ARBITRATION

IN THE MATTER OF ARBITRATION BETWEEN:

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| STATE COUNCIL OF PROFESSIONAL EDUCATORS (SCOPE)/OHIO EDUCATION ASSOCIATION (OEA) | : | No. 27-20-930212-1785-06-10 |
| | | Grievance of DuWayne Shoup |
| and | : | **DECISION AND AWARD** |
| THE STATE OF OHIO | : | |

This matter was heard on May 21, 1993 in Columbus, Ohio.

**ARBITRATOR**

Mitchell B. Goldberg
2100 PNC Center
201 E. Fifth Street
Cincinnati, Ohio 45202

**FOR THE ASSOCIATION**

Henry L. Stevens, OEA/SCOPE Labor Relations Officer
DuWayne E. Shoup, II, Grievant
Susan D. May, SCOPE Vice President and Grievance Chairperson
Wayne McDowell, SCOPE/OEA Cite Representative

**FOR THE EMPLOYER**

Georgia Brokaw, OCB Advocate
Jon Creal, Personnel Coordinator/Personnel Officer
Gloria J. Coyan, Personnel Technician II
Walter C. Croskey, Personnel Director
Lou Kitchen, OCB

## I. INTRODUCTION

The State Council of Professional Educators (SCOPE - OEA/NEA) ("Association") and the State of Ohio ("Employer") are parties to a collective bargaining agreement effective from July 1, 1992 through June 30, 1994. Article 5 contains the grievance procedure. The last step in the procedure, which includes grievance mediation, results in arbitration. This Arbitrator was selected pursuant to Article 6, and Section 6.05 sets forth the limitations of the Arbitrator's jurisdiction as follows:

> 6.5 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; or shall the Arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

The grievance which is the subject of this case was filed by DuWayne E. Shoup on February 12, 1992. The grievance was precipitated by action on the part of the Employer which reduced the Grievant's wages then in effect. The Employer discovered, approximately two years after the Grievant was employed, that the Grievant allegedly received service credits which placed him at a higher starting salary level than he was entitled to, given the Grievant's experience under the rules set forth in the collective bargaining agreement, as well as related sections of the Ohio Revised Code. The Employer not only reduced the Grievant's compensation, but sought to recover excess salary paid to the Grievant from the time the Grievant was first employed. The Grievant seeks as a remedy, a finding that he was properly

compensated during his employment, that the Employer should be prohibited from recovering any monies from the Grievant, and that the Grievant should be restored all lost back-pay, benefits and interest from the reduction in his compensation which was made by the Employer.

## II. STIPULATED ISSUE

The issue stipulated between the parties for determination in this arbitration proceeding is as follows:

> Did the Employer violate the collective bargaining agreement when they lowered the hourly rate of pay of Grievant, changed his credit service time and attempted to collect back-pay for alleged overpayment of wages? If so, what shall the remedy be?

## III. STIPULATED FACTS

The parties stipulated the following facts for purposes of this proceeding:

1. The case is properly before the Arbitrator.

2. The Grievant was employed by the Ohio Department of Rehabilitation and Corrections on February 11, 1991 as a vocational teacher-masonry at the Mansfield Correctional Institution.

3. Prior to his employment with DR&C, Mr. Shoup was employed in the construction trade.

4. The intent of the language in Article 21.05 of the 1986-89 agreement was to "grandfather in" employees from civil service into the first collective bargaining agreement between OEA/SCOPE and the State of Ohio. The State was aware that over 700 "mistakes" existed in the pay rates and the language was necessary so as to

"not harm any employee." The language from this section was based on a finding by James Mancini. That fact-finding stated:

> "during the term of this contract, no employee shall receive a decrease in compensation for time worked which is less than that received prior to the adoption of this agreement."

## IV. FURTHER FACTUAL BACKGROUND

The Grievant completed an Ohio Civil Service Application for Employment in which he listed all of his work history, job experience and educational background. Upon being hired, the Personnel Department, on February 11, 1991, completed a Personnel Action form which indicated a starting wage rate of $10.20 per hour. On the same day, the Grievant executed a sworn statement reflecting his agreement to teach vocational masonry at the Institution at the hourly rate of $10.20. The Personnel Action form was then processed through the Ohio Department of Administrative Services, Division of Personnel and Payroll (DAS). Ms. Gloria Coyan, the Personnel Technician assigned to the Department of Rehabilitation and Correction proceeded to evaluate the information contained on the Grievant's employment application in connection with her review of the Personnel Action form. Her job was to evaluate the Grievant's work history, education and experience to make sure that he was properly classified with the correct wage rate in accordance with the collective bargaining agreement and the Ohio Revised Code. Ms. Coyan, after reviewing the Grievant's application, credited the Grievant with 10 years prior service credit which placed him at a starting salary of $14.08 per hour, instead of the original assigned rate of $10.20 per hour. Ms.

Coyan believed that the Grievant was entitled to this credit because of his prior work experience in the construction industry. The Grievant, thereafter, received normal pay increases for a period of almost two years, until the end of 1992. Ms. Coyan's Supervisor, Mr. Croskey, testified that he reviewed the original rate change made by Ms. Coyan and he was concerned that the rate was incorrect. He and his Personnel Officer, Delores Bond, contacted Ms. Coyan to review the issue. They received the assurance, however, from Ms. Coyan that the rate was correct; and, based upon that assurance, they alleviated their concerns.

The issue arose again in the fall of 1992 when the Grievant was required, as were other employees, to complete a Seniority Verification form which was required by the Personnel Office at the Mansfield Correctional Institute. The Grievant did not complete the form and this caused Mr. Croskey to again question the Grievant's assigned rate of pay. Mr. Croskey contacted Jon Creal, Personnel Coordinator, for Rehabilitation and Corrections in Columbus, Ohio and Mr. Creal in turn contacted Ms. Coyan to review the Grievant's job application and assigned rate of pay. Mr. Creal and Mr. Croskey, at that point, concluded that an error had been made and that the Grievant was mistakenly assigned an incorrect hourly rate. Mr. Creal directed Mr. Croskey to prepare a personnel action form to correct the hourly rate for the Grievant. The new personnel action form dated December 30, 1992 was processed and a letter was sent to the Grievant that same date notifying the Grievant of this rate change. Moreover, Mr. Creal calculated the

amount of overpayment which had occurred for approximately two years in the amount of $15,697.52. An agreement was prepared by Mr. Croskey whereby the Grievant could repay the overpayment at a mutually agreed upon dollar amount per pay period. The Grievant objected to the rate change and refused to acknowledge that an overpayment had been made.

## V. POSITION OF THE ASSOCIATION

The Association argues that there was no error in the computation of the Grievant's original salary. It is undisputed that the Grievant had considerable work experience in the construction industry. The Grievant attended North Central Technical College and needed three hours for the completion of an Associate Degree. He had considerable course work in mathematics, sciences and drafting. Ms. Coyan properly evaluated the Grievant's background and experience and her judgment was continuously relied upon by the Employer. Ms. Coyan's decision was reviewed by Mr. Croskey and her judgment was confirmed. The Grievant was assigned ten years of experience and given an original rate of $14.08 per hour, which increased to $15.04 per hour for the next school year.

Section 21.02 of the Collective Bargaining Agreement provides that no employee shall receive a decrease in compensation which is less than that received prior to the adoption of the Agreement.

The Employer should be prohibited from recovering any alleged overpayments from the Grievant or from decreasing his compensation under the doctrine of Equitable Estoppel. The Employer knew, or should have known, that its actions would be relied upon by the

Grievant. The Grievant in fact relied upon the actions of the Employer and his reliance was reasonable and substantial. To require the substantial repayment claimed by the Employer works an injustice upon the Grievant and is unconscionable. On the other hand, the Grievant has done nothing wrong.

Section 3317.14(10) of the Ohio Revised Code provides that a Board of Education may exercise its discretion in evaluating a teacher's background and experience by giving credit for years of teaching experience or "similar work experience." Attorney General's Opinion No. 68-052 dated March 18, 1968 confirms that the Board of Education may establish its own service requirement notwithstanding Sections 3317.13 of the Ohio Revised Code and that the evaluation may be based upon "training and years of service." A teacher may be given credit for years of teaching service where such service was performed in any other school or in similar work experience.

The Employer engaged in the practice of advance step hiring, which was an economic benefit at the time the Collective Bargaining Agreement was adopted. Section 39.03 of the Agreement continues all economic benefits which were in effect on the effective date of the Agreement.

## VI. POSITION OF THE EMPLOYER

The 1986-1989 Collective Bargaining Agreement was the first contract between the parties. Section 21.06 was inserted to "grandfather" employees from Civil Service into the contract who were already in the employ of the State. There was no discussion

between the parties during negotiations about errors made in the calculation of wages as claimed by the Association. The Grievant was hired under the 1989-1992 contract; and, therefore he could not have been grandfathered in under the language in the prior contract. Section 21.06 refers to employees who were paid under Section 21.02. Section 21.02 defines how compensation is calculated based upon education and/or years of prior teaching experience. Section 21.02(A) incorporates Ohio Revised Code Section 3317.13, which establishes the specific criteria for earning prior service credit. The Employer is merely attempting to correct the error made in crediting the Grievant's prior service in order to bring him into compliance with the Code and the Collective Bargaining Agreement.

The personnel action forms offered into evidence by the Association do not establish that the Employer engages in "advance step hiring." Furthermore, none of the employees referred to in the personnel action forms were involved in actual situations similar to that of the Grievant.

Article 21 of the Contract does involve advance step hiring. However, it is the burden of the employee to supply documentary proof and upon receiving DAS approval, he/she will be hired at a higher step on the grid. The Grievant did not obtain advance step hiring in accordance with these procedures.

Section 3317.14 of the Ohio Revised Code is not applicable to this situation. The employees covered under this contract are not governed by a "local board of education" and they do not receive

funding under Chapter 3317. Section 3317.13 of the Ohio Revised Code is explicitly incorporated in Section 21.02(A) of the Agreement. Section 3317.14 is not referred to and thereby excluded from the contract. Moreover, the language of Section 3317.14 is permissive and not mandatory relative to giving credit for similar work experience. The Employer did not make a conscious decision to give the Grievant prior service credit on the basis of work experience. Ms. Croskey simply made a clerical error. The Employer has consistently corrected payroll errors based upon newly discovered evidence. The Employer is permitted to correct an error or a mistake of fact. There is no deprivation of any economic benefit to the Grievant when an error is corrected and the Grievant is merely restored to his correct rate of pay.

The doctrine of Equitable Estoppel is not applicable to this case. The Grievant's testimony that Mr. Creal specifically acknowledged to the Grievant that his initial wage rate was being changed to $14.08 from $10.20 an hour is not credible given the fact that Mr. Creal testified that he never met the Grievant and that Mr. Creal processes numerous employees and personnel action forms. Therefore, the Grievant could not have reasonably relied upon any statement made by Mr. Creal relative to the Grievant's salary and service credits. The Association and the Grievant never brought up the alleged statement by Mr. Creal until this arbitration hearing. The Grievant knew that he was being overpaid when he began employment and this was verified when he refused to complete

the seniority verification form. Accordingly, there was no detrimental reliance.

The arbitration case decided by Rhonda Rivera involving the grievance of Archie Combs is cited by the Association as a precedent for the application of the doctrine of Equitable Estoppel. The Combs case and this case, however, are distinguishable on the facts. A clear promise was made to Mr. Combs. No such promise was made to the Grievant; in fact, the Grievant signed a document acknowledging his agreement to work for $10.20 per hour. Combs had a right to rely on the promise. The Grievant, however, had no right to rely on any action of the Employer. There was simply a clerical error made. Finally, nine years had elapsed before the Employer changed its position regarding Mr. Combs. In the Grievant's case, two years had elapsed but the Employer acted immediately to correct the error as soon as the facts became known. Combs was employed prior to 1986 and it can be argued that he was subject to the "grandfather" language in the contract. The Grievant was hired in 1991 and could not be subject to the "grandfather" clause.

The Employer should be entitled to correct a pay error and it should be entitled to recover the overpayments. This is not a case of a unilateral mistake. The Employer made a mistake but the Grievant knew, or should have known, that he was being overpayed. Based upon this knowledge or constructive knowledge, the Grievant should restore the overpayment in order to avoid being unjustly enriched.

## VII. DISCUSSION

A. Refund of Overpayment. The Employer, under the facts and evidence presented in this case, is not entitled to a refund from the Grievant, even if the Employer is entitled to correct the error which was committed in the calculation of the Grievant's original pay rate. The evaluation and analysis of the Grievant's background and experience and the assignment of the original pay rate are all within the exclusive control of the Employer. There is no evidence that the Grievant is expected to negotiate or provide any input in the Employer's decision. Accordingly, the Grievant did not have knowledge of the correct pay rate which was to be assigned, nor should he have had knowledge of the assigned pay rate. There is no information communicated to the Grievant from which the Grievant should reasonably have known that any error was committed in the original assigned pay rate. Thereafter, the Grievant reasonably relied upon his issued pay rate and he conducted his life accordingly.

Assuming that the Employer made a unilateral mistake, it should not be entitled to recover any overpayment made to the Grievant caused by a payroll error. Employees such as the Grievant should not suffer from the Employer's unilateral mistake in the absence of evidence that the employee knew, or should have known, of the existence of the error. See Peabody Galion Corp., 63 LA 144 (Arb. Stevens, 1974).

B. The Alleged Payroll Error. The Association's contractual arguments are without merit. The contract provision cited to the

effect that no employee shall receive a decrease in compensation was not intended, nor could it prevent, the Employer from correcting a payroll error. The appropriate issue, therefore, focuses upon is the issue of equitable estoppel. Critical to this issue is the determination of whether or not the error made by the Employer was clerical in nature or judgmental in nature. Based upon the testimony of Ms. Coyan, the decision of the Board was an exercise of judgment rather than a simple clerical action.

Ms. Coyan had worked in the Personnel Department for approximately fourteen and a half years. Her job was to check Payroll Action forms for rates and classifications under the Ohio Revised Code and under collective bargaining agreements. She reviewed the Grievant's job application and ascertained that he had worked in his family construction business for a number of years. According to her interpretation based upon the practices and policies of her department, experience in the construction trade qualified as unit service time. The Grievant's application contained twelve years of prior experience in the construction trade; and, based upon that fact, Ms. Coyan assigned him ten years of prior experience and changed the beginning rate to $14.08 per hour from $10.20 per hour. Her decision was reviewed by a Supervisor, Connie Mack, and by Steven Perry, the Director of DAS.

Later, when her decision was subsequently overturned, she was advised by Mr. Croskey that prior service credit must be based upon teaching time from a chartered school system or other teaching experience and that prior work experience would not qualify for

service credits. However, Ms. Coyan gave testimony which is conclusive as to this Arbitrator's determination of these issues. Ms. Coyan specifically testified that when she reviewed Personnel Action forms in the past, employees had been given credit for prior work experience - not only prior teaching experience. Ms. Coyan's testimony has some support in the collective bargaining agreement and in the related Ohio Revised Code sections.

Section 21.02(A) of the collective bargaining agreement states that employees shall be given credit for years of experience in accordance with the provisions of Section 3317.13(A)(1)(a)(b) and (c), provided that a total of not more than ten years of experience shall be credited.

Section 3317.13 establishes minimum service requirements for teachers, but said section must be read together with Section 3317.14 which provides that Boards of Education may exceed the minimum requirements. There is no question in this Arbitrator's mind that the Employer in this case could, by contract or otherwise, establish service requirements exceeding the minimum requirements as set forth in Section 3317.13. The Employer, in fact, prior to the employment of the Grievant, evaluated employees for teaching positions by giving credit for teaching service "or in similar work experience." The Employer has obviously changed its policy by deciding not to give prior service credits for non-teaching work, but this policy change should not be applicable to the Grievant's employment.

The original policy decision of granting prior service credit for similar work experience, as testified to by Ms. Coyan, seems reasonable and practical under the circumstances. This is a vocational school setting in which many of the courses involve technical trades. The qualification for a particular vocational teacher depends not only on prior teaching experience, but also upon the knowledge and experience in the particular trades. Under some circumstances, an applicant with two years of teaching experience and eight years of experience in the trade, may be less qualified or equally qualified with another applicant who possesses twelve years of trade experience without any teaching experience. This is the judgment call of the evaluator and this was the responsibility of Ms. Coyan when the Grievant applied for his job. The judgment was made based upon the practice and policy of the employer, which practice and policy was authorized by Section 3317.14 of the Ohio Revised Code, as it relates to Section 3317.13 of the Ohio Revised Code. This judgment, based upon existing practices, may be changed, but the judgment should not be permitted to be revisited in order to lower the Grievant's pay. This is simply unfair based upon the Grievant's obvious and reasonable reliance upon his pay agreement which assigned a rate of $14.08 per hour. The original pay rate was not a simple clerical error, which if was permitted to remain, would work an injustice upon the Employer and an unjust enrichment to the Grievant. Therefore, the grievance should be sustained in all respects.

## VIII. AWARD

The grievance is sustained and the Grievant shall be awarded and restored all back-pay and benefits based upon his original starting pay of $14.08 per hour at the time he was employed. In addition, the Employer shall restore to the Grievant interest at the rate of 3% per annum on the money which was improperly withheld from his pay. This Arbitrator reserves jurisdiction to determine and resolve any outstanding issues concerning the amount of back-pay and benefits to be restored to the Grievant as a result of the issuance of this Award.

SO ORDERED.

Date: July 12, 1993

Mitchell B. Goldberg, Arbitrator

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