

STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA

-and-

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION

In the Matter of Arbitration)	
)	
Between)	<u>OPINION AND DECISION</u>
)	
STATE COUNCIL OF PROFESSIONAL EDUCATORS)	
OHIO EDUCATION ASSOCIATION)	OCB Grievance No.
NATIONAL EDUCATION ASSOCIATION)	G87-2285
)	
-and-)	Alice M. Stover,
)	Grievant
STATE OF OHIO, DEPARTMENT OF)	
MENTAL RETARDATION / DEVELOPMENTAL)	
DISABILITIES)	

SAMUEL S. PERRY, IMPARTIAL ARBITRATOR

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

The oral hearing was held on Tuesday, February 21, 1989 in a Conference Room at the Ohio Education Association, 5026 Pine Creek Drive, Westerville, Ohio.

The following appearances were made for each of the Parties:

FOR THE ASSOCIATION

<u>NAME</u>	<u>POSITION</u>
Henry L Stevens	O. E. A. Representative
Alice M. Stover	Grievant
Adele Workman	Witness

FOR THE STATE

<u>NAME</u>	<u>POSITION</u>
Tim D. Wagner	Chief, Arbitration Services
Robin Thomas	Advocate for Employer
Donald L. Walker	Labor Relations Officer/MR/DD
Bettilu Gooldin	Personnel Director/MR/DD

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

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

The Parties have approved publication of this Opinion and Decision.

The oral proceedings in this matter were concluded on February 21, 1989. The Arbitrator received the post-hearing brief of the Association on March 21, 1989 and received the post-hearing brief of the State on March 23, 1989.

The Arbitrator declared the hearing closed as of March 24, 1989, and shall render his Opinion and Decision pursuant to Article 6, Section 6.07 of the Agreement (Joint Exhibit #1) existing between the Parties.

The Arbitrator, by letter dated March 27, 1989, made a request for an extension of time of thirty (30) days from April 23, 1989 within which to submit his Opinion and Award. This request for an extension of time was approved by the Parties.

THE GRIEVANCE

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

SEE NEXT FIVE (5) PAGES

Joint Exhibit #2

OHIO EDUCATION ASSOCIATION

An affiliate of the National Education Association

FRANKLIN COUNTY METRO UNISERV OFFICE
5026 Pine Creek Drive, Westerville, Ohio 43081
Phone (614) 895-1041 or 1-800-221-2530 (in Ohio)

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



February 12, 1988

Mr. N. Eugene Brundige, Deputy Director
Office of Collective Bargaining
65 E. State Street - 16th Floor
Columbus, OH 43266-0585

FILE COPY

GR# MR/DD-OE-3-87-561 - Alice Stover - Gallipolis DC

Dear Mr. Brundige:

Pursuant to Article 5, Section 5.05 (F) and Article 6 of the 1986-89 Agreement between the State of Ohio and SCOPE/OEA/NEA, this letter will request that the above grievance be submitted to the arbitration panel.

A copy of the grievance is enclosed.

Sincerely,

A handwritten signature in cursive script that reads "Henry L. Stevens".


Henry L. Stevens
UniServ Consultant

HLS/asw
Enc.

cc: Carrie Smolik
John Beattie

**JOINT
EXHIBIT**

2

OHIO EDUCATION ASSOCIATION 

An affiliate of the National Education Association
FRANKLIN COUNTY METRO UNISERV OFFICE
5026 Pine Creek Drive, Westerville, Ohio 43081
Phone (614) 895-1041 or 1-800-221-2530 (in Ohio)

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



November 11, 1987

Mr. N. Eugene Brundige, Deputy Director
Office of Collective Bargaining
65 East State Street - 16th Floor
Columbus, OH 43266-0585

FILE COPY

RE: Alice Stover - Gallipolis D.C.

Dear Mr. Brundige:

Pursuant to Article 5, Section 5.05 (E), this letter will request a review of a grievance by the Director of the Office of Collective Bargaining (Step 4).

Your immediate attention to this matter is greatly appreciated. I have enclosed a copy of the grievance.

Sincerely,

Henry L. Stevens
UniServ Consultant

HLS/asw

Enc.

cc: Carrie Smolik
Alice Stover
Robert Brown

**JOINT
EXHIBIT**

2

4 935 710
FOR CERTIFIED MAIL
INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

An affiliate of the National Education Association
FRANKLIN COUNTY METRO UNISERV OFFICE
5026 Pine Creek Drive, Westerville, Ohio 43081
Phone (614) 895-1041 or 1-800-221-2530 (in Ohio)

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

John Beattie	
30 E Broad St.	
Columbus, Ohio 43215	
Postage	
Certified Fee	
Special Delivery Fee	



October 6, 1987

FILE COPY

Mr. John Beattie
Department of MR/DD
30 E. Broad Street
Columbus, OH 43215

RE: Alice Stover - Gallipolis D.C.

Dear Mr. Beattie:

Pursuant to Article 5, Section 5.05 (D), this letter will request a hearing at the Employing Agency Director's Level (Step 3).

Please contact me at the above address when this hearing will be conducted.

I have enclosed a copy of the grievance.

Sincerely,

Henry L. Stevens

Henry L. Stevens
UniServ Consultant

HLS/asw
Enc.
cc: Carrie Smolik
Alice Stover

JOINT EXHIBIT
2

UNIT 10
EDUCATION AND LIBRARY SERVICES
EMPLOYEE GRIEVANCE FORM

TO BE COMPLETED BY THE EMPLOYEE (Please Print or Type):

Department MH & MR/DD	Date September 11, 1987
Institution Gallipolis D.C.	SS No.
Employee Name Alice Stover	Work Telephone No.
Classification Title Teacher	Date of Incident Giving Rise to Grievance

Explanation of Grievance:

Denial of representation by the sole and exclusive bargaining representative.

The above-mentioned action(s) violate(s), misinterpret(s) or misrepresent(s) the Agreement between SCSPE/OEA and the State of Ohio.

- Specific Violation of Article 1 - 1.02
- Specific Violation of Article 5 - 5.05
- Specific Violation of Article 8 - 8.06

Remedy Sought Since Mrs. Stover was denied representation by the exclusive representative, we seek that she be given the highest marks possible for her annual performance evaluation.

Employee Signature _____ Date _____

TO BE COMPLETED BY THE APPROPRIATE MANAGEMENT REPRESENTATIVE:

<u>Date Received</u>	<u>Date Notified Assoc. Representative</u>	<u>Date of Meeting</u>	<u>Date of Grievance Response</u>
----------------------	--	------------------------	-----------------------------------

- Informal
- Step
- Step I
- Step II
- Step III

ADM T86C

JOINT EXHIBIT
2

TO: Alice Stover, Teacher
FROM: ^{DW.} Don Walker, Labor Relations Designee
RE: UniServ Consultant
DATE: August 28, 1987

It is my understanding that you desire Mr. Stevens, the OEA UniServe Consultant, to be present and represent you at your Step II Annual Performance Evaluation review. With review of OEA contract, Article 8.06, I feel I must inform you of my position on this matter.

There is no provision for the UniServe Consultant to represent you, however, there is a section which speaks to the site representative who may use his or her own time to represent you to this internal review. If you would desire to discuss this matter with me, please contact my office to arrange for a time to meet.

DW:tlc

cc: Lawana Moore, OEA Site Representative
Pamela K. Matura, Superintendent
Bettilu Gooldin, Personnel Director
Rose Ramos, Program Director
Ruth Kirkland, O.L.A.P.C.
Mary Lou King, Teacher Supervisor

JOINT
EXHIBIT

2

THE ISSUE

The issue as framed by the Association states as follows:

Did the Management violate the 1986-89 Agreement between the State Council of Professional Educators/OEA/NEA and the State of Ohio when they denied Mrs. Alice Stover representation by the Association (sole and exclusive bargaining representative) at a meeting she believed would have adverse effect on her employment and if so, what shall be the appropriate remedy?

The issue as framed by the State states as follows:

Did the Employer violate the Contract when it denied the Grievant the opportunity to be represented by an Association UniServ Consultant at the internal review stage of her performance evaluation appeal and if so, what shall the remedy be?

PERTINENT PROVISIONS OF THE AGREEMENT (Joint Exhibit #1):

Article I	Bargaining Unit
Article III	Section 3.01 - Management Rights
Article XII	Section 13.02 - Investigatory Meeting
Article XIV	Section 14.01 - Work Rules

OTHER PERTINENT RULES AND LAWS (Joint Exhibit #3)

Chapter 4117 of the Ohio Public Employee Collective Bargaining Law & Rules 1988

FACTS AND BACKGROUND:

The Parties to this Arbitration are the State Council of Professional Educators, Ohio Education Association (OEA) and National Education Association (NEA) (hereinafter referred to as the Association) and the State of Ohio, Department of Mental Retardation/Developmental Disabilities (hereinafter referred to as the State).

The Grievant in this matter, Alice M. Stover, has been employed for approximately twenty (20) years as a teacher at the Gallipolis Developmental Center (GDC), an institution operated by the Ohio Department of Mental Retardation and Developmental Disabilities (MR/DD). This grievance arose over a dispute over contract language interpretation between the Parties pertaining to representation during the performance evaluation appeal process by the Grievant. The facts in this issue are undisputed and well documented.

This dispute centers over Article 8, Evaluation. The pertinent sections of this article state as follows:

8.03 - Performance Evaluation Procedures

It is intended that evaluations shall be accurate, fair and non-prejudicial. All formal performance evaluations of full-time employees shall be completed on a form provided by the Employer. The evaluator shall discuss the performance evaluation with the employee. The employee shall sign the evaluation only to indicate that he or she has discussed the evaluation with the evaluator and received a copy of the evaluation form as completed by the evaluator. The employee's signature does not necessarily indicate agreement with its content. Refusal of the employee to sign the evaluation at the time of discussion shall constitute waiver of the employee's right to a review of the performance evaluation by the employing agency of the Director of Administrative Services. When an employee refuses to sign the evaluation, the supervisor shall document such refusal on the evaluation form.

Within three (3) calendar days after the employee's receipt of the evaluation form, the employee shall have an opportunity, if desired, to make written comment concerning the evaluation, which comment shall be made on the evaluation form or attached thereto. The evaluation, and any employee comment, shall thereupon be subject to review within the agency. The employee shall receive a copy of the performance evaluation in its final form after this review has been completed.

* * *

8.05 - Annual Performance Evaluation

All employees who have completed their probationary period shall be evaluated once a year. The annual evaluation shall measure the employee's performance for the year immediately preceding the evaluation date or for that portion of that year after the completion of the probationary period. Employees shall be evaluated within thirty (30) days before or after their anniversary date except that such evaluations may be made at the schools for the Deaf of blind in the second half of the academic year.

8.06 - Annual Performance Evaluation Review

Each agency shall establish procedures providing for the review or modification or annual performance evaluations. The internal review procedures shall include at least two (2) steps:

1. A review by the employee's rater and/or the personnel officer; and
2. A review by the Appointing Authority.

Performance evaluations may be appealed by written request to the Appointing Authority within seven (7) days after receipt by the employee of the evaluation signed by the Appointing Authority. If the employee is not satisfied with the answer of the Appointing Authority, within seven (7) days following the receipt of the answer of the Appointing Authority, the employee may request in writing that the Director of Administrative Services review the performance evaluation. An employee shall not be entitled to such review until he or she has exhausted all available internal review procedures of the employing agency.

An Association site representative will not be granted release time for representation of an employee during an evaluation review by the employing agency of the Director of Administrative Services. However, an Association site representative may use his or her authorized personal or vacation time for such activities if the internal review procedure of the employing agency allows representation. An Association UniServ Consultant, with prior notification to the Director of Administrative Services, may represent an

employee at the Department of Administrative Services appeal hearing.

Following the completion of the review, the Director of Administrative Services may order:

1. That the evaluation stand unaltered;
2. That all or part of the evaluation be expunged.
3. That the individual ratings be raised or lowered; or
4. Any other appropriate remedy.

The Director shall not alter or expunge a performance evaluation unless the employee establishes by a preponderance of evidence:

A. That the rater, reviewer or Appointing Authority abused his or her discretion producing an inaccurate, unfair or prejudicial evaluation; or

B. That the employing agency failed to substantially comply with the terms of this Article and/or order of the Director or with the employing agency's internal procedures in completing or reviewing the performance evaluation.

The decision of the Director of Administrative Services is final and binding and not subject to Articles 5 or 6 of this Agreement.

The Grievant, Alice Stover, until 1986, had received performance evaluations averaging in the eighty (80) point range except for 1973, in which she received seventy-eight (78) points and 1977 where she received seventy-seven (77) points. (Association Exhibit #3) In 1985, the Grievant received a total of ninety-three (93) points on her performance evaluation. In 1986, the Grievant received sixty-four points on her performance evaluation.

In approximately the middle of June 1987, the Grievant was evaluated by M. L. King, Teacher Supervisor, receiving a rating of 53. (Association Exhibit #4) The rating, as outlined in the Section 8.03 and 8.06, was then reviewed by Ruth Kirkland, Appointing Authority, on June 16, 1987 and Pamela K. Matura, Superintendent, on June 23, 1987. (Association Exhibit #4) The

Grievant reviewed the evaluation and signed acknowledgement on June 23, 1987 with the following comment:

I acknowledge but absolutely disagree. I wish to appeal.

The Grievant, still unhappy about the total score on the performance evaluation, decided to appeal the evaluation to the Appointing Authority, as is outlined in Section 8.05 of the Agreement. The evaluation was discussed with the Grievant on July 6, 1987 and her supervisor, Mary Lou King, as well as the Personnel Officer, Bettilu Gooldin. (State Exhibit #4) The Grievant was not represented by a site representative (State Exhibit #4) because she felt she did not need representation at the first step of the appeal process. (oral testimony, Stover) When the evaluation was not changed as a result of the first step of the appeal process, the Grievant then appealed to the Appointing Authority.

The site representative assigned to the Grievant's facility had made it known that she no longer desired to represent Union members during a Union meeting in August, 1987. The site representative also informed the Grievant that she did not desire to represent her in the upcoming second step of her appeal of the performance evaluation. (oral testimony, Stover) As a result of the reluctance of the site representative to represent the Grievant, Ms. Stover made a request to Don Walker, Labor Relations Designee, to allow Mr. Henry Stevens, an OEA UniServ Consultant, to represent the Grievant in the appeal process before the Appointing Authority.

On August 28, 1987, Don Walker, Labor Relations Designee, in a memo, (Joint Exhibit #2) denied representation by Mr. Stevens by stating the following:

* * *

There is no provision for the UniServe [sic] Consultant to represent you, however, there is a section which speaks to the site representative who may use his or her own time to represent you to this internal review. If you would desire to discuss this matter with me, please contact my office to arrange for a time to meet.

On September 3, 1987, the Grievant once again requested representation by Mr. Stevens at Step 2 of the performance evaluation appeal. (State Exhibit #2) In the handwritten memo to Mr. Walker, Labor Relations Designee, the Grievant stated the following:

I am continuing to request that Mr. Stevens OEA Uniserve [sic] consultant be present at my Step II Annual Performance Evaluation review. I believe that I have a right to representation. Lawana Moore (OEA) representative prefers to not be involved but would attend the meeting if I couldn't find anyone else to go.

* * *

Mr. Walker again stated that a UniServ Consultant was not called for at Step 2 of the appeal process. (oral testimony, Walker) The second step of the Grievant's appeal of her performance evaluation took place on September 4, 1987. Present at the meeting were Don Walker, Labor Relations Designee, Mary Lou King, Teacher Supervisor, and the Grievant. The site representative did not attend the meeting. The Grievant requested another teacher at the center who attended the meeting to act as a witness because no site representative was present. (oral testimony, Stover) As a result of the meeting, Mr. Walker recommended that the 1987 performance evaluation for the Grievant be changed by raising area #1 by two points and raising areas #3 and #5 each by one point. The Grievant was still dissatisfied with the result of the performance evaluation. The evaluation was then referred to the Director of Administration, in accordance with Section 8.06 of the Agreement, where final

review has not been completed. The decision of the Director of Administrative Services is final and binding and not subject to the Grievance Procedure or Arbitration. (Joint Exhibit #1)

On September 11, 1987, the Grievant filed a grievance over the denial of representation by the sole and exclusive bargaining representative. (Joint Exhibit #2) The remedy sought was that she be given the highest marks possible for her annual performance evaluation. (Joint Exhibit #2) The grievance was denied at Step 2 and on October 6, 1987 a request for Step 3 hearing at the Employing Agency Director's Level was initiated by Henry L. Stevens, UniServ Consultant. (Joint Exhibit #2) On November 11, 1987, Henry L. Stevens, UniServ Consultant, requested a review at Step 4 by the Director of the Office of Collective Bargaining. (Joint Exhibit #2) On February 12, 1988 a request for submittal to the arbitration panel was initiated (Joint Exhibit #2) thus leading to this arbitration hearing.

POSITION OF THE ASSOCIATION

The Association states the Grievant had the right to representation by the exclusive representative under the following: Part 1, Ohio Revised Code, Chapter 4117 of the Ohio Public Employee Collective Bargaining Law & Rules, 4117.03(A)(3) and 4117.04(A) (Joint Exhibit #3); Articles 1.04, 4.02, 5.04 or the Agreement between the Parties (Joint Exhibit #2); Weingarten Right to Union Representation Expanded. The Association argues that on several occasions, the UniServ Consultant has represented members of the bargaining unit for a variety of reasons such as (a) personal, (b) lack of expertise by the site representative in a certain area and (c) when the Grievant is the site representative, as in this case.

The Association states this proceeding is not about the evaluation itself. It is about the evaluation appeal. The Association argues there is a difference between a performance evaluation and a performance evaluation appeal. Therefore, it

asks that the Arbitrator find that the Grievant was entitled to representation by a UniServ Consultant during her evaluation performance appeal. The Association further asks that the Arbitrator award the Grievant the highest marks possible for her annual performance evaluation.

POSITION OF THE STATE

The State states this grievance is not an Unfair Labor Practice (ULP) case and it is not about the context of the Grievant's performance evaluation. It is about the matter of who may represent the Grievant during the performance evaluation. The State argues that the employee has the right to representation by a site representative only during the internal review stage of the performance evaluation appeal. It argues that a UniServ Consultant may represent an employee only at the Department of Administration Services appeal level.

It is the State's position that the clear and unambiguous language of the Agreement supports the State's action in limiting participation at the internal performance evaluation meeting. The State believe that this grievance is an effort by the Union to expand on the rights negotiated at the bargaining table and asks that the grievance be denied.

DISCUSSION AND OPINION

The issue to be decided in this case centers on who may represent the Grievant during the performance evaluation appeal procedure. The State argues the Grievant was entitled to be represented only by a site representative during the internal phase of the performance evaluation. The Association argues the Grievant is entitled to representation by a UniServ Consultant during the performance evaluation appeal, and makes a distinction between the review process of the performance evaluation and the performance evaluation appeal process.

Random House Dictionary of the English Language Second Edition, Unabridged, 1987, defines "appeal" and "review" as follows:

appeal: a request or reference to some person or authority for a decision, corroboration, judgment, etc.; summons or challenge; to make an earnest entreaty.

review: a second or repeated view of something; to view, look at or look over again; to inspect, esp. formally or officially.

Article 8.06 calls for a review by the employee's rater and/or the personnel officer and also a review by the Appointing Authority. The Ohio Department of Administrative Services - Employee Performance Evaluation form upon which the Grievant's 1987 performance evaluation was written (Association Exhibit #4) appears to reflect the use of the word "review", as used in the Agreement, as being a look over again or formal inspection. The performance evaluation was signed by the Grievant's supervisor, the Appointing Authority, the Superintendent, and also the Grievant. (Association Exhibit #4) No where on the form is there a reference to Union Representation, or is there an indication the completed form can be modified at the time it is signed by the above referenced persons. This leads one to believe, based upon the explanation of a performance evaluation and procedure in Section 8.03 and Section 8.05, that at the time the form is filled out by the supervisor, reviewed by the appointing authority, and signed by the Grievant, no provision is granted by the Agreement to alter or change the evaluation. The Agreement, in Section 8.03., merely calls for a discussion of the evaluation with the employee at the time the form is completed by the Employer.

In reference to representation during the performance evaluation review, Article 8.06 states, in part:

* * *

An Association site representative will not be granted release time for representation of an employee during an evaluation review by the employing agency or the Director of Administrative Services. However, an Association site representative may use his or her authorized personal or vacation time for such activities if the internal review procedure of the employing agency allows representation.

* * *

It is this Arbitrator's opinion the State was correct in stating the Grievant was not allowed a UniServ Consultant during the performance evaluation review. No testimony was offered to show the agency has ever allowed a site representative to represent an employee during the review portion of the evaluation, which, in this Arbitrator's opinion, would have been the initial discussion between the Grievant and her supervisor on June 23, 1987 and the subsequent reviews as indicated on the evaluation form. (Association Exhibit #4) As the Agreement calls for a discussion between the employee and the supervisor, with no provision at the initiation of the evaluation for modifications, a reasonable person would reason that if a representative were allowed to attend such an informal discussion, he or she might be asked to do so on their own personal or vacation time, as indicated in the Agreement, and would serve only as a "witness" to the discussion at that point.

Article 8.06 further states:

* * *

Performance evaluation may be appealed by written request to the Appointing Authority within seven (7) days after receipt by the employee of the evaluation signed by the Appointing Authority. [emphasis added] If the employee is not satisfied with the answer of the Appointing Authority, within seven (7) days following the receipt of the answer of the Appointing Authority, the employee may request in writing that the Director of Administrative Services review the performance evaluation.

* * *

An Association UniServ Consultant, with prior notification to the Director of Administrative Services, may represent an employee at the Department of Administrative Services' appeal hearing.

* * *

Keeping in mind the definition of "appeal", it is this Arbitrator's opinion that after the Grievant's performance evaluation went through its initial stages of review, it was then subject to an appeal process. In accordance with the Agreement and State Exhibits #3 and #4, the appeal process is held seven days after receipt of the completed performance evaluation review at the employee's agency. Mr. Walker testified he agreed that an employee has the right to union representation by somebody at an evaluation review appeal. The site representative in this case was unwilling to represent the Grievant at the agency level in her appeal of the performance evaluation. It is interesting to note that Article 5.06 (Joint Exhibit #1) states the following in regard to other parties attending grievance meetings:

* * *

However, it is understood by the parties that, in the interest of resolving grievances at the earliest possible step of the grievance procedure, it may be beneficial that other representatives or witnesses, not specifically designated, be in attendance provided that their presence will not interfere with or interrupt normal school or work facility operations.

* * *

This Arbitrator finds the Agreement silent pertaining to representation at the agency level in the appeal process of the performance evaluation. The forms (State Exhibit #3 & #4) used by the Agency in the appeal process indicate the Grievant was

entitled to representation at each phase of the appeal process. This Arbitrator feels due process dictates that if the site representative was unwilling, or if the Grievant felt that for personal reasons she would not have been fairly represented by a particular site representative, then she had every right to choose another representative to represent her at the agency. In this case, she chose a UniServ Consultant. Although the State stated the performance evaluation could not be used in a disciplinary action against an employee, this Arbitrator finds the performance evaluation is of great importance when filling vacant positions or promotions. Article 17.04 states:

* * *

The following criteria shall be utilized for consideration when filling vacant positions by transfer or promotion: qualifications; work record, as reflected by a review of the employee's performance evaluation(s) and a review of active disciplinary record(s) within the preceding two (2) years; ability; and agency seniority.

In view of the significance of the performance evaluation in light of the above, the Grievant in this case had every right to be concerned over a poor performance evaluation and asserted her rights as afforded her under the Agreement between the Parties. For whatever reasons, the site representative was not present during the agency process of the appeal of the Grievant's performance evaluation. In view of the fact the Grievant was to be represented at the Director of Administrative Services level, due process dictates, as well as the Agreement, that she had every right to be represented in her presentation at the lower level as well. This Arbitrator parallels such representation at the agency level as the same afforded in the Miranda decision, where representation must be provided at the very lowest level to ensure fair representation throughout the judicial process. The result of a poor performance evaluation, although not disciplinary in nature, would adversely affect the

Grievant in future promotions or transfers. In view of this, it is imperative that the Grievant be granted fair representation throughout the process. It does not appear to this Arbitrator the Grievant could be fairly represented outside the agency if her union was not there in the early stages of her appeal to aid her in her presentation and ensure that the Grievant at least had some input into the appeal process so that she could have her "day in court" at the Agency level first. This was not done in the Grievant's case. She asked for a UniServ Consultant to represent her, which was her right, however, was denied that right to representation by someone of her choosing.

Based upon the above considerations, this Arbitrator finds the Grievant had the right to representation by a representative of her choice. This Arbitrator finds the Agreement does not prohibit a UniServ Consultant to attend a hearing at the Agency level of the appeal process of the performance evaluation. Association Exhibit #12 indicates there has been at least one other case whereby a Uniserv Consultant represented another employee at the agency level of the appeal of a performance evaluation. This referenced performance evaluation appeal took place within the Department of Mental Retardation but at another institution. No testimony was submitted by the State to controvert the assertion by the Association that a past practice exists of allowing someone other than the site representative to represent an employee at the Agency level of the appeal of a performance evaluation.

There was a lengthy discussion at the beginning of this arbitration hearing concerning subpoenas issued by the Association. The Association stated when they informed the State of the persons they were going to subpoena, the State determined those witnesses were irrelevant and informed the Association the employees to be subpoenaed would not be released to testify. The Arbitrator did not receive the Association's copies of the subpoenas prior to the hearing and therefore, did not issue the subpoenas. The State and Association determined

that a delay of the hearing would be necessary in order to subpoena other employee to testify and neither side wished to delay the hearing. This Arbitrator does not believe the State can determine what is relevant and irrelevant as far as witnesses for the Association. Secondly, the Association did not give itself enough time for the Arbitrator to comply with the conditions of Article 6.05 of the Agreement in reference to giving notice to the other side and having a hearing as to the objections to the issuance of subpoenas. One of the witnesses to be subpoenaed was to be the Grievance Chairperson who was to establish past practice in allowing other than the site representative to represent employees during the internal appeal process of the performance evaluation. The Grievant has the right to a fair hearing and has the right to present all evidence and testimony she feels may be relevant to her case. It is this Arbitrator's duty to decide what is relevant and irrelevant to the case at hand and this decision cannot be left to one side or the other if the Grievant is to be afforded a fair and impartial hearing. That was not done in this case. For these reasons, this Arbitrator faults both sides in this matter.

The State notified the Arbitrator, by letter dated April 4, 1989, of their objection to a reference in the Association's brief of a memo sent to OEA members and Administrative Persons at Gallipolis Developmental Center. The State objected to this reference in that the document was not presented at the arbitration hearing. This Arbitrator has given no weight to the referenced memo nor has it had any bearing on the Arbitrator's opinion and decision in this case.

The Association asks the Arbitrator to sustain the grievance by finding that the Grievant was entitled to representation to a UniServ Consultant during the internal Agency appeal process of her performance evaluation. The Arbitrator agrees with the Association and therefore sustains the grievance in this part. However, the Association also asks this Arbitrator to award the Grievant the highest marks possible

for her performance evaluation for 1987. This Arbitrator must point out the Agreement specifically addresses this issue in Article 8.06 by stating:

* * *

Following the completion of the review, the Director of Administrative Services may order:

1. That the evaluation stand unaltered;
2. That all or part of the evaluation be expunged;
3. That the individual ratings be raised or lowered; or
4. Any other appropriate remedy.

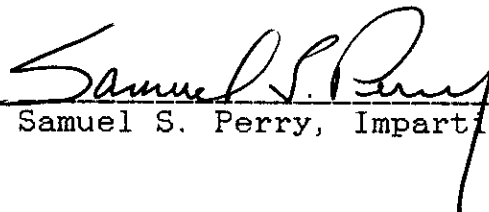
The Director shall not alter or expunge a performance evaluation unless the employee establishes by a preponderance of evidence:

- A. That the rater, reviewer or Appointing Authority abused his or her discretion producing an inaccurate, unfair or prejudicial evaluation; or
- B. That the employing agency failed to substantially comply with the terms of this Article and/or order of the Director or with the employing agency's internal procedures in completing or reviewing the performance evaluation.

The decision of the Director of Administrative Services is final and binding and not subject to Articles 5 or 6 of this Agreement.

In view of the above, this Arbitrator must deny the Association's request to award the Grievant the highest marks possible on her performance evaluation. Raising the performance evaluation rating is solely within the authority of the Director of Administrative Services and is not within the authority of this Arbitrator to do so. This Arbitrator finds, without a doubt, that the employing agency failed to substantially comply with the terms of Agreement between the Parties when it did not allow a UniServ Consultant to represent the Grievant, thereby violating Section B. of Article 8.06. Some testimony was given by the Grievant which indicated that she may have received an

unfair and prejudicial evaluation. As she did not have representation during the appeal process, it is questionable the Grievant was afforded a fair opportunity to challenge the ratings and the rater's justifications for such a low rating, which would establish a violation of Section A. of Article 8.06, namely, that the evaluation was inaccurate, unfair or prejudicial. In light of the fact that the Agreement was most certainly violated and the Grievant's rights to fair representation were denied, it is assumed the Director of Administrative Services will take the opportunity to remedy the violation of Ms. Stover's rights by taking whatever steps deemed necessary as outlined in the Agreement under Article 8.06.



Samuel S. Perry, Impartial Arbitrator

STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA

-and-

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION

In the Matter of Arbitration)
)
Between) OPINION AND DECISION
)
STATE COUNCIL OF PROFESSIONAL EDUCATORS)
OHIO EDUCATION ASSOCIATION) OCB Grievance No.
NATIONAL EDUCATION ASSOCIATION) G87-2285
)
-and-) Alice M. Stover,
) Grievant
STATE OF OHIO, DEPARTMENT OF)
MENTAL RETARDATION / DEVELOPMENTAL)
DISABILITIES)

DECISION OF THE ARBITRATOR

The Impartial Arbitrator, Samuel S. Perry, having been duly appointed by the Parties, in accordance with the Agreement entered into by and between the Parties effective July 1, 1986 through June 30, 1989, and having duly heard the allegations and proofs of the Parties, Awards as follows:

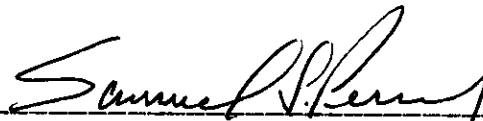
The Grievance filed by Alice M. Stover is SUSTAINED in part, for reasons set forth in the Discussion and Opinion.

The Grievant was denied her right to have a UniServ Consultant or another representative of her choice present during the internal agency process of her performance evaluation appeal.

The Grievance is DENIED in part, for reasons set forth in the Discussion and Opinion.

The Grievant is not entitled through this arbitration proceeding to be awarded the highest marks available on her performance evaluation.

Opinion rendered, Decision signed, Issued and Dated at Beachwood, Cuyahoga County, Ohio this 27th day of April, 1989.



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