific specialization, it is entirely reasonable to conclude, as Arbitrator Drotning apparently did, that inspection of electronic devices is a "related duty."

III. The Employer also relies on Moreland to assert that since the assignments to Baxter and McDowell were not routine, and were not assigned regularly or frequently, the side letter is not applicable here, just as it was not applicable in the Moreland case. The specific language in the Moreland decision states,

It is clear to the arbitrator, however, that the [side] letter relates to routine duty assignment. . . . The situations with which the arbitrator is here concerned are not normal or routine. Although they may occur with greater regularity than one would hope, they are not planned into the regular schedule, nor are teachers frequently or regularly assigned restraint or escort duties. Rather, these duties arise out of extraordinary unruly behavior by students. For these reasons the arbitrator finds that the side letter of May 19, 1986 is not relevant to this case.

Is this same reasoning applicable to the McDowell and Baxter grievances? The essential element in Moreland was the extraordinary, unplanned, non-routine, behavior of the youth who required restraint. This was a completely unpredictable event. The arbitrator is particularly persuaded by the Employer's argument concerning the need for flexibility in such circumstances, whether there is a declared emergency or not. The parties could not have intended by the May 19, 1986 side letter to prevent the assignment of teachers as Moreland was on that occasion.

With respect to the mail room assignment in this case, the situation is entirely different. The Employer's own witnesses provided evidence that the mail room congestion

was entirely predictable and a normal, routine circumstance at Christmas. The Moreland decision in no way suggested that the Agreement allows teachers to be assigned to non-related duties under normal or routine and predictable circumstances no matter how infrequent. The assignment of teachers to the mail room at a time when a need for extra hands in the mail room was entirely predictable, normal and not extraordinary, violates the spirit and intent of the side letter. The fact that such assignments happen only once or twice per year does not make them non-routine or extraordinary. On the contrary, the mail room congestion at Christmas is routine. Thus, the Baxter and McDowell assignments to the mail room violated the side letter of the Agreement.

The McDowell grievance concerning cell shake down in February, 1987, is more problematic. He provided no details surrounding the incident. Father Foxen, however, testified about an incident in which a quantity of knives had suddenly been discovered missing from the bread machine and a general shake down was ordered. It was not clear whether this was the same or a different incident. In any event, there are sudden, unexpected, unplanned events, such as that described by Father Foxen, which may require that teachers be pressed into certain security duties, which are not "related duties," because regular security staff are not immediately available to perform such duties. In accord with Moreland, such assignment could not be considered a violation of the side letter of the Agreement. Each such case, however, in the absence of a declared emergency, is subject to the grievance procedure and must be judged on a case-by-case basis. Where such duties are not "related duties," the circumstances under which assignments are made effectively determine whether the side letter is applicable and, therefore, whether the assignment has violated the Agreement.

In the matter of Mr. McDowell's assignment to cell shake down on February 17, 1987, the Association had the burden of showing that such assignment was not the result of a sudden unexpected event--that it was planned well in advance so that adequate security personnel could have been available to perform the work, i.e., that the Employer had a clear alternative to the use of teacher bargaining unit members to perform the work. This burden was not carried by the Association, so no contractual violation can be found in this instance.

In reaching the above conclusions, the arbitrator has been mindful of the Employer argument concerning the management rights clause. It provides specifically that the Employer may, "Direct . . . employees; Maintain . . . efficiency . . . ; [and] Determine . . . the personnel by which governmental operations are to be conducted"

The management rights clause, however, begins with the words, "Except to the extent expressly abridged only by specific articles and sections of this Agreement" Clearly, the language of the side letter expressly limits the nature of the tasks that may be assigned routinely to members of the bargaining unit. Moreover, a standard rule of contract interpretation is that "the specific governs the general" because the specific provides a more precise indication of the parties mutual intent. In that light, since the side letter is a much more specific statement with respect to assignment than the management rights clause, the arbitrator must conclude that despite the management rights language, the parties intended to restrict assignments when they negotiated the side letter.

Finally, the Agreement provides, in Section 14.02, that work rules will be applied uniformly. The Employer has settled grievances similar to the instant one concerning working out of classification for other members of the bargaining unit. (See the testimony of Ms. Smolik at p 10.) Although the details of the grievance in Association exhibit 7 differ somewhat from the instant case, the settlement clearly recognizes the principal that some assignments, even in a penal institution, are beyond the scope of "related duties" for members of the bargaining unit. It is universally accepted that the way an agreement has been applied reflects the parties' intent. The settlement of grievances is perhaps the strongest form of application. Therefore, it would require an extraordinary set of facts and argument to find that the parties' intent was contrary to the outcome of subsequent grievance settlements.

The Employer argues that such settlements occurred in a different department of state government, namely the Department of Youth Services, and thus are not relevant to this proceeding. Section 14.02 clearly expresses the intent that work rules, with which the instant dispute is concerned, are to be applied uniformly across the bargaining unit, not merely within departments that form a part of the bargaining unit. Therefore, the arbitrator must conclude that his assessment of the parties' intent based on the language of the Agreement coincides with the intent as expressed through the parties' behavior.

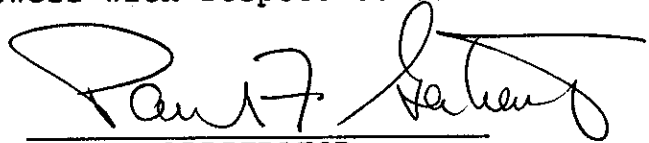
Remedy. Teachers are ordinarily expected to grade papers, prepare lesson plans, and undertake related work in connection with their teaching. Time lost to improper assignment to unrelated duties must be made up through "homework." Arguably, a claim for compensation could be made equal to the number of hours of such improper assignment. In this case, however, insufficient data was provided to show precisely how much time was involved and, furthermore, no such remedy was requested by the

Association. Accordingly, no remedy other than a finding of Agreement violation is provided.

AWARD

The grievances of Mr. Baxter and Mr. McDowell with respect to mail room assignments are sustained. The Employer violated the Seidler letter of May 19, 1986, when it assigned Baxter and McDowell to the mail room, a task which is not part of their "related duties" pursuant to the letter. Other than this finding, no remedy is provided.

The grievance of Mr. McDowell with respect to cell shake down is denied.



ARBITRATOR

Cleveland,
Cuyahoga County, Ohio
March 3, 1989