In the Matter of Arbitration Between:

THE STATE OF OHIO
DEPARTMENT OF REHABILITATION AND CORRECTION

and

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

Re: Gr. #27-10-(6/13/90)-58-01-03 (Cullison) #799

Arbitration hearing held July 2, 1992 in Columbus, Ohio

Decision issued July 24, 1992 in Toledo, Ohio, Lucas County

APPEARANCES

OCSEA/AFSCME
- Don Sargent, Advocate, Staff Representative
- Patrick Mayer, Second Chair
- Kim Browne, Arbitration Clerk
- George Cullison, Grievant

Employer
- Ted Durkee, Labor Relations Officer
- Meril Price, Second Chair
- Connie McGrady, Personnel Coordinator, D.A.S.

Arbitrator
- Douglas E. Ray

I. BACKGROUND

Grievant is a Correctional Officer at the Hocking Correctional Institute (HCI) and is covered by a collective bargaining agreement between the State of Ohio and OCSEA/AFSCME. In March 1990, Grievant bid on a vacancy for a Correctional Farm Supervisor I at HCI. He was originally denied the position and it was given to someone from outside the institution. He then filed a grievance on June 11, 1990. Although the grievance was initally denied by the Employer, the parties stipulated for hearing that, as the only facility applicant, Grievant should have been awarded the position and that he was granted the position in the Employer's Step 3 reponse to the grievance.

Although granted the position at Step 3, Grievant was not awarded a pay increase and, for that reason, did not accept the position because he would have lost his roll call pay in leaving his correction officer position. The parties stipulated that only correction officers earn five hours of roll call pay per pay period at 1 1/2 times their hourly rate. Grievant continued to grieve the failure to award him a 4 percent pay increase and the matter was processed to arbitration.

The parties stipulated that Grievant was a Correctional Officer assigned to Pay Range 27, step 7 and earning $10.58 plus 81 cents longevity on March 20, 1990, that the Correctional Farm Supervisor I is assigned to Pay Range 7, and that movement from Pay Range 27 to Pay Range 7 is a

promotion. It was further stipulated that Pay Range 27 starts at $9.01 Step 1 and ends at $10.58 Step 7 on the salary schedule negotiated effective July 1, 1989 and that Pay Range 7 starts at $9.26 Step 1 and ends at $10.58 Step 6 on the same salary schedule.

II. ISSUE

The parties stipulated the issue to be:
Is Grievant entitled to a 4 percent increase above and beyond the top step of Pay Range 7.

III. CONTRACT PROVISIONS

Among the contract provisions reviewed by the arbitrator are:
Article 36.04 -Promotions- which provides: "Employees who are promoted shall be placed in a step to guarantee them at least an increase of four percent (4%). However, reallocations made as a result of the Class Modernization Study shall not be subject to this provision."
Article 25.03 -Arbitration Procedures- which includes language stating that "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.

IV. POSITIONS OF THE PARTIES

A. The Union

The Union argues that the Employer has agreed that going from pay range 27 to pay range 7 is a promotion and

that the clear meaning of Section 36.04 requires that a 4 percent pay increase be given for a promotion. The Union argues that the contract clearly states that employees who are promoted "shall" be placed in a step to guarantee them an increase of 4 percent and makes no reference to staying within a pay range in order to achieve the 4 percent increase.

The Union stresses that this provision is clear and unambiguous and provided sections from the Elkouri and Elkouri and Fairweather treatises on arbitration supporting its position that when language is clear and unambiguous, arbitrators are to enforce the clear meaning of the contract. The Union asks that the grievance be granted.

B. The Employer

The Employer does not contest Grievant's entitlement to the position, noting that it has already been awarded. The Employer does contest the demand for a 4 percent increase, stressing that Section 36.04 requires only that promoted employees be "placed in a step" to guarantee them at least an increase of 4 percent. Because Grievant is in the top step, the Employer argues that it had no ability to place him in a step to grant a 4 percent increase and that to create a new and fictional step would be beyond what the parties negotiated. The remedy of an increase to a rate above that in the contract's negotiated pay schedules is, in the Employer's view, beyond the arbitrator's authority to grant.

The Employer further argues that if there were a dispute over the appropriate pay rates for the Correctional Farm Supervisor position, the contract provided means by which the Union could have appealed the pay rates set for the position for the entire class.

In summary, the Employer asks that the grievance be denied.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has reviewed the collective bargaining agreement, the testimony and exhibits from hearing and the arguments of the parties.

This dispute is well defined by the parties' stipulated issue. "Is grievant entitled to a 4 percent increase above and beyond the top step of Pay Range 7." At the time this dispute arose, Grievant was at the top step of Pay Range 27 which was Step 7 and paid a rate of $10.58. At that time the top rate for Pay Range 7 was Step 6 which also paid a rate of $10.58. Pay rates are set forth in Appendix L to the collective bargaining agreement and Article 36 discusses wages.

Both parties make good arguments. As the Union points out, Section 36.04 uses the word "shall" with regard to the pay raise to be given after promotion. No raise was given. As the Employer points out, the same section states that the promoted employee "shall be placed in a step" to guarantee the increase. The contract pay schedules do not contain a

step in Pay Range 7 that would achieve this end. Grievant's pay at Step 7, Pay Range 27 was already at the top rate for Step 6, Pay Range 7.

There appears to be little or no evidence from bargaining history to help resolve this matter. It appears, too, that moves from Pay Range 27 to Pay Range 7 would not necessarily have been treated as "promotions" in the past. For this reason, the Employer's past practice of not moving shifted employees beyond the top step for the new position even if this meant a raise of less than 4 percent or no raise, is not necessarily controlling.

Even Section 25.03, which sets forth the authority of the arbitrator is not entirely clear in its application here. On the one hand, the arbitrator is not to "subtract from or modify" any of the agreement's terms. On the other hand, the arbitrator is not to "add to" nor to impose a limitation or obligation not specifically required by the expressed language of the agreement.

After reviewing the matter, the arbitrator is of the opinion that the grievance must be denied. The reasons for this determination follow:

1. The Union argues well that arbitrators must apply clear and unambiguous language. The problem is that, after much thought, the arbitrator does not find the language of Section 36.04 clear and unambiguous. If the contract merely stated that "employees who are promoted shall be guaranteed at least an increase of four percent," the matter would be

clear and probably would not have even reached arbitration. The section provides, however, that employees who are promoted "shall be placed in a step" to guarantee them at least an increase of four percent. There is no step that would achieve this purpose in the contract. For this reason, the arbitrator believes that he has to interpret the entire contract rather than just the "guarantee" language of 36.04. The issue becomes whether the Employer has to, in effect, create a new step for promoted employees in this situation.

2. In most, and perhaps in almost all, promotion situations, this conflict will not arise because the employee is moving to a Pay Range with a higher cap. Pay Ranges 1 through 12 have continually higher starting and top rates with 12 being higher than 11, for example. Similarly, Pay Ranges 23 to 43 progress to continually higher starting and top rates. The problem will arise in cases like the move from range 27 to 7, 28 to 8, 29 to 9, 30 to 10, and 31 to 11 where the top rates are the same. For example, although Range 27 has a lower starting rate than Range 7, Ranges 27 to 31 go up to step 7 while Ranges 7 to 11 go up to step 6. This enables an employee at Range 27, Step 7 to be paid the same as an employee at the Step 6 top rate of Range 7. Any of these moves treated as promotions will raise the issue presented in this case if the promoted employee in ranges 27 to 31 is already at the Step 7 top rate. If he or she is not at the top rate in his or her

range, the problem would not arise because there would then be room to move up on the new range. Similar problems could arise if moves between ranges 23 and 26 to ranges 3 through 6 were to be treated as promotions.

The arbitrator does not believe it likely that the parties considered this problem when they negotiated Section 36.04 and Appendix L setting forth the pay schedules. First, it is not a problem that would arise frequently. In most cases, there is a step available into which a promoted employee may be moved. Second, it appears that there had been a practice of treating at least some moves like this as lateral transfers thus not raising the issue. The arbitrator does find the provisions to be in conflict. Section 36.04 contemplates moving the employee to a step. In a case like this the step does not exist.

3. Ultimately, the arbitrator interprets the limitations expressed in Appendix L, Pay Schedules, to control. The parties negotiated which jobs go into which pay ranges and, for each pay range, the number of steps and top rate for each pay range. In 1990, when this grievance arose, these negotiations had produced substantially different results for how many steps an employee could progress within a pay range. Under Section 36.03, step movement is to occur after probation and subsequent step movement after a year of satisfactory service. Ranges 1 - 4 went up to Step 5. Ranges 7 - 12 and 23 - 26 went up to Step 6, Ranges 27 - 31 to Step 7 and 32 - 36 to Step 8.

Ranges 41 and 43, by contrast, went up only to Step 2. Thus, the parties' contract reflects a complex schedule involving a series of judgments and agreements as to what the top rate and number of steps allowable should be for each job. Further, the parties also negotiated in Section 36.07 a section on longevity pay that provides salary adjustments based on length of service. The arbitrator believes that the carefully laid out salary schedule limits must control. Section 36.04 provides that the employee shall be "placed in a step" to achieve the raise. By the parties' negotiations, they have determined that there is to be no step above Step 6 in Pay Range 7.

3. Section 25.03, which places limits on the arbitrator's authority, also comes into play. To direct that Grievant be placed in a step at a rate higher than that negotiated for Pay Range 7 may well be to impose on the Employer "an obligation not specifically required by the expressed language of this Agreement." The arbitrator understands the Union's well argued position that the rate is "specifically required" by Section 36.04 but ultimately believes that the negotiated limits on the pay ranges must control in the absence of evidence that the parties intended otherwise. Other arbitrators, too, have struggled with close cases such as this and found themselves unable to award requested relief that would have expanded the contract. See Sharpless, Inc., 90-1 ARB para 8030 (Schwartz 1989) (arbitrator lacked power to award pay grade higher than exists in contract)

VI. AWARD

The grievance is denied.

Douglas E. Ray

Arbitrator

July 24, 1992

Toledo, Ohio, County of Lucas