

Arbitration Decision and Award

In the Matter of Arbitration Between

STATE COUNCIL OF PROFESSIONAL EDUCATORS,
OHIO EDUCATION ASSOCIATION
and
STATE OF OHIO DEPARTMENT OF MENTAL HEALTH

MARCUS HART SANDVER, Ph.D.
Arbitrator

Hearing Date: June 16, 1993
Briefs Received: July 19, 1993
Decision Issued: August 10, 1993

Representing the State of Ohio:

Mr. Tim Wagner
Labor Relations Officer
Ohio Department of Mental Health

Representing SCOPE:

Mr. Henry Stevens
Labor Relations Consultant
Ohio Education Association

I. INTRODUCTION AND ISSUE

This case grows out of a dispute involving the layoff of grievant Borys Ostrowskyj on September 5, 1992 from his position as a teacher at the Western Reserve Psychiatric Hospital. The issue to be decided, jointly stipulated by the parties is:

"Did the employer violate, misinterpret and misapply the 1992-94 Agreement between the State Council of Professional Educators and the State of Ohio when they failed to correct the seniority list for employees employed in the Mental Health facilities, thus improperly reducing Mr. Borys Ostrowskyj?"

The grievance was processed through the steps of the grievance procedure but was not resolved. On March 4, 1993, after receiving the ODMH third step answer on February 10, 1993, the SCOPE requested that the case be submitted to Arbitration. Due to difficulties in scheduling, the case was not finally scheduled for Arbitration until June 16, 1993.

II. THE HEARING

The hearing began promptly at 9:00 A.M. in the Conference Room of the Office of Collective Bargaining. In attendance for the State Council of Professional Educators - OEA were:

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|-----------------------|--------------------------------------|
| 1. Henry Stevens | SCOPE-OEA Labor Relations Consultant |
| 2. Borys Ostrowskyj | Grievant |
| 3. M. Shannon Maloney | Witness |

In attendance for the State of Ohio were:

- | | |
|--------------------|---------------------------------------------------------------|
| 1. Tim Wagner | Labor Relations Officer - Ohio Department
of Mental Health |
| 2. Edith Bargar | Attorney, Office of Collective Bargaining |
| 3. Michele Szantay | Sagamore Human Resource Director |
| 4. Gene Briers | Western Reserve Human Resource Director |
| 5. Don Holley | Western Reserve Rehabilitation Services Director |

The following Joint Exhibits were introduced into evidence at the hearing:

Joint Exhibit # 1 - Agreement Between the State of Ohio and the State Council of Professional Educators/OEA/NEA 1992-94.

Joint Exhibit # 2 - The Grievance and the Grievance Trail Correspondence dated September 8, 1992, September 22, 1992, October 5, 1992, November 3, 1992, February 10, 1993 and April 4, 1993.

Joint Exhibit # 3 - State of Ohio Classification Specification. Teacher 1-4 (Art). Dated March 26, 1990.

Joint Exhibit # 4 - State of Ohio Classification Specification. Teacher 1-4 (Learning Disabilities and Behavioral Disorders). Dated March 26, 1990.

Joint Exhibit # 5 - Inter-Office Communication from Roger Beyer to OEA Associates. Subject: Changes in Seniority Date. Dated November 18, 1992.

There were also Exhibits introduced by S.C.O.P.E. during the hearing. These were labeled as follows:

SCOPE Exhibit # 1 - Association Pre-Hearing Brief.

SCOPE Exhibit # 2 - Central Ohio Psychiatric Facility Seniority List.

SCOPE Exhibit # 3 - Seniority Rosters as of August 10, 1991 for
Mill Creek
Cleveland
Fallsvievw
Woodside
Portsmouth
Lewis Center
Masillon
Toledo
Sagamore
C.O.P.H.
Dayton
W.R.P.H.C.

SCOPE Exhibit # 4 - Letter from Jayn Devney and George Gintoli to Borys Ostrowskyj dated August 12, 1992. (Notice of Displacement)

SCOPE Exhibit # 5 - Letter from Borys Ostrowskyj to Gene Briers dated August 24, 1992. (Notice of Intent to Exercise Displacement Rights)

SCOPE Exhibit # 6 - Letter from Borys Ostrowskyj to Roger Beyer dated September 17, 1992. (Request to Correct Seniority Date)

SCOPE Exhibit # 7 - Pay Receipts for Borys Ostrowskyj for Pay Periods ending September 5, 1992 and September 19, 1992.

SCOPE Exhibit # 8 - Grievance Form filed by Borys Ostrowskyj dated May 22, 1987. (Pay Grievance)

SCOPE Exhibit # 9 - Sagamore Seniority Roster. Dated May 7, 1992.

SCOPE Exhibit #10- Association Post Hearing Brief.

The following exhibits were placed into evidence by the Office of Collective Bargaining:

OCB Exhibit # 1 - Position Description. Class Number 71212
Teacher 2 LDBD

OCB Exhibit # 2 - Position Description. Class Number 71123
Teacher 3 Art

OCB Exhibit # 3 - State of Ohio Department of Education Teaching Certificate
of Doreen Noark. (Sciulli)

OCB Exhibit # 4 - Opening Statement.

OCB Exhibit # 5 - Personnel Action - Dennis Matson. Dated April 8, 1990.
Total Service Noted as 19 years 266 days.

OCB Exhibit # 6 - Personnel Action - Borys Ostrowskyj. Dated August 28, 1992.
Notice of Layoff and Displacement by Dennis Matson.

OCB Exhibit # 7 - Personnel Action - Dennis Matson. Dated September 8, 1992.
Notice of Resignation.

OCB Exhibit # 8 - Notice of Resignation - Dennis Matson. Effective Date
September 9, 1992.

OCB Exhibit # 9 - Management Closing Arguments.

Following the marking of the Exhibits the parties were asked to make brief opening statements. Both parties submitted written opening statements into the record. Following the opening statements the Union was asked to call its first witness.

The first witness called by the Union was Ms. Shannon Maloney, an LD teacher at the Central Ohio Psychiatric Hospital. The witness was sworn-in by the Arbitrator. Mr. Stevens began his direct examination of the witness by asking her to describe to the Arbitrator her experience with SCOPE. Ms. Maloney testified that she was active in organizing the State Council and that she had been a member of the bargaining team for all 3 SCOPE contracts negotiated with the State Of Ohio.

Next, Mr. Stevens asked the witness if she had ever been laid off from her job. Ms. Maloney testified that she had once been laid off and replaced by a less senior person. Ms. Malone testified that she filed a grievance over the matter and that she was reinstated to her position.

Mr. Stevens asked Ms. Malone about her teaching responsibilities. Ms. Malone testified that she teaches K-12 Competency Education and Art, Science and Math.

On cross examination, Mr. Wagner asked Ms. Malone if her testimony was based upon her experiences at the Central Ohio Psychiatric Facility (COPH) and she testified that it was. Mr. Wagner asked Ms. Malone if the teaching assignments and teaching responsibilities of an LDBD teacher would be similar for teachers at Sagamore Hills and she testified that they would be.

On redirect examination, Mr. Stevens asked Ms. Malone to look over Article 18.01(a) of the Collective Bargaining Agreement (Joint Exhibit # 1). Mr. Stevens asked the witness if

the intent of that paragraph was that a correct seniority list be provided to the Union 45 days before any layoffs took place and the witness testified that this was the intent behind Article 18.01 (a). Mr. Stevens asked Ms. Malone to look at the second page of Union Exhibit # 3 (Seniority Roster - Sagamore). Mr. Stevens asked Ms. Malone if the teachers listed on the Seniority Roster for Sagamore could teach Math, English, Horticulture, Family Living, Health, and Art. Ms. Malone testified that the LDBD teachers listed on the Sagamore Seniority Roster could teach these subjects. At this point, Mr. Wagner objected on the grounds that Ms. Malone did not know the Sagamore teachers. The Arbitrator overruled the objection and allowed the questioning to continue.

Mr. Stevens asked Ms. Malone if it was possible that the teachers at Sagamore only taught LDBD subjects. Ms. Malone testified that the teachers would teach what ever needed to be taught. Finally, Mr. Stevens asked Ms. Malone if a teacher with a LDBD certificate could teach Art and she testified that an LDBD teacher could teach Art. The witness was excused.

The next witness called by the Union was the grievant, Mr. Borys Ostrowskyj. The witness was sworn-in by the Arbitrator. The witness testified that he had worked at the Western Reserve Psychiatric Hospital until September 5, 1992 when he was laid off. Mr. Stevens asked the witness to identify SCOPE Exhibit # 4, and the witness testified that this was his layoff notice dated August 12, 1992. Mr. Stevens asked Mr. Ostrowskyj if he was replaced by a teacher from Sagamore as the letter stated and the witness testified that in his opinion he was not replaced.

Next, Mr. Stevens asked the witness to identify SCOPE Exhibit # 5. Mr. Ostrowskyj

testified that SCOPE Exhibit # 5 was his letter to Gene Briers dated August 24, 1992 notifying Briers that Mr. Ostrowskyj intended to bump a less senior employee (Doreen Sciulli) from her position at Western Reserve. Next, Mr. Stevens asked Mr. Ostrowskyj to identify SCOPE Exhibit # 6. Mr. Ostrowskyj testified that SCOPE Exhibit # 6 was his letter dated September 17, 1992 to Roger Beyer, the Labor Relations Officer at Western Reserve, requesting that his seniority date be corrected.

Next, Mr. Stevens asked Mr. Ostrowskyj to explain to the Arbitrator how his seniority had been listed incorrectly in Departmental records. Mr. Ostrowskyj testified that the records at Western Reserve had him credited with seniority since October 18, 1982 (9 years 317 days) but in fact, his true seniority should have been 11 years 259 days due to prior service with the State of Ohio as a teacher previous to coming to Western Reserve. Mr. Ostrowskyj testified that it was not until November 18, 1992 that he was notified by Roger Beyer (Joint Exhibit # 5) that his seniority was changed to 11 years and 85 days.

Next, Mr. Stevens asked Mr. Ostrowskyj to identify SCOPE Exhibit # 8. Mr. Ostrowskyj testified that SCOPE Exhibit # 8 was a grievance he filed in 1987 requesting that his seniority records be corrected to reflect his true state seniority. Finally, Mr. Stevens asked Mr. Ostrowskyj if he had more seniority than Mr. Matson on the day he was laid off and he testified that he did.

On cross examination Mr. Wagner asked Mr. Ostrowskyj if he was laid off from his position at Western Reserve and he testified that he was. Mr. Wagner asked Mr. Ostrowskyj if he was replaced by another teacher and he testified that he was not. Mr. Wagner asked Mr. Ostrowskyj if the teacher assigned to replace him (Matson) attended the orientation

session at Western Reserve and Mr. Ostrowskyj testified that Matson did attend the orientation session.

Mr. Wagner asked the witness to look over SCOPE Exhibit # 7 (Payroll stubs from September 5, 1992 and September 19, 1992). Mr. Wagner asked Mr. Ostrowskyj if his seniority was properly calculated in SCOPE Exhibit # 7 and the witness testified that it was. Mr. Wagner asked Mr. Ostrowskyj to identify his correct seniority date with the State of Ohio and the witness testified that the correct date was September of 1981. The witness was excused. At this point the Union rested its case.

The first witness called by the Office of Collective Bargaining was Ms. Michelle Szantay, Personnel Director at Sagamore. The witness was sworn in by the Arbitrator. Mr. Wagner asked the witness to describe the layoffs which occurred in 1992 at Sagamore. The witness testified that Sagamore in 1992 was changing its status from an in-patient to an out-patient facility and that 44 persons were laid off because of this change. Mr. Wagner asked Ms. Szantay if Dennis Matson was one of the teachers laid off and she testified that he was. Mr. Wagner asked Ms. Szantay how much seniority Mr. Matson had at his layoff and she testified that Matson had approximately 21 years seniority at the time of his layoff.

Next, Mr. Wagner asked Ms. Szantay to identify OCB Exhibit # 5. Ms. Szantay testified that OCB Exhibit # 5 was a personnel action form dated April 8, 1990 correcting Mr. Matson's seniority to 19 years 266 days.

Mr. Wagner asked Ms. Szantay when Mr. Matson knew he would be laid off at Sagamore. Ms. Szantay testified that the employees knew in May or June of 1992 that they would be laid off. Mr. Wagner asked the witness if Mr. Matson had expressed an interest in

exercising his rights to displace a less senior employee at another facility and Ms. Szantay testified that Mr. Matson had notified the Personnel Department at Sagamore that he intended to exercise these rights.

On cross examination, Mr. Stevens asked Ms. Szantay if any LDBD teachers at Sagamore could teach Art and the witness testified that she did not know. Mr. Stevens asked Ms. Szantay if LDBD subjects were the only subjects taught at Sagamore and she testified that other subjects were taught as well.

Next, Mr. Stevens asked Ms. Szantay if she knew that the seniority list of August 10, 1991 (SCOPE Exhibit # 3) was incorrect. Ms. Szantay testified that she did not know at the time that the list was incorrect. Mr. Stevens asked Ms. Szantay why it was that Matson was "shorted" in his seniority credit and Ms. Szantay testified that she did not know that all State of Ohio service counts as seniority for layoff purposes. Mr. Stevens asked Ms. Szantay if the seniority roster was correct when the layoffs took place and she testified that it was not correct.

Next, Mr. Stevens asked Ms. Szantay if Mr. Matson transferred to Western Reserve and the witness testified that he did transfer to Western Reserve. Mr. Stevens asked Ms. Szantay how she knew Matson transferred and she testified that she knew because she filled out the transfer paper work. Mr. Stevens asked Ms. Szantay if she knew where Mr. Matson was working now and she testified that she did not know. Mr. Stevens asked Ms. Szantay if she knew whether or not Matson actually worked at Western Reserve and she testified that she did not know. After questions on redirect and recross regarding Matson's seniority date, the witness was excused.

The next witness called by the Office of Collective Bargaining was Mr. Gene Briers, Human Resource Director at Western Reserve. The witness was sworn-in by the Arbitrator.

On direct examination, Mr. Wagner asked Mr. Briers to explain to the Arbitrator the confusion at Sagamore and Western Reserve regarding the seniority rosters. Mr. Briers testified that prior to July of 1992, the only seniority that was used in determining layoffs was agency seniority. After the contract between OCB and SCOPE was ratified in the summer of 1992, the rules were changed. The new Collective Bargaining Agreement requires that seniority accrued in any agency of the State of Ohio will be used in determining an employees seniority for layoff purposes. Mr. Briers testified that the employees of Western Reserve were notified in September of 1992 that seniority dates were going to be recalculated. A memo was issued November 18, 1992 (Joint Exhibit # 5) that notified employees at Western Reserve regarding the recalculation of their seniority dates.

Mr. Wagner asked Mr. Briers if he knew Mr. Matson. Mr. Briers testified that he knew Matson and testified that he was asked to displace Ostrowskyj and replace him with Matson. Mr. Brier identified OCB Exhibit # 6 which states that Matson would displace Ostrowskyj.

Next, Mr. Wagner asked Mr. Briers some questions about Mr. Matson's employment at Western Reserve. Mr. Briers testified that Mr. Matson's first day at Western Reserve was to be Monday, September 6, 1992. Because the 6th was a holiday, Mr. Briers testified, Mr. Matson was not at work that day but did receive holiday pay. On September 7, Mr. Matson requested, and was given a personal leave day. On September 8, 1992, Mr. Matson

telephoned Mr. Briers to tell him that he would be resigning his position at Western Reserve to take a position at the Akron Public Schools. On September 9, 1992 Mr. Matson officially resigned his position at Western Reserve (OCB Exhibit # 8).

Mr. Wagner next asked Mr. Briers if he wanted to fill the vacancy left by Mr. Matson's resignation and he testified that the institution would not be filling the vacancy. Mr. Briers testified that Western Reserve was planning its own "downsizing" of the teaching staff and that Matson's position would be abolished soon anyway. Mr. Wagner asked Mr. Briers why Ostrowskyj did not bump someone else in the bargaining unit at Western Reserve and Mr. Briers testified that Mr. Ostrowskyj did not have enough seniority. Mr. Wagner asked Mr. Briers why Ostrowskyj did not bump Patingale and Mr. Briers testified that Patingale was a Librarian and that a teacher could not bump a Librarian. Mr. Wagner asked Mr. Briers why Ostrowskyj did not bump Sciulli and Mr. Briers testified that Sciulli was an Art teacher (class number 71123) and that Ostrowskyj was an LDBD teacher (class number 71212) and therefore not qualified to bump into Sciulli's position.

Mr. Wagner directed the witnesses attention to OCB Exhibit # 1 (Teacher 2 LDBD) and to OCB Exhibit # 2 (Teacher 3 Art). Mr. Briers testified that the Job Duties in OCB Exhibit # 2 describe the position as one that involves instructing patients in Art Therapy Services. Further, Mr. Briers pointed out that the minimum acceptable characteristics section of the job description requires the person who fills the position to "interpret a variety of technical material in books and other sources". Mr. Briers testified that the Teacher 3 Art position requires a certificate in Art.

Next, Mr. Wagner asked Mr. Briers if he considered Ostrowskyj qualified to teach Art. Mr. Briers testified that in his opinion Mr. Ostrowskyj was not qualified to teach Art because he was not certified as an Art teacher. Mr. Wagner asked Mr. Briers if he considered Ms. Sciulli qualified to teach Art and Mr. Briers testified that Ms. Sciulli was certified in Art (OCB Exhibit # 3) and he considered her qualified to fill the Art teacher position. Mr. Wagner asked Mr. Briers why Mr. Ostrowskyj was not allowed to bump Ms. Sciulli and Mr. Briers testified that Mr. Ostrowskyj was not allowed to bump Ms. Sciulli because Ostrowskyj was not qualified to fill Ms. Sciulli's position.

On cross examination, Mr. Stevens asked Mr. Briers if he knew about the reduction in force procedures in Article 18 of the Collective Agreement, Mr. Briers testified that he knew about these procedures. Mr. Stevens asked Mr. Briers if he had any reasons to doubt the accuracy of the seniority roster at Western Reserve in August of 1992 and Mr. Briers testified that he knew of no errors in the seniority roster at that time.

Mr. Stevens asked Mr. Briers if Matson displaced Ostrowskyj; Mr. Briers testified that Matson did displace Ostrowskyj on September 5, 1992. Mr. Stevens asked Mr. Briers if Matson actually worked at the Western Reserve facility and Mr. Briers testified that Matson never worked at Western Reserve because of the Monday holiday, the use of a personal leave day on Tuesday and his resignation on Thursday which was effective on Wednesday. Mr. Stevens asked Mr. Briers again if Mr. Matson displaced Mr. Ostrowskyj and Mr. Briers testified that in his view, Matson displaced Ostrowskyj for 3 days. Mr. Stevens asked Mr. Briers if he ever considered bringing Mr. Ostrowskyj back to Western Reserve to replace Mr. Matson and Mr. Briers testified that he never considered bringing Ostrowskyj back to his

previous position.

At this point, Mr. Stevens asked Mr. Briers several questions about other personnel movements at Western Reserve. Mr. Stevens asked Mr. Briers about Mr. Jim Willens' displacement from Western Reserve. Mr. Briers testified that Willens was displaced by Helen Zeitouni who came to Western Reserve from Fallsview.

Next, Mr. Stevens asked Mr. Briers several questions about OCB Exhibit # 3 (the Teaching Certificate of Ms. Sciulli). Mr. Stevens asked Mr. Briers what type of Certificate this was; Mr. Briers answered that it was a special K-12 Certificate. Mr. Stevens asked Mr. Briers to describe what a special K-12 Certificate qualified someone to teach and Mr. Briers testified that he did not know. Mr. Stevens asked Mr. Briers what the grade type "provisional" meant on the Certificate and Mr. Briers testified that he did not know. Mr. Stevens asked Mr. Briers if in his opinion this certificate qualified someone to teach Art K-12 and Mr. Briers testified that in his opinion the "Art Visual" designation under "area" on the Certificate qualified Ms. Sciulli to teach Art. At this point, the witness was excused.

The next witness called by the Office of Collective Bargaining was Mr. Don Holley, Director of Psychological-Social Rehabilitation Services at Western Reserve. The witness was sworn in by the Arbitrator. Mr. Wagner began his direct examination of Mr. Holley by asking him to describe the Art Therapy Program at Western Reserve. Mr. Holley testified that Art Therapy began at Western Reserve in the early 1980's as a program designed to help patients bolster their self esteem through artistic expression. Mr. Wagner asked Mr. Holley to describe Ms. Sciulli's involvement in the Art Therapy Program and Mr. Holley testified that Ms. Sciulli had been involved in the Program since 1985. Mr. Holley testified that Ms.

Sciulli worked with patients in various mediums including crayon, pencil and ceramics.

Mr. Wagner asked Mr. Holley to review OCB Exhibit # 2 (Position Description Teacher 3 Art). Mr. Wagner asked Mr. Holley if this position description reflects the demands of Ms. Sciulli's job and he testified that it did. Mr. Wagner asked Mr. Holley if he would hire someone for the Art teacher position who was not certified in Art and Mr. Holley testified that he would not.

On cross examination Mr. Stevens asked Mr. Holley if he knew the whereabouts of Ms. Sciulli. Mr. Holley testified that Ms. Sciulli has been on disability leave since June of 1991. Mr. Stevens asked Mr. Holley who was currently teaching Art at Western Reserve and Mr. Holley testified that no one was teaching Art at the present time. Mr. Holley testified that Stan Koreski had taught Art in the past but that he had been laid off.

Mr. Stevens asked Mr. Holley if any K-12 teacher could teach Art and Mr. Holley testified that it depended on the person's skills. Mr. Stevens asked Mr. Holley if a K-12 teacher could teach children self expression and Mr. Holley testified that he thought any teacher could do this with children.

On redirect, Mr. Wagner asked Mr. Holley if Stan Koreski was certified to teach Art. Mr. Holley testified that Mr. Koreski was an Art teacher and that he had taught Art previously at other places before coming to Western Reserve. At this point the witness was excused.

Mr. Stevens asked to recall Mr. Borys Ostrowskyj as a rebuttal witness. The Arbitrator reminded the witness that he was still under oath. Mr. Stevens asked Mr. Ostrowskyj if he knew Mr. Koreski. Mr. Ostrowskyj testified that he knew Koreski. Mr.

Stevens asked Mr. Ostrowskyj what Koreski taught at Western Reserve and the witness testified that Koreski taught Art, Social Skills and History. Mr. Stevens asked Mr. Ostrowskyj if he could teach Art and he testified that he could. Mr. Stevens asked Mr. Ostrowskyj if other teachers at Western Reserve could teach Art and he testified that there were other teachers who could teach Art as well.

On cross examination, Mr. Wagner asked Mr. Ostrowskyj if he was certified as an Art teacher and he testified that he was not. Mr. Wagner asked Mr. Ostrowskyj if he told Mr. Briers that he could teach Art and the witness testified that he told Mr. Briers that he could teach all subjects. Mr. Wagner asked Mr. Ostrowskyj if he specifically mentioned Art as one of his areas of expertise to Mr. Briers and the witness testified that he did not. Mr. Wagner asked Mr. Ostrowskyj why he did not specify his interest in teaching Art to Mr. Briers and the witness testified that Briers was aware of his qualifications and that he did not need to go into detail. At this point the witness was excused, both sides rested their cases and the hearing was closed.

III. THE BRIEFS

The briefs were received on July 19 from both advocates. The Arbitrator provided exchange briefs to each advocate on July 26.

A. Association Brief

In its closing brief the Association made several points of fact and opinion, these may be summarized as follows.

1. The relevant sections of the Collective Bargaining Agreement which relates to this case are:

§ 18.01 Pre-Reduction in Force Action

§ 18.05 Displacement Rights

§ 18.09 Employees on Leave

§ 18.12 Recall Rights and Rcedures

2. The employer violated Article 18.01 of the Collective Agreement when they failed to provide the Association with an accurate seniority list.

3. The inaccurate seniority list caused Mr. Ostrowskyj to be reduced improperly.

4. Mr. Ostrowskyj should be compensated for the time he was improperly laid off (3 months).

5. On September 8, 1992 the Association requested that the Employer continue Mr. Ostrowskyj's employment status until the employment status of a teacher on disability at Western Reserve was clarified.

6. On November 3, 1992 the Association requested that no reduction in force occur until such time as Management has met all necessary requirements of Article 18 of the Agreement.

7. When the Association met with the Employer 45 days prior to the reduction in force the Association challenged the reduction in force action. The employer did not seriously consider the Association input.

8. While the employer did subsequently correct the seniority of Ostrowskyj, the employer ignored the issue of Mr. Matson and Ms. Sciulli.

9. Ms. Sciulli should have been treated for the purpose of reduction in force and displacement the same as all other employees. Ms. Sciulli had less seniority than Mr. Ostrowskyj.

10. According to the testimony of Ms. Shannon Maloney, a veteran teacher at CPH and member of the bargaining teams, a teacher with an LDBD certificate would be allowed to teach all special education subjects.

11. Under Articles 18.01 and 18.12 of the Agreement, Mr. Matson should not have been moved out of the affected classification within the affected facility and facilities.

12. As soon as Mr. Matson resigned his position at Western Reserve, Mr. Ostrowskyj should have been recalled to that position.

13. Mr. Ostrowskyj gave written notification of his intent to exercise his displacement rights within 5 days of the date he was notified of his reduction.

14. Mr. Matson, because of his 19 or 22 years of seniority, should not have been the one to displace Ostrowskyj. Mr. Ostrowskyj should have been displaced by someone with less seniority than Matson.

15. The Employer had refused to include Ms. Sciulli in the reduction in force because she was on disability leave.

16. Mr. Matson never reported to the position he displaced Mr. Ostrowskyj from; instead he resigned.

17. The Agreement calls for Mr. Ostrowskyj to maintain his position until he was properly displaced.

B. Employer Brief

In its closing brief the employer made several points of fact and opinion; these may be summarized as follows:

1. The only issue in the case is the one stipulated to by the parties: Did Management violate the contract when it failed to correct the seniority list, which the Union alleges

improperly displaced Mr. Ostrowskyj?

2. The Union shoulders the burden of proof in the case and must prove that the contract places a requirement on Management to maintain an accurate seniority list.

3. Because there is no penalty specified in the Agreement for Management providing the Union with an inaccurate seniority list, the Arbitrator has no authority to assess such penalty.

4. The Union bears the burden of proof to show that Mr. Ostrowskyj was adversely affected by the inaccurate seniority list. Unless Mr. Ostrowskyj was adversely affected he had no grievance.

5. Mr. Matson had more seniority than Mr. Ostrowskyj and properly displaced him.

6. The Union received all relevant documents and information from Management necessary to present its case well in advance of the Arbitration hearing.

7. There was no antunion animus or malicious intent on the part of the Employer when the incorrect seniority list was supplied to the Union.

8. New seniority list rules were negotiated between the Employer and the Association effective July 1, 1992.

9. Mr. Matson did assume Mr. Ostrowskyj's position and did not resign until September 9, 1992 after receiving orientation training at Western Reserve.

10. There was no vacancy created by the resignation of Mr. Matson because the employer had no desire or intent to fill this position after Mr. Matson's resignation. Western Reserve was in the midst of its own layoffs when Matson resigned.

11. Under Article 3 of the Contract the Employer makes the decision to fill or not to fill a position.

12. Article 17.01 of the Contract does not have relevance until the Employer has made the decision to fill the position.

13. The matter of Mr. Ostrowskyj's rights to bump Ms. Sciulli is not relevant in this case because the matter of bumping was not mentioned in the stipulated issue or in the remedy sought.

14. Further, even on its merits, the matter of Mr. Ostrowskyj bumping Ms. Sciulli is not germane in this case. Under Article 18.06(C) of the Contract it is required that a teacher

possess the "requisite minimum qualifications for the position or classification". The requisite minimum qualifications for the Teacher 3 (Art) are a teacher certificate appropriate for Arts and Crafts and a Master's Degree. Mr. Ostrowskyj has neither of these minimum qualifications.

15. Article 18.06(E) of the Contract prohibits an employee from bumping an employee of lesser seniority in a different classification series unless they are certified in that classification. Mr. Ostrowskyj is in classification series 71212; Ms. Sciulli is in classification series 71123. Mr. Ostrowskyj was not certified to teach Art.

IV. DISCUSSION

Both parties clearly agree, in their stipulations at the hearing and in their post hearing briefs, that the issue to be decided is: "Did Management at the Department of Mental Health violate, misinterpret, and misapply the 1992-94 Agreement between the State Council of Professional Educators and the State of Ohio when they failed to correct the seniority list for employees employed in the Mental Health facilities, thus improperly reducing Mr. Borys Ostrowskyj? If so, what should the remedy be?"

The relevant contract provisions which relate to the issue are found in Articles 20.1, 20.2 and 20.3 of the 1992-94 Agreement. Layoff and displacement procedures are covered in Articles 18.01 - 18.08 and Recall Rights and Procedures are covered in Articles 18.12 and 18.13. Management Rights in connection with hiring employees and determining the adequacy of the work force is mentioned in Article 3 of the Agreement.

Neither side to this dispute would disagree with the fact that there were errors in the seniority roster when the decision was made to layoff Mr. Ostrowskyj. The possibility of just this fact occurring was anticipated by the parties when the Collective Agreement became effective on July 1, 1992. Article 20.03 states that:

"Within forty-five (45) days after the effective date of this Agreement, the Employer agrees to provide notice to each employee in the bargaining unit of the seniority currently shown for him/her. A copy of the notice shall also be forwarded to the Association President. Any employee whose seniority is incorrect shall contact the office identified on each notice to obtain the appropriate form to challenge the listed seniority information."

The procedure for correcting errors in the seniority list are clearly listed in Article 20.03 as well. The notice of seniority shall be provided to employees 45 days after the effective date of the contract (about August 15, 1992). Employees have 20 days to notify their employers if errors are found in the seniority roster (about September 5, 1992). Forty days later the employer is required to produce a corrected list (approximately by October 15, 1992) and the employees then have 10 days to challenge the new list (by October 25, 1992 approximately).

When Mr. Ostrowskyj was notified on August 12, 1992 that he was to be displaced, the letter listed an incorrect seniority date of October 18, 1982 (SCOPE Exhibit # 4). Mr. Ostrowskyj filed a letter with Roger Beyer on September 17, 1992 requesting that his seniority date be corrected. Mr. Ostrowskyj mentioned in his letter of September 17, 1992 that the Western Reserve records were inaccurate but that the State records were corrected as far back as July of 1986. Joint Exhibit # 5 shows that as of November 18, 1992 Mr. Beyer had changed the records of Mr. Ostrowskyj and several other OEA Associates to reflect the changes required in the Collective Agreement.

SCOPE Exhibit # 9 dated May 7, 1992 shows that Matson also had incorrect seniority

records which were maintained at Sagamore. In fact, Matson's uncorrected seniority records on May 7, 1992 show him with less seniority than Ostrowskyj's corrected records reflected on November 18, 1992. Unbeknownst to the Union however (and apparently to the Personnel Director at Sagamore) Mr. Matson had filed a request to correct his seniority records on April 8, 1990 (OCB Exhibit # 5) and that in fact Mr. Matson's State seniority (which was used since July 1, 1992 to prioritize employees under the SCOPE Agreement for layoff) dated back to 1970. In point of fact, Mr. Matson had plenty of state seniority; as much or more than anyone else at Sagamore according to SCOPE Exhibit # 3 (dated August 10, 1991). In looking over all the seniority exhibits and in light of the testimony of Ms. Szantay and Mr. Briers I agree with the Union that errors were found in the seniority records at Western Reserve and Sagamore at the time that the layoff of Mr. Ostrowskyj occurred.

But in looking over all the exhibits and the testimony I can not find a remedy in this case for Mr. Ostrowskyj. The person who was really wronged in this case was Matson; Matson was displaced from his position out of line of seniority at Sagamore if anyone junior to him was retained at Sagamore. Not that this needs concern us overly in this case. If no one junior to Matson was retained at Sagamore the issue is moot. Further, Matson clearly was senior to Ostrowskyj within the LDBD classification and has bumping rights over him.

In looking over all the evidence and testimony relating to the seniority list issue I find that while there may have been errors in the seniority rosters at Western Reserve and at Sagamore these errors did not result in the inappropriate or unauthorized bumping of Ostrowskyj. The matter of who had the right to bump Ostrowskyj from Sagamore, and in what order they bumped are immaterial to Ostrowskyj's case. Ostrowskyj did not have

enough State seniority to protect him from bumping from someone within the LDBD classification at Sagamore.

The Association makes reference to its grievance of September 8, 1992 in which it asks that Mr. Ostrowskyj's employment continue at Western Reserve until all matters of seniority and bumping order are resolved. The employer ignored this request and the Union protested. Although not explicitly addressed in the Association's brief it may be inferred that the 3 months back pay Mr. Ostrowskyj is requesting is to compensate him for the time that passed between the time when the layoff was initiated (September 1992) and the time when Mr. Ostrowskyj's seniority status was finally corrected and resolved (November of 1992). Nonetheless, the remedy sought by the Union for the incorrect seniority roster is nowhere mentioned in Section 20 of the Agreement or anywhere else that I can find. In short, Mr. Ostrowskyj does not have a remedial course of action under the Collective Agreement arising from this grievance.

In addition, to the main issue of the incorrect seniority roster there were several other tangential matters raised at the hearing and in the briefs that I will briefly address.

- Was Mr. Ostrowskyj displaced by Mr. Matson?

In my opinion, yes. Mr. Matson displaced Mr. Ostrowskyj when he attended the orientation session at Western Reserve, when he received holiday pay for Labor Day (September 6, 1992), and when he received a personal leave day on September 7, 1992. The fact that Mr. Matson was on paid status at Western Reserve for only two days is immaterial. Mr. Matson occupied the position for two days then resigned from it on September 9, 1992.

- Was a vacancy created at Western Reserve when Mr. Matson resigned his position?

In my opinion, no. Under Article 3 of the Agreement it is a Management right to determine the "adequacy of the workforce" and to determine matters of "hiring employees". When Mr. Matson resigned on September 9, 1992 Management at Western Reserve determined that there was no need to replace him. Thus, no vacancy existed and the Article 17.01 procedures do not apply.

- Did Mr. Ostrowskyj have the right to bump Ms. Sciulli?

In my opinion, no. The classification specifications for the Art Teacher 3 (class 71123) and the LDBD 2 (class 71212) are dissimilar enough that I do not believe that the provisions of Article 18.06(C) or 18.06(E) will allow bumping between these classifications. Mr. Ostrowskyj did not possess the minimum qualifications to fill the Art Teacher 3 position. Although, Ms. Malone testified that it was her opinion that LDBD teachers could teach Art, and that some LDBD teachers do teach Art at CPH, I do not give this testimony much weight in this particular case involving Western Reserve. Perhaps if the Association could have demonstrated a well established past practice of LDBD teachers teaching Art at Western Reserve or if Mr. Ostrowskyj himself had been employed at some time in the past as an Art teacher at Western Reserve, I may see the matter differently. Given the facts of the present case, I do not feel that Mr. Ostrowsky can bump Ms. Sciulli.

V. AWARD

The grievance is denied.

VI. CERTIFICATION

The Arbitration Decision and Award contained herein is based upon evidence and testimony presented to me at an Arbitration hearing on June 16, 1993 and on post hearing briefs delivered to me on or about July 19, 1993.

A handwritten signature in cursive script, reading "Marcus Hart Sandver", written over a horizontal line.

Marcus Hart Sandver, Ph.D.
Arbitrator
Upper Arlington, Ohio 43221-3745

August 10, 1993

MARCUS HART SANDVER, Ph.D.

1961 Berkshire Road
Upper Arlington, Ohio 43221

Neutral In Dispute Resolution

Phone: 614-487-0278

ADDENDUM

August 10, 1993

Today, I received a letter from Henry Stevens, SCOPE Representative. In his letter, Mr. Stevens enclosed a copy of a grievance form regarding the layoff of Ms. Noreen Sciulli. I have looked over the grievance form carefully, but I do not feel that it has any relevance to the layoff of Mr. Ostrowskyj.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcus Hart Sandver". The signature is fluid and cursive, with the first name "Marcus" being the most prominent.

Marcus Hart Sandver, Ph. D.
Arbitrator