OCB-SCOPE VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between: THE STATE OF OHIO Department of Rehabilitation and Corrections London Correctional Institution -and- STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA, UniServ State Unit 10	* * * * * * * * * * * * * * *	Case No 27-13-(88-12-19)008-06-10 Decision Issued: August 30, 1990 #483

APPEARANCES

FOR THE STATE

Don Wilson	Advocate, OCB
Rodney Sampson	OCB Representative
Thomas E. Durkee	Labor Relations Officer
Dr. Barbara Brown Nichols	Deputy Warden
Jack L. Hayes	Witness

FOR THE ASSOCIATION

Henry L. Stevens	SCOPE Staff Representative
Carrie Smolik	SCOPE President
Robert Sauter	Attorney for SCOPE
Vicki Harris	Grievant
John Reger	Witness

ISSUE: §23.04: Mandatory Teachers' Meeting During Planning Time.

Jonathan Dworkin, Arbitrator
PO Box 236, 9461 Vermilion Road
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BACKGROUND OF DISPUTE

This is a policy grievance on behalf of teaching employees at the London (Ohio) Correctional Institution. The State Council of Professional Educators (SCOPE), as bargaining representative, demands compensation for six teachers required to attend a staff meeting on December 16, 1988 during their scheduled planning time. Planning time is a benefit established in Article 23, §23.04 of the governing Agreement. The provision states:

> **23.04 - Plan Time**
>
> The work day for each employee working in a full-time teacher, teaching coordinator or teacher, Deaf or Blind School position shall include a minimum of forty-five (45) consecutive minutes of planning/conference time daily. Said employees who are required to utilize such plan time by the employing agency to perform duties other than planning or conferences shall receive additional compensation for the time they are required to perform non-planning duties during the scheduled forty-five (45) minute period at their regular rate of pay. When an employee's daily plan time exceeds forty-five (45) consecutive minutes, said employee may be required to perform duties other than planning or conferences with no additional compensation.

December 16 was the last day of the school quarter. Most, if not all class planning was finished; teachers were wrapping up their quarterly assignments. A matter of importance remained unsettled. The California Test of Adult Basic Education (CTAB) was to be given in the near future and staff members had not received assignments and instructions. The School Guidance Counselor, whom witnesses described as "conscientious" and "the unofficial group leader and

teacher advisor," was in charge of the CTAB. It was he who felt that a meeting was desirable before the quarter recessed. He approached Management on the subject and received conditional authority. The permission was in the form of a memo, purportedly approved by the Deputy Warden. It stated:

> Pat,
>
> Hold your testing meeting for the teachers at 11^{30} AM to 12^{30} PM as per Nichols (the Deputy Warden) orders, if you need more time after this, call Ms. Nichols for approval. Do not call off any classes without Nichols approval.

After obtaining the go-ahead, the Guidance Counselor told every affected staff member that he would meet with them on testing from 11:30 to 12:30 that day. Generally, the teachers saw the Counselor's statement as a directive from Management -- that attendance was mandatory. They also recognized that the time selected was the period daily set aside for planning at London.

The time conflict led to this grievance. SCOPE maintains that the Administration was contractually prohibited from absorbing planning time into a staff meeting. It contends that the benefit provided by Article 23, §23.04 is not subject to administrative intrusion for extra duty, student contact, assemblies, meetings, or anything of the sort. Planning time, according to SCOPE, belongs to the teachers. It is the entitlement of each member of the Unit to use it to prepare for classes, participate in meetings voluntarily, or perform any other work-related duty s/he reasonably

deems appropriate. SCOPE concludes that the meeting scheduled by Management on December 16 encroached on the negotiated benefit and, therefore, the affected employees are entitled to what §23.04 specifies, "compensation for the time they are required to perform non-planning duties during the scheduled forty-five (45) minute period at their regular rate of pay."

The Employer disputes both SCOPE's version of the facts and its contractual analysis. It maintains that the meeting on December 16 was neither mandatory nor part of the Administration's agenda. In fact, no member of the Administration was there. It was set up and conducted by the Guidance Counselor. No one was compelled to attend; those who were absent (if there were any) were in no jeopardy of being disciplined. In short, the Employer maintains that the meeting was entirely voluntary and, therefore, posed no interference with planning time.

If attendance at the meeting had been mandatory, the Employer contends it still would not have constituted a violation of the Agreement. Planning periods, according to Management, are not "free time" to be used any way an employee chooses. Concededly, they are not available for extra class assignments, but they do not belong entirely to employees either. The Administration regards them as shared time, primarily for planning but also open to being used for legitimate needs of the school system. As partial support for this position, the Employer calls attention to a Letter of Understanding, executed on May 19, 1986, and incorporated in the Collective Bargaining Agreement itself. The Letter deals with permitted uses for working time in explicit terms. It states:

> This letter is intended to express the understanding of the Office of Collective Bargaining, as agent for the State of Ohio, regarding recent discussions which were held between the State and the State Council of Professional Educators, OEA/NEA, during collective bargaining negotiation sessions between these two parties for State Unit 10 (Education and Library Sciences).
>
> The Employer guarantees that assignment 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. [Emphasis added.]

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The parties were unable to settle their differences, and the grievance was processed to arbitration. It was heard in Columbus, Ohio on July 12, 1990. At the outset, the Representatives of SCOPE and the State stipulated that the grievance was timely, free of procedural defects, and subject to a conclusive arbitral award. It should be observed that the extent of the Arbitrator's jurisdiction in this dispute is carefully circumscribed by the following language in Article 6, §6.04 of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on

either party a limitation or obligation not specifically required by the express language of this Agreement.

THE ISSUES

The issue statement submitted by SCOPE is: "Does Management at London Correctional Institution violate the 1986-89 Agreement between the State Council of Professional Educators and the State of Ohio when they require teaching staff members to attend meetings during their negotiated planning time?" That perception of this dispute reaches the core of the controversy over what §23.04 does and does not provide as a teacher benefit. But it assumes that allegations are established facts -- that Management of the Institution actually required staff attendance at the December 16 meeting.

As indicated in the previous discussion, the assumption is by no means uncontested. The Employer asserts several arguments to verify that it did nothing to interrupt planning time. It contends: 1) the meeting was called by the Guidance Counselor (a Bargaining Unit employee), not Management; 2) teachers had a choice of whether or not to attend -- no one was required to sacrifice his/her planning time; 3) since December 16 was the last day of the quarter, student-contact time was less than usual, and each teacher attending the meeting had at least forty-five consecutive minutes of uninterrupted planning time during the day.

If one or more of the Employer's contentions are adopted as "facts," this dispute could be completely resolved without mention or consideration of the contractual issue. An award denying the

grievance could be premised exclusively on the finding that the Administration did not do what SCOPE charges and, therefore, no contractual violation took place. That kind of arbitral decision-making is ordinarily preferred. Arbitrators serve as third-party adjuncts to a collective-bargaining relationship. They are given enormous power to establish binding interpretations of contractual meaning and profoundly influence the relationship -- perhaps forever. It is appropriate, therefore, for them to apply their authority sparingly, deciding only what is necessary to resolve a particular dispute and leaving the parties the task of resolving everything else.

In this instance, however, the parties would be poorly served by a decision on the facts alone. Obtaining forty-five minutes' pay for six teachers who attended the meeting is not SCOPE's priority in arbitration; nor is saving the money the Employer's. Both parties seek a dispositive answer to the question of whether or not the Agreement prohibits Management from scheduling staff meetings during planning time. The Representatives of SCOPE and the Agency made this purpose clear during the hearing. They stipulated that the Arbitrator was to decide the broad contractual issue regardless of the factual outcome.

Accordingly, there are two issues in dispute, both of which are to be independently decided. They are:

1. Did the Employer require teacher attendance at a staff meeting during planning time?

2. Was the Employer required to pay the compensatory penalty in §23.04 (forty-five minutes'pay) for scheduling a staff meeting during planning time?[1]

SCOPE'S EVIDENCE AND ARGUMENTS

The December 16 meeting covered much outside of testing instructions. In fact, only three matters were discussed relative to the CTAB -- when testing would occur, which levels were among the responsibilities of individual teachers, and where materials could be picked up on the day of the test. The scarcity of testing information moved the SCOPE Representative to remark that the meeting was obviously unnecessary; the six affected teachers could have been given directions one-by-one in their classrooms, with greater efficiency and without the invasion of their planning period.

SCOPE urges that attendance at the meeting was mandatory, notwithstanding the Employer's contrary contention. It argues that the Memo by which the Deputy Warden permitted the Guidance Counselor to call the employees into conference at 11:30 a.m., clothed the Counselor with apparent authority to interrupt the planning period.

[1]Whether or not Management had a right to schedule meetings during planning time is not truly in issue. Article 23, §23.04 specifically recognizes the Employer's authority to require employees to "utilize such plan time . . . to perform duties other than planning or conferences," but states that an agency must pay compensation when it does so.

And, according to undisputed testimony, the authority was executed in the form of directives -- teachers were summoned, not invited to the meeting.

One of the Grievants testified that the Counselor told her to be at the 11:30 conference. When she and the others arrived, she heard him explain that the Deputy Warden had instructed him to meet with them during planning time. He emphasized the statement by displaying the Memo. Another Grievant (the former SCOPE Site Representative) said that he saw the Memo before the meeting. When he was approached by the Guidance Counselor, he objected to losing his planning period and asked why another time could not have been selected. He testified the Counselor clearly indicated that the Deputy Warden had made the decision.

SCOPE points out that the CTAB was not something new to the school. The test was part of the routine. It was generally given quarterly, and more frequently to selected small student groups. In the past, teachers involved in testing were given their instructions individually or, if meetings were called, they were scheduled during the fifteen minutes before classes began or the twenty minutes after they ended. Occasionally, time was provided by reducing class lengths. This was the first instance when employees were required to sacrifice a planning period for that purpose.

In sum, SCOPE maintains that the Administration appropriated the negotiated planning time and owes Grievants compensation. It regards the Deputy Warden's assertion that the meeting was voluntary as a pretense, designed to evade the Employer's contractual liability.

In support of its contention that the staff meeting was not a permitted use for planning time, SCOPE presented its Attorney as a witness. He was the lead negotiator in 1986 bargaining and vividly recalled what occurred when planning time and analogous employment terms were discussed. He stated that some of the benefits proposed for the Agreement were already provided by law. For example, the OHIO REVISED CODE established planning time for teachers of deaf and/or blind students. SCOPE's goal was to extend the allowance to all its teaching members. According to the witness, the State's negotiating team offered no resistance. All Management requested was a bit of leeway, and it was granted with the wage penalty. The penalty was meant to be more a deterrent than an employee allowance.

The SCOPE Attorney stated that everyone at the bargaining table understood the intended extent and limitations of the allowance to which they had agreed. They recognized §23.04 was a grant of time for individual employees. The word, "each" in the first line of the provision was designed to convey that meaning ("The work day for each employee . . . shall include . . . planning/conference time daily.")

SCOPE concedes that a teacher's planning period legitimately can be used for conferences with parents, team teaching associates, and the like. It urges, however, that staff meetings is not one of the permissible applications. Since the Administration converted planning time to staff-meeting time on December 16, SCOPE maintains the grievance should be sustained and the affected employees paid.

THE EMPLOYER'S EVIDENCE AND ARGUMENTS

The Deputy Warden was the London Director of Education and Supervisor of the teaching staff at the time in question. If the Administration called a teachers' meeting during planning time on December 16, she was the person ultimately responsible for the decision. She appeared in the hearing and vigorously denied the allegation that she scheduled the conference. All did was authorize the Guidance Counselor to meet with teachers; she did not order teachers to meet with him. She never made attendance compulsory; no attendance requirement was imposed. The Employer concludes, therefore, that SCOPE's factual allegations are inaccurate. The witness further testified that there was nothing unusual about holding a staff meeting during planning time. She noted that the planning period was always understood as time for performing work. It was not a scheduled break for teachers, and from time to time employees were required to meet during planning to perform functions of mutual importance. She said, "All kinds of decision-making and future institutional planning went on at meetings during planning time." The Deputy Warden noted that §23.04 allows for conferences as well as planning and, in her view, the December 16 meeting was a conference.

With regard to contractual intent, the Agency Labor Relations Officer, a member of the State's bargaining team in 1986, took exception to the testimony of SCOPE's Attorney. He denied the implication that Management's negotiators accepted the Bargaining Unit's planning-time proposal uncritically and with little discussion. To the contrary, the State's team required clear definitions before

executing a tentative agreement. First it sought and obtained SCOPE acknowledgement of the fact that working time belonged to the State and planning time would not be an exception to that principle. Then it asked SCOPE's spokesperson what the Unit's proposal was meant to achieve. The response was that planning time could not be utilized to force teachers to cover for absences. The Employer agreed to that limited concept, and discussions turned to what uses for planning time were legitimate. SCOPE then consented to a broad range, including practically every aspect of duties other than teaching -- counselings, job discussions, conferences, even Union meetings.

According to the State, before the parties signed off on planning time, it was mutually understood that the forty-five minutes exempt from student contact did not constitute a break period. They were for anything which would facilitate teaching; a volume of included activities was contemplated. Certainly a staff meeting concerning testing was one of the permissible uses.

The Employer finds explicit support for its position in two portions of the Agreement. The first is the Letter of Understanding previously quoted. In it, the State reserves the right to assign all non-teaching time to duties related to teaching, "not limited to conferences, curriculum development. testing and treatment team assignment." It should be observed, according to the State, that the Letter encompasses all unassigned time during the workday. It does not exempt planning time.

The second portion of the Agreement relied upon by the Employer is Article 3, the Management Rights Clause. It states in concrete

terms that the Employer retains the right to schedule employees [Article 3, §3.01(5)].

In conclusion, the Employer argues that the limitations on planning time pursued by SCOPE through this grievance are not those which were negotiated in 1986. They are part of a Bargaining Unit "wish list" -- improvements SCOPE would like to obtain. If improvements are to be had, they must be accomplished through collective bargaining, not arbitration. The Employer points out that Article 6, §6.04 of the Agreement limits the Arbitrator's authority to interpreting and applying contractual language; it prohibits arbitral alterations, additions, or revisions. Since SCOPE failed to disprove the Deputy Warden's testimony that she did not call the meeting or order employee attendance, and since the Agreement allows planning time to be used for teaching-related meetings, the Employer requests that the grievance be denied.

OPINION

The Employer's arguments underscored the Management Rights Clause repeatedly. However, the Arbitrator finds its language is not dispositive of this controversy. Management prerogatives do exist, they occupy an important place in the contractual theme; but they never subsume specified negotiated rights and benefits. This axiom appears in the Management provision itself. Article 3, §3.01 begins with the following statement of restrictions on managerial authority:

> 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.

Under these circumstances, the Agency begs the question by asserting Management Rights as a key to this dispute. If there is no contractually specified limitation on the Administration's use of planning time, Management Rights of course would govern the question. But SCOPE contends that §23.04 controls, and if it does, the Management Clause cannot overcome that provision.

A more decisive aspect of the Agreement is the Letter of Understanding executed on May 19, 1986. It has contractual force and seems to restrict employee entitlements to use planning periods as they see fit. Although the Letter has been quoted in full, some of its provisions bear repetition. It states that classroom, student-contact time shall not exceed six hours per day. Article 23, §§23.01 through 23.03 establishes that the normal workday consists of eight hours, one hour of which is for lunch and rest breaks. Up to six hours are to be spent in the classroom, and the Letter of Understanding suggests that Management has an almost unbridled right to assign the remaining hour:

> 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.

If the Letter regulates the dispute, the Employer not only had contractual authority to order a testing conference during the

planning period, it could have required the teachers to perform the actual testing on planning time. In fact, it is easy to see that if the Letter controls, §23.04 has no meaning. Its forty-five minute grant of time would become fictional since the Administration could put it to practically any use it desired.

A canon of contract interpretation, observed broadly by arbitrators, is that negotiators should be presumed to have intended meaning for every provision they placed in an agreement. Language is determined to be worthless only if no other interpretation is reasonable. The doctrine applies to this case. The Arbitrator presumes that §23.04 was meant to create a substantive right, and the only way the presumption can be given materiality is by finding that the Section is an exception to the Letter of Understanding. It follows that forty-five minutes of each school day is to be devoted to the purposes expressed in §23.04 -- planning and/or conferences. If an Agency forces employees to use the time for anything else, it must pay the prescribed wage penalty.

The foregoing analysis should not be misinterpreted. It is specifically <u>not</u> the Arbitrator's finding that the Employer is prohibited from interfering in planning time or regulating what goes on during the forty-five-minute period. SCOPE clearly did not obtain an extra free-time allowance at the bargaining table. It acceded to the Employer's right of dominion over employee activities throughout the workday, including planning period. Thus, the Employer retained authority to tell employees what to do on their planning time, and so long as such directives fall within the concepts of "planning" or "conferences," they are legitimate.

The words, "planning" and "conference" are liberal. They can embody a host of discrete activities. The Arbitrator has neither permission from the parties nor the capacity to define everything they might include in the contractual sense. There is little doubt, however, that they could properly encompass delivering testing instructions; and if the Employer can deliver such instructions individually during planning time, there is no reason to doubt its right to do the same thing for a group of employees in a conference called for that purpose.

SCOPE does not have a justiciable grievance if the only basis is that a meeting of six teachers was convened during planning time to convey testing information. But the Employer should not read too much into this finding. The Arbitrator is aware that the term, "planning time" has fairly well defined meaning in the field of education -- meaning which existed and was understood before these parties met at the bargaining table. One thing the term does not include is ordinary staff meetings. The London Correctional Institution holds regular meetings with the teaching staff every month, and nothing in this Opinion is to be construed as authorizing the meetings to be scheduled during planning periods. Any decision to the contrary would be antithetical to contractual intent. It would destroy the concept of planning time in §23.04 and expunge the Section's intended regulation of Management Rights. Whatever permissiveness the Plan Time provision entails, staff meetings are not included.

The question remains of whether or not the December 16 conference was a compulsory staff meeting called by the Administration. SCOPE's

evidence confirms that the meeting may have been designed to impart testing information, but deteriorated into something else. It became more a staff meeting than the kind of planning or conference period envisioned by §23.04. If the session had been controlled by Management, compensation most certainly would have been due. However, SCOPE's evidence only suggests that the Employer was responsible for the staff-meeting aspect of the time expenditure. It falls short of proving the contention or refuting the Deputy Warden's statement that she had no part in establishing the meeting's content. Without better evidence, there is nothing but speculation to justify an award of compensation, and the Arbitrator declines to speculate.

AWARD

The grievance is sustained in part and denied in part.

It is held that the Plan Time provision, Article 23, §23.04, requires the Employer to pay compensation for normal staff meetings which intrude on scheduled planning time.

The evidence fails to confirm that the Administration of the London Correctional Institution violated this prohibition on December 16, 1988. Accordingly, SCOPE's demand for compensation is denied.

Decision Issued:
August 30, 1990

Jonathan Dworkin, Arbitrator