

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 572

OCB GRIEVANCE NUMBER: 11-08-880621-0012-01-09
11-03-880318-0009-01-09
11-03-891508-0050-01-09

GRIEVANT NAME: DOMENIC, CHRIS & RICE, JOSEPH

UNION: OCSEA/AFSCME

DEPARTMENT: BUREAU OF EMPLOYMENT SERVICES

ARBITRATOR: RIVERA, RHONDA

MANAGEMENT ADVOCATE: LIVENGOOD, RACHEL

2ND CHAIR: DUCO, MICHAEL P.

UNION ADVOCATE: MILLER, TIM

ARBITRATION DATE: JANUARY 11, 1991; BRIEF: FEB. 8, 1991

DECISION DATE: MARCH 11, 1991

DECISION: MODIFIED

CONTRACT SECTIONS

AND/OR ISSUES: DID OBES VIOLATE ART. 30.06 OF THE CONTRACT
IN DENYING LEAVE W/PAY TO Ee's TO ATTEND JOB
RELATED VETERAN MEETINGS?

HOLDING: ARTICLE 30.06 DOES NOT MANDATE FUTURE PAID EXCUSED
LEAVE FOR DVOS'S AND LVER'S AT VETERANS MEETINGS.
HOWEVER, GRIEVANTS ARE TO MADE WHOLE FOR THE
SPECIFIED DAYS OF LEAVE REQUESTED BECAUSE THE
DENIALS WERE DISCRIMINATORY.

ARB COST: \$675.00

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Statement of the Issue (Employer)

Did the Ohio Bureau of Employment Services violate Article 30.06 of the labor agreement? If so, what shall the remedy be?

Statement of the Issue (Union)

Did management violate Article 30.06 by denying leave with pay for employees to attend job related veteran meetings?

Joint Exhibits

1. The 1986 Contract
2. The 1989 Contract
3. Grievance Trails

- 3A. Domenic
- 3B. Rice
- 3C. Rice
- 4. Title 38 United States Code
- 5. Department of Labor Grant
- 6. Position Descriptions
 - 6A. Domenic
 - 6B. Rice (current)
 - 6C. Rice (old)
- 7. Classification Specifications
 - 7A. DVOS
 - 7B. LVER

Stipulated Facts

The Grievants' dates of hire are as follows:
Joseph Rice, 8-21-78 and Chris Domenic, 1/6/86.

Employer Exhibits

- E-1 Opening statement
- E-2 Brochure I.A.P.E.S. Central Ohio Chapter Spring
Institute May 17-18-19, 1990
- E-3 Draft Agenda I.A.P.E.S. Conference May 2-3-4, 1991
- E-4 Closing Statement

Union Exhibits

- U-1 Opening statement
- U-2 Grievance Decision (Step 3) Re: P.J. Moore and J.J. Rice dated 11/2/87
- U-3 Letter from Campbell (VFW Post Commander to OBES re J.J. Rice
- U-4 P. 25 of the self-study guide on Services to Veterans
- U-5 Memos from OBES Administrator to all Directors etc. on attendance at 1987 International I.A.P.E.S. Convention dated 5/28/87, 9/22/87, 4/20/88, 6/14/88, 4/25/89, 5/24/89, 9/18/89 and 6/12/90
- U-6 Closing Statement with addendum

Relevant Contract Sections

1986-89 § 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

1989-91 § 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

1986-89 Article 5 - Management Rights

Except to the extent expressly abridged only by the specific articles and sections of this Agreement,

the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with the Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

1989-1991 Article 5 - Management Rights

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

1986-89 § 30.06 - Professional Meetings

Employees with technical or specialized skills and who exercise independent judgement in their jobs shall be granted reasonable amounts of leave with pay to attend work-related professional meetings.

1989-91 § 30.06 - Professional Meetings

Employees with technical or specialized skills and who exercise independent judgement in their jobs shall be granted reasonable amounts of leave with pay to attend work-related professional meetings. The pay shall be at regular rate and shall not exceed eight (8) hours in any given day.

1986-89 § 25.03 - Arbitration Procedures (in part)

Only disputes involving the interpretation, application or alleged violation of a provision of the 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 he/she impose on either party a limitation or

obligation not specifically required by the expressed language of this Agreement.

1989-91 - § 25.03 - Arbitration Procedures (in part)

Only disputes involving the interpretation, application or alleged violation of a provision of the 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 he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

1986-89 § 43.03 - Work Rules

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

1989-91 § 43.03 - Work Rules

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

Facts

Grievant Rice is currently (1991) a Local Veterans Employment Representative (LVER) in the Akron office. In 1988,

Grievant Rice was a Disabled Veterans Outreach Specialist (DVOS). Grievant Rice's previous PCN was 20151.1 (Joint Exhibit 6C). Job description is as follows:

- 45% Under general supervision, carries out a program promoting employment opportunities for disabled veterans, especially disabled veterans of the Vietnam era, in accordance with Federal Program guidelines. Job responsibilities include outreach, problem identification, job development, referral, placement and follow-up. First priority on all services will be given to disabled veterans although assistance will be given to all veterans in job placement.
- 40% Interviews disabled veterans especially disabled veterans of the Vietnam era, with problems regarding reemployment rights, compensation and schooling. Engages in job development and job promotion activities for eligible veterans and coordinates activities with the Veterans' Administration regarding on-the-job training and conducting job fairs, job marts, and other special programs to match disabled veterans with appropriate job and job training opportunities.
- 10% Assists the VER in working with employer groups, individual employers, labor organizations and veterans organization in promoting employment opportunities for veterans, based on qualifications. Informs veterans of the rights, benefits, and supportive services available to them.
- 5% Prepares monthly reports of activities. Operates and maintains audio-visual aids and equipment. Attends training conferences in connection with the Disabled Veterans' Program.

Grievant Rice's previous classification specification (Joint Exhibit 7A) describes the job duties as follows.

- 55-61% Interviews disabled veterans with problems regarding re-employment rights, compensation & schooling & provides job referral &/or placement, conducts follow-up & informs disabled veterans of their rights, benefits & supportive services available.
- 34-40% Participates in job development & job promotional activities for eligible veterans & coordinates

activities with Veteran's Administration regarding programs (e.g., job fairs, on-job training, job marts) to match disabled veterans with appropriate job & job training opportunities; assists Veteran Employment Representatives in working with employee groups, individual employers, labor organizations & veterans organizations in promoting opportunities for veterans.

2-7% Prepares monthly activity reports; attends training conferences in connection with Disabled Veterans Program; operates & maintains audio-visual aids & equipment.

The Classification Specification describes the "major worker characteristics" as follows.

Knowledge of interviewing; public relations; fractions, decimals & percentages; office practices & procedures; employee training & development*; agency policy & procedures related to federally mandated employment programs*. Ability to apply principles to solve problems & deal with variety of variables in somewhat unfamiliar context; prepare meaningful & accurate reports; gather, collate & classify information about data, people or things; handle sensitive inquiries from & contacts with officials & general public.

*Developed after employment.

The minimum qualifications are listed as follows.

Formal education in arithmetic that includes fractions, decimals & percentages & in reading, writing & speaking common English vocabulary; 3 mos. trg. or 3 mos. exp. in interviewing; 3 mos. trg. or 3 mos. exp. in public relations; 3 mos. trg. or 3 mos. exp. in office practices & procedures. Appointment preference shall be given first to disabled Vietnam-era veterans, second to other disabled veterans & finally to any veteran in accordance with federal statutes. Note: non-veterans may not apply for this classification.

- Or alternative, equivalent evidence of the Major Worker Characteristics noted above.

Grievant Rice was previously a Local Veterans Employment Representative (Joint Exhibit 7B) which has the following job duties:

- 57-63% Plans & organizes service programs for veterans in accordance with policies & procedures; reviews records, reports & procedures of local office relative to selection, referral & placement of veterans to evaluate adequacy of services; assists local office personnel through staff conferences & training to improve services.
- 15-21% Performs variety of public relation duties to promote employment opportunities for veterans (e.g., works with employee groups, labor organizations & veteran organizations, engages in job development & promotions, coordinates activities with Veterans Administration relative to on-job training, conducting job fairs & other special programs).
- 12-18% Interviews veterans to discuss problems concerning reemployment rights, compensation, education & training & refers them to appropriate agencies; takes applications & job orders; fills job orders.
- 4-10% Prepares monthly activity reports, attends training sessions & conferences pertaining to veterans programs.

LVER has the following major worker characteristics:

Knowledge of interviewing; public relations; office practices & procedures; employee training & development*; agency policy & procedures related to federally mandated employment programs*. Ability to apply principles to solve problems & deal with variety of variables in somewhat unfamiliar context; prepare meaningful & accurate reports; gather, collate & classify information about data, people or things; handle sensitive inquiries from & contacts with officials & general public.

*Developed after employment.

LVER has the following minimum qualifications.

Formal education in arithmetic that includes fractions, decimals & percentages & in reading, writing & speaking common English vocabulary; 3 mos. trg. or 3 mos. exp. in interviewing; 3 mos. trg. or 3 mos. exp. in public relations; 3 mos. trg. or 3 mos. exp. in office practices & procedures. Preference shall be given first to qualified service - connected disabled veterans & if no such person is available; then to qualified eligible veterans & if no such person is available; then to qualified eligible persons, per federal Veterans' Employment, Training & Counseling Amendments of 1987.

- Or alternative, equivalent evidence of the Major Worker Characteristics noted above.

Grievant Domenic is currently a DVOS with PCN No.

54313.1(09) (Joint Exhibit 6A) with the same job duties as Grievant Rice (see above).

These two positions DVOS and LVER are basically funded by the federal government under Title 38 USC Chapter 41, 42 and 43 (See Joint Exhibits 4 and 5).

On 3/16/89, Grievant Rice applied for 32 hours of excused leave to attend the VFW Washington Conference pursuant to Article 30.06 of the Contract. His request was denied, and he grieved the denial (Joint Exhibit 3B).

On April 12, 1988, Grievant Domenic requested 8 hours of excused paid leave to attend the American Disabled Veterans Department of Ohio Convention. His request was ultimately denied, and he grieved the denial (Joint Exhibit 3A). On July 14, 1989, Grievant Rice requested 24 hours of paid leave to attend the VVA National Convention. This leave was denied, and he grieved the denial (Joint Exhibit 3C).

In all three grievances, Grievants alleged that 1) in the past, leave was granted for similar conferences and 2) that the conferences were clearly work-related to the duties and tasks described in their Position Descriptions.

The Grievants relied in part on a Step 3 Grievance Decision dated 11/2/87 wherein Grievant Rice was granted 8 hours of excused absence to attend the VVA meeting in September of 1987 (Union Exhibit 2).

Both Grievants introduced evidence with regard to employee attendance at local, state, and national I.A.P.E.S. conferences where OBES encouraged, permitted, and granted paid leave to a wide variety of OBES employees to attend (Union Exhibit 5). The Grievants alleged that such conduct was discriminatory on the part of the Employer per Article 2.02.

Discussion

These Grievances require the Arbitrator to interpret 30.06 and apply that section to the situation of DVOS's and LVER's within OBES.

§ 30.06 (1989-91) reads as follows:

Employees with technical or specialized skills and who exercise independent judgement in their jobs shall be granted reasonable amounts of leave with pay to attend work-related professional meetings. The pay shall be at regular rate and shall not exceed eight (8) hours in any given day.

First, 30.06 is an express limitation of Management Rights found in Article 5. Article 5, in essence, reserves to management functions and decisions not expressly abridged by the Contract. Article 30.06 expressly grants a specific contractual right to certain employees. Such an express abridgement is to be strictly construed. Unfortunately, the words of Article 30.06 are not self-enforcing nor are the specific terms contained in Article 30.06 defined by the article nor are they defined elsewhere in the contract.

First and foremost, the right to have excused paid leave is granted to a limited and defined category of employees, namely, "Employees with technical or specialized skills who exercise independent judgement in their jobs. . . ." The phrase "with technical or specialized skills who exercise independent judgement in their jobs" is not set off by commas and is therefore, a restrictive phrase, that is, the phrase narrows and set limits on the word "employees." The threshold question becomes do DVOS's and LVER's meet these specifications, that is, do these positions have "technical or specialized skills" and do those employees exercise "independent judgement"?

A perusal of the Position Description and Classification Specification indicates that the positions of DVOS's and LVER's do require either technical or specialized skills.

A skill¹ is

1. ... 2a: the ability to use one's knowledge effectively and readily in execution or performance b: dexterity or coordination of doing something competently: a developed aptitude or ability.

The Arbitrator finds that both jobs require "skill." However, the skill required must be technical or specialized.

Technical means

1a: having special and usu. practical knowledge esp. of a mechanical or scientific subject b: marked by or characteristic of specialization 2: of or relating to a particular subject; esp : of or relating to a practical subject organized on scientific principles.

Specialized means

1: designed or fitted for one particular purpose or occupation <-- personnel>.

If one examines the Classification Specification of DVOS's, the worker characteristics and minimum qualifications for the most part are very general, i.e., "knowledge of . . . office practices . . . ability to apply principles to solve problems." However, one specific knowledge is required: "agency policy and procedures related to federally mandated employment programs." However, note that this particular major worker characteristic is to be "developed after employment." To be a veteran is required but the veteran need have no specialized skills or knowledge. However, to carry out the duties of the Job Description, the

¹All definitions are taken from Webster's New Collegiate Dictionary.

employee needs to have a broad and deep knowledge of federal programs available to Veterans. The Arbitrator finds that DVOS's and LVER's do have technical or specialized skills at least subsequent to their employment.

The next issue is whether these employees exercise independent judgement.

Judgement means

1a: a formal utterance of an authoritative opinion b: an opinion so pronounced ... 4a: the process of forming an opinion or evaluation by discerning and comparing b: an opinion or estimate so formed 5a: the capacity for judging: DISCERNMENT b: the exercise of this capacity.

Judgement requires discernment. Discernment means

1: an act of discerning 2: the quality of being able to grasp and comprehend what is obscure : skill in discerning.

syn DISCERNMENT, DISCRIMINATION, PERCEPTION, PENETRATION, INSIGHT, ACUMEN shared meaning element : keen intellectual vision. DISCERNMENT stresses skill and accuracy (as in reading character or appreciating art) <a man of great intelligence and discernment> <the discernment revealed in her novels> DISCRIMINATION emphasizes a capacity for distinguishing and selecting the excellent, the appropriate, or the true <nobody should reproach them for reading indiscriminately ... only by so doing can they learn discrimination -- Times Lit. Supp.> PERCEPTION implies quick acute discernment and delicacy of feeling <persecutors were ordinary, reasonably well-intentioned people lacking in keen perception -- C.H. Sykes> PENETRATION implies a searching mind that goes beyond the obvious or superficial <analyzed the underlying causes of the discontent with great penetration> INSIGHT emphasizes depth of discernment coupled with understanding sympathy <the ecstasy of imaginative vision, the sudden insight into the nature of things -- Edmund Wilson> ACUMEN suggests consistent penetration accompanied by shrewd soundness of judgment <it is clear and bold, reflecting astute scholarship and logical acumen -- L.L. Gerson>.

Discern means

1a: ... 2: to come to know or recognize mentally
3: to recognize or identify as separate and distinct :
DISCRIMINATE -- vi : to see or understand the
difference.

DVOS's and LVER's make some type of judgments; they discern and they compare. Their job responsibilities include "... problem identification, job development, referral, placement, and follow-up." (See Joint Exhibit 6C). These functions require some judgment namely, what is the problem, where should the veteran be referred, what placement activities are appropriate. However, to satisfy 30.06, this "judgement" must be independent. Independent means

1: not dependent: as a (1): not subject to control by others : SELF-GOVERNING (2) : not affiliated with a larger controlling unit b (1): not requiring or relying on something else : not contingent <an -- conclusion> (2) : not looking to others for one's opinions or for guidance in conduct.

Are the judgments made by DVOS's and LVER's independent? The job duties of "problem identification, job development, ... placement" are all carried out "under general supervision" according to the position description. A close reading of the rest of the position description indicates no duties that require judgment of any significant level nor any which require independent judgment.

As defined, "independent judgements" are made by few employees and hence 30.06 applies to few employees, that is, as a

contractual right, few employees can benefit from 30.06 and automatically receive paid excused leave.

Assuming arguendo that an employee exercises "independent judgement," 30.06 has another virtually insuperable obstacle for most employees. The "meeting" in question must be a "work related professional meeting." "Work related" is sufficiently broad so that if the Arbitrator had found DVOS's and LVER's to exercise independent judgment, the Arbitrator easily could have concluded that the Veteran's meetings at issue were "work related." But, were those meetings "professional" meetings? Professional means

1a: of, relating to, or characteristic of a profession
b: engaged in one of the learned professions c:
characterized by or conforming to the technical or
ethical standards of a profession.

Profession means

1: ... 2: 3: 4a: a calling requiring specialized
knowledge and often long and intensive academic
preparation b: a principal calling, vocation, or
employment c: the whole body of persons engaged in a
calling.

The word "meetings" is qualified by the description

"professional." Whose profession are we talking about? Logic dictates the profession of the attendee. The profession of the LVER's and DVOS's is not Veterans. Their status is that of Veterans. Perhaps, an officer of a Veteran's organization is a "professional Veteran."

Since only a few persons in any organization can make independent judgments [i.e., those persons at the top who can decide things free from supervision or those persons whose vocations dictate independent judgment limited only by ethics (e.g., lawyers, doctors, clergy) and who specifically have a duty to their professions independent of their current "jobs"] section 30.06 appears to grant rights only to a very limited sub set of employees which does not include the Grievants.

Notwithstanding this Arbitrator's decision, the Union argues that this issue has been definitely decided (contra to this Arbitrator's conclusion) and that this Arbitrator should follow that prior decision. The Union points to the Step 3 decision rendered by the Employer on 11/2/87 (Union Exhibit 2). In that Decision, pay was awarded to Grievant Rice for past attendance at a Veteran's meeting. The Union argues that the Employer itself, in essence, settled the meaning of the words of 30.06, and the Arbitrator should adhere to that decision. The Union cites to Internat'l Harvester, 19 LA 812 (1953). That arbitration award would be very persuasive if the November 1987 decision were a "settlement." However, the November 87 decision was not a mutually arrived at settlement but a unilateral granting of a grievance by the Employer. Moreover, a close reading of that decision indicates that the grievance was granted because the policy of the agency was unclear and results had differed causing inequities among employees. That decision does not definitively decide what 30.06 means.

Thus, the Arbitrator does not find that the Grievants were entitled under 30.06 nor under the decision of 11/2/87 to attend with pay the conferences in question.

However, a final issue remains. Section 30.06 does not require the employer to allow paid attendance at Veteran's meetings for LVER's or DVOS's. However, much testimony was adduced about the paid attendance of various employees at I.A.P.E.S. meetings. This Arbitrator's reading of 30.06 would not require that the employer allow most employees, since only a few could meet the standards which 30.06 imposes, to attend with paid leave I.A.P.E.S. meetings. Presumably, the employer chooses under its management rights to allow a broad variety of employees to attend I.A.P.E.S. meetings (See Union Exhibit 5). Likewise, the Employer chooses not to allow LVER's and DVOS's to attend veteran's meetings. No written policy of OBES as to attendance at meetings that are not covered by 30.06 was produced into evidence. The Employer's management witnesses could not remember any "policy" to cover attendance beyond the ad hoc announcements by the Director on I.A.P.E.S. Conferences (See Union Exhibit 6). In the 11/2/87 decision, legal counsel recommended that a policy concerning leave requests be developed. To date no such policy exists. In his 8/8/89 grievance, Grievant Rice specifically requests that Veteran's meeting be accorded the same consideration as I.A.P.E.S. meetings and cites Article 2.02 which forbids discrimination against an employee and Article 37.04 which requires that training opportunities be equitably

distributed. In his March 16, 1988 grievance, Grievant Rice again cites Article 2.02 and specifically asks that OBES develop fair policies. In his grievance of 6/13/89, Grievant Domenic cites 37.04 and 43.02. 43.02 says work rules must be reasonable.

The Arbitrator finds no violation of 30.06 when the Grievants were denied paid leave for certain veterans meetings. However, the Grievants were treated differently than other employees who were allowed to take paid excused leave for I.A.P.E.S. meetings when leave for I.A.P.E.S. was not, in all cases, mandated by 30.06. Hence, the Grievants were discriminated against under § 2.02. Future grievances in this area could be avoided if fair objective policy for excused paid leave (paid leave not required by 30.06) be drawn up in keeping with the 1987 suggestion of the department's legal counsel. Ad hoc decisions create unreasonable and unfair differences in treatment.

Award

Grievance denied in part. Article 30.06 does not mandate future paid excused leave for DVOS's and LVER's at veteran meetings. Grievance sustained in part. Grievants are to be made whole for the specific days of leave requested in the three grievances because the denials were discriminatory.

March 11, 1991

Date


Rhonda R. Rivera