

In the Matter of the
Arbitration Between

SCOPE/OEA/NEA

Union

and

Ohio Department of Corrections
and Rehabilitation
c/o OCB

Employer.

Grievance No. 27-22-9301-
07-06-01

Grievant: Charles Blackwell

Hearing Date: September 20, 1993

Brief Date: October 21, 1993

Award Date: November 30, 1993

For the Employer: David J. Burrus, ODRC
Rachel Livengood, OCB

For the Union: Henry L. Stevens, Advocate OEA
Thomas Bunsey, SCOPE President

Present at the Hearing in addition to the Grievant and Advocates were Denise L. Justice, Principal - ODRC (witness), Anna M. Lawless, Personnel Officer - ODRC (witness), Roger A. Coe, LRO, ODRC (witness).

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. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract 1992-1994
2. Grievance Trail

Union Exhibits

1. Opening Statement
2.
 - a) Position Description Authorization dated August 7, 1991
 - b) Position Description PCN #5108.0 dated August 7, 1991 (2 pages)
 - c) Letter to Stevens from Price dated January 15, 1992
 - d) Letter to Stevens from Price dated February 26, 1992
 - e) Certification of Grievant by Department of Education
-- Permanent Elementary dated June 18, 1980 and
Certification of Grievant by Department of Education
-- Elementary Principal dated March 28, 1995 (good until
June 30, 1993)
3. Personnel Action of Grievant approved by Warden on December 18, 1991
4. Memo from T.I.E. Deputy to D. Justice and Grievant dated August 22, 1991
5. Report of Corrective Counseling to Grievant dated March 12, 1992
6. Report of Corrective Counseling to Grievant dated February 21, 1992
7. Letter to Smolik OEA President from J. Shaver, Chief LRO (ODRC) dated July 25, 1991
8. Letter to H. Stevens (OEA) from T. Durkee LRO, ODRC dated August 13, 1992
9. Letter to T. Durkee LRO, ODRC from Smolik OEA President dated July 12, 1991

Employer's Exhibits

1. Opening Statement/Issue
2. Personnel Action of grievant from Personnel Division approved March 21, 1992
3. Personnel Description Authorization approved by DAS on March 23, 1992

Union's Issue

Does the Employer and Management at the Pickaway Correctional Institute violate, misinterpret and misapply the 1989-92 Agreement between the State Council of Professional Educators and the State of Ohio when they failed to properly adjust the salary of Grievant, ABE Teacher, for the time he was required to do bargaining unit work?

If so, what shall be the appropriate remedy?

Employer's Issue

The issue that Management submits to the Arbitrator is one of arbitrability. Management contends that the Grievance lacks arbitrability on both a procedural and substantive basis.

Relevant Contract Sections

ARTICLE 1 - BARGAINING UNIT 1.01 - Recognition

The Agreement is made and entered into pursuant to the provisions of Chapter 4117 of the Ohio revised Code by and between the State of Ohio, represented by the Office of Collective Bargaining, hereinafter referred to as "Employer" and the State Council of Professional Educators, Ohio Education

Association (OEA) and National Education Association (NEA), hereinafter referred to as the "Association."

This Agreement is made for the purpose of promoting cooperation and harmonious labor relations among the Employer, employing agencies, employees of the bargaining unit, and the Association, establishing an equitable and peaceful procedure for the resolution of differences, and protecting the public interest by assuring the orderly operations of state government.

1.02 - Bargaining Unit

The Employer hereby recognizes the Association as the sole and exclusive bargaining representative for the purpose of collective bargaining on all matters pertaining to wages, hours or terms and other conditions of employment, and continuation, modification, or deletion of an existing provision of the Agreement for employees within the bargaining unit, State Unit 10, in the classifications listed in Appendix G.

For the purpose of this Agreement, the following definitions shall apply to employees holding classification titles listed in Appendix G:

A. A full-time employee is paid by warrant of the auditor and is regularly scheduled to work a work week as defined in Article 23. Said employee shall be included in the bargaining unit on the date of hire.

B. A part-time employee is paid by warrant of the auditor and is regularly scheduled to work less than the work week for full-time employees. Said employee shall be included in the bargaining unit on the date of hire.

C. An interim employee is paid by a warrant of the auditor and is hired to work a definite continuous period of one (1) month or more. Said employee will temporarily fill a position which is vacant as a result of sickness, authorized disability leave, authorized leave of absence or promotion.

D. Intermittent employee is paid by warrant of the auditor who works an irregular schedule which is determined by the fluctuating demands of the work and is generally characterized as requiring less than one thousand (1000) hours per calendar year.

The bargaining unit shall be composed of all full-time and part-time employees within the classifications listed in Appendix G.

Excluded from the bargaining unit are interim employees and intermittent employees within the classifications listed in Appendix G.

The Employer will promptly notify the Union of its decision to establish all new classifications. If a new classification is a successor title to a classification covered by this Agreement with no substantial change in duties, the new classification shall automatically become a part of this Agreement.

If a new classification contains a significant part of the work now done by any classifications in these bargaining units or shares a community of interest with classifications in one of the bargaining units, the Association may notify the Employer that it believes the classification should be in the bargaining unit within thirty (30) days of its receipt of the Employer's notice. The parties will then meet within twenty-one (21) days of such notice to review the classification specifications, and if unable to agree as to its inclusion or exclusion, shall submit the question to the SERB for resolution.

1.03 - Classifications

Classifications in the Bargaining Unit are to be found in Appendix G.

1.04 Legal References

This Agreement governs the wages, hours, and terms and conditions of employment of employees within the bargaining unit. The provisions of this Agreement shall be interpreted in accordance with, and be subject to, the provisions of Chapter 4117 of the Ohio Revised Code. Pursuant to Ohio Revised Code 4117.10 (A), where this Agreement makes no specification about a matter, the Employer and employee are subject to all applicable state laws pertaining to the wages, hours, terms and conditions of employment for public employees.

1.05 - Savings Clause

This Agreement shall be interpreted to be in conformance with the Constitution of the United States, the Constitution of the State of Ohio, all applicable federal laws, and Chapter 4117 of the Ohio Revised Code.

Should specific provision(s) of this Agreement be declared invalid by any court of competent jurisdiction, and upon written request by either party, the Employer and the Association shall meet within thirty (30) days at mutually convenient times in an attempt to modify the invalidated provision(s) by good faith negotiations.

Amendments and modifications of this Agreement may be made by mutual agreement of the parties subject to ratification by the Association and/or the General Assembly as required pursuant to Chapter 4117 of the Ohio Revised Code.

ARTICLE 5 - GRIEVANCE PROCEDURE

5.01 - Purpose

The State of Ohio and the Association recognize that in the interest of harmonious relations, a procedure is necessary whereby employees are assured of prompt, impartial and fair processing of their grievances. Such procedure shall be available to all employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure. The grievance procedure shall be the exclusive method of resolving both contractual and disciplinary grievances except where otherwise provided by this Agreement.

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances at the lowest possible level.

An employee who elects to pursue a claim through any judicial or administrative procedure shall thereafter be precluded from processing the same claim and incident as a grievance hereunder. This restriction does not preclude, however, pursuing a claim which has been heard in the grievance and arbitration procedure, in another

forum, subject only to the State's right to file a motion for deferral.

5.02 - Definitions

A. Grievance - refers to an alleged violation, misinterpretation or misapplication of specific provision(s), article(s), and/or section(s) of this Agreement.

B. Disciplinary Grievance - refers to a grievance involving a suspension or termination.

C. Day - refers to calendar day except where otherwise specified. Times shall be computed by excluding the first and including the last day, except that when the last day falls on a Saturday, a Sunday or a legal holiday, the act may be done on the next succeeding day which is not a Saturday, Sunday or legal holiday. "Work Days" refers to Monday through Friday, excluding legal holidays.

D. Appointing authority is the public official of a department, board, commission or body who has the authority to appoint or discharge an employee. The term "appointing authority" also includes the public official's designee.

E. Employing agency is the department, board, commission, or body within which the employee is appointed. If there is more than one (1) appointing authority within the employing agency, the term agency refers to the entire department under the control of the director of the department.

5.03 - Qualifications

A grievance under this procedure may be brought by any employee or group of employees or the Association setting forth the name(s) or group(s) of the grievant(s). At each step of the grievance procedure, except Step 1, the grievant must specify on the written grievance form the specific provision(s) of the Agreement alleged to have been violated and the desired resolution. The parties shall use the mutually developed grievance form for the processing of grievances.

Where a group of employees desires to file a grievance involving an alleged violation which

affects more than one (1) employee in the same way, the grievance may be filed by the Association provided that at least one (1) employee so affected signs the grievance. Grievances so initiated shall be called class grievances. The caption of the grievance shall bear the name of one (1) affected employee with the designation et al. Class grievances shall be filed within fifteen (15) working days of the date on which any of the affected employees knew or reasonably could have had knowledge of the event giving rise to the class grievance. Class grievances shall be initiated directly at Step 2 of the grievance procedure.

5.04 - Termination of Grievance

When a decision has been accepted by the appropriate parties at any step of this grievance procedure, the grievance shall be terminated. Should the grievant fail to comply with the time limits specified herein, that grievance shall be terminated and considered resolved in favor of the Employer.

5.05 - Grievance Procedure

The following procedure applies to the processing of grievances:

A. Step 1: Immediate Supervisor

An employee having a grievance shall first attempt to resolve it informally with his/her immediate supervisor within fifteen (15) working days of the date on which the employee knows or reasonably could have had knowledge of the event giving rise to the grievance, but no later than thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed ninety (90) days after the event. At this step, the employee may be represented by an Association representative if the employee so desires. Within seven (7) days after the employee has notified the supervisor of the grievance, the supervisor shall respond to the employee in writing. If the employee is not satisfied with the result of this informal step, the employee may pursue the formal steps which follow:

B. Step 2 - Next Level Supervisor

Should the grievant not be satisfied with the written answer received at Step 1, within ten (10) days after receipt thereof, or the date such answer was due, whichever is earlier the grievant or the Association, if requested, may file the grievance with the next level supervisor. If the requirements of Step 1 have not been attempted by the employee, the employee shall have no right to file a formal grievance.

Upon receipt of the grievance, the next level supervisor shall indicate the date of receipt on the grievance form. Within fourteen (14) days of receipt, a meeting shall be held with the grievant. The grievant shall receive notification at least two (2) days prior to the meeting. An Association representative may attend the meeting and shall represent the employee if requested.

Within ten (10) days of this meeting, the next level supervisor shall respond on the grievance form and return a copy to the grievant and to the Association representative.

C. Step 3 - Employing Agency Director

Should the grievant or the Association not be satisfied with the written answer received at Step 2, within ten (10) days after receipt thereof or the date such answer was due, whichever is earlier, the grievance shall be filed with the Agency Head/Director or designee. When different work locations are involved, transmittal of grievance appeals and subsequent responses shall be by U.S. Mail. The grievance may be submitted by serving written notice (including a copy of the grievance) presented to the Agency Head/Director or designee. The mailing of the grievance appeal shall be timely, if it is postmarked within the appeal period. Envelopes lacking a legible postmark shall be assumed to have been mailed three (3) days prior to their receipt. Upon receipt of the grievance, the agency head/Director or designee shall hold a meeting and render a decision within forty-five (45) days after the receipt of the grievance. The grievant shall receive notification at least two (2) days prior to the meeting. An Association representative may attend the meeting and shall represent the employee if requested. A representative of the Office of Collective Bargaining may be present at such meeting. The

Director of the Office of Collective Bargaining or designee shall review the written decision of the agency head or designee, prior to its being mailed to the grievant and/or Association.

The Association shall designate an individual within the organization to whom copies of Step 3 responses shall be mailed. The notification shall be sent to the Office of Collective Bargaining by the President of the Association.

By mutual agreement, the Association and agency may waive any preceding step of the grievance procedure.

D. Step 4 - Request for Arbitration

If the Association is not satisfied with the answer at Step 3, it may submit the grievance to arbitration, by serving written notice of its desire to do so (including a copy of the grievance) by U.S. Mail. The notice shall be presented to the Director of the Office of Collective Bargaining, with a copy sent to the Agency Head/Director or designee. This notice shall be mailed within fifteen (15) days after the receipt of the decision at Step 3, or the date such answer was due, whichever is earlier. The mailing of a letter requesting a grievance appeal shall constitute a timely appeal, if it is postmarked within the appeal period. Envelopes lacking a legible postmark shall be assumed to have been mailed three (3) days prior to their receipt.

5.06 - Association Representation

A. In each step of the grievance procedure, certain specific Association representatives are given approval to attend the meetings therein prescribed. However, it is understood by the parties that, in the interest of resolving grievances at the earliest possible step of the grievance procedure, it may be beneficial that other individuals, not specifically designated, be in attendance provided that their presence will not interfere with or interrupt normal school or work facility operations.

In regard to the adjustment of grievances and the formalization of settlements at Step 3, the Association shall designate those bargaining unit members who have the authority to act on behalf of the Association. The President of the Association

shall serve written notice to the Director of the Office of Collective Bargaining regarding who these bargaining unit members are. Where feasible, the bargaining unit representative designated to attend such meetings shall be an employee of the Agency seeking to settle the grievance. A bargaining unit representative shall be granted administrative leave with pay, per Section 28.07, to attend a meeting held to facilitate the adjustment of a grievance, so long as attendance does not adversely impact the adequacy of the workforce at the employing agency.

B. A grievant and the Association site representative shall be allowed time off, with pay at base rate, from regular duties for attendance at scheduled meetings under the grievance procedure. Grievance meetings will usually be held during normal business hours.

C. The Association shall be the exclusive representative of the employee in all matters pertaining to the enforcement of any rights of the employee under the provisions of this Article and in accordance with Chapter 4117.03(A)(5) of the Ohio Revised Code.

D. At any step in the grievance procedure, the Association shall have the final authority in respect to any aggrieved employee, to decline to process a grievance if, in the judgment of the Association, the grievance lacks merit or justification under the terms of this Agreement or has been adjusted or rectified under the terms of this Agreement to the satisfaction of the Association.

5.07 - Time Extensions and Step Waivers

A. The grievant or the Association representative and representatives of the Employer may mutually agree in writing at any step to a short time extension. Any step in the grievance procedure may be waived by written mutual consent. In emergency situations as defined by the Governor of the State of Ohio, an Appointing Authority, employing agency Director, or the Director of the Office of Collective Bargaining, the time limitations shall be suspended by both parties for the duration of the emergency. In the absence of such extensions or emergency situations, at any step where a grievance response of the Employer has not

been received by the grievant and the Association representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure within the same number of days from the date the decision was due as specified in Section 5.06 of this Article.

Except as provided above, grievances shall be processed within the specified time limits.

B. Certain issues which by their nature cannot be settled at Step 1 of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may, by mutual agreement, be filed at the appropriate advanced step where the action giving rise to the grievance was initiated. By mutual agreement, in lieu of a step meeting, a grievance response may be issued by a representative of the Employer based on a review of written documents only.

ARTICLE 6 - ARBITRATION

6.05 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

6.07 - Issues

Prior to the start of an arbitration hearing, the representatives of the Employer and the Association shall attempt to reduce to writing the issue(s) to be placed before the arbitrator and any stipulations as may be agreed upon. At the meeting, if the parties cannot agree upon the issue(s) they shall at that time submit their separate versions of the issue(s) in writing to each other, and shall submit copies to the arbitrator at the hearing. Where such a statement is submitted, the arbitrator's decision shall address itself solely to the issue(s) presented and shall not impose upon either party any restriction or obligation pertaining to any matter

raised in the dispute which is not specifically related to the submitted issue(s).

Facts

A. To understand this alleged grievance, the Arbitrator will first create an outline of the paper trail of the events leading to the alleged grievance. The Arbitrator will integrate in a chronological order the documents from the joint exhibits as well as the Union and Employer exhibits. [In two incidents, the exhibits overlapped (i.e., had same document).]

June 18, 1980. The Grievant received his permanent certification as a elementary teacher grades 1-8 from the Ohio Department of Education (Union Exhibit 2(e)).

March 28, 1985. The Grievant received his certification as an Elementary Principal valid from July 1, 1985 through June 30, 1993 (Union Exhibit 2(e)).

July 12, 1991. Carrie Smolik, President of SCOPE/OEA wrote to Ted Durke, Labor Relations-ODRC. The letter read in pertinent part as follows:

This letter shall act as a request to negotiate the effects of any changes in wages, hours, or other terms and conditions of employment with your agency concerning whatever is happening with the pre-release programs and how it affects the Association and it's members.

I normally am more specific with these requests, but you have failed to provide me with the information I requested on the telephone on July 3, 1991. We agreed that you would inform me of any changes by Friday, July 5, 1991. I did not receive your call. I left

a message on Monday, July 8, and still have not heard anything from you.

During our last telephone conversation, you did share with me that some changes are planned for pre-release, and that pre-release programs may be contracted out. We discussed the contractual obligation to discuss this with the Association. You also mentioned that there may be some changes within the job descriptions or duties of teachers at Pickaway. (Union Exhibit 9)

July 25, 1991. Joseph R. Shaver, Chief, Labor Relations (ODRC) wrote to Carrie Smolik, President of SCOPE/OEA. The letter read in pertinent part as follows:

I have received your request for affects bargaining dated July 12, 1991. Our office has consulted the Division of Training, Industries and Education and the Office of Collective Bargaining.

The pre-release program is on the agenda for the Agency Labor/Management meeting for July 26, 1991. The Association will be informed of any changes in the pre-release program. If the Association feels the changes at Pickaway Correctional Institution affects the wages, hours, or terms and conditions of employment of its members, then a specific request for affects bargaining can be submitted.

It is not anticipated that any employees covered by the SCOPE/OEA contract will be displaced. Quite the contrary as Pickaway Correctional Institution converts to a full service educational program additional positions may be added. Since subcontracting was negotiated in the current contract and no employee will be displaced this will not be bargained. Neither is our decision to affect changes in position descriptions which was negotiated under Article 16. The Agency intends to abide by the negotiated bargaining agreement in these areas and is willing to listen to the Association's concerns.

August 7, 1991. From Anna M. Lawless (Designatee of Appointing Authority) ODRC requested a Reclassification DAS for Parole Program Specialist to Teacher (ABE) Position Control No. 51080(10) and a Deletion of 5002.0 from the Position Control Roster. Attached was a Position Description for PCN 5108.0(10), also dated August 7, 1991.

August 22, 1991. The TIE Deputy Warden wrote to Denise Justice, School Facilitator and Grievant as "Pre-Release Coordinator." The content of that memo is as follows:

It is my understanding that the reclassification of certain members of the Pre-Release staff will become effective in the near future. In addition, it has been determined that overall supervision of the Pre-Release Program will become the responsibility of Ms. Justice effective September 1, 1991.

I anticipate that we will experience approximately a 90-day transitional period (October through December) during which the various institutions will implement their parent institution pre-release programs. During this transitional period the pre-release program will continue to exist virtually unchanged, with the following exceptions:

1. Ms. Justice will assume duties as Grievant's direct supervisor. In this role Ms. Justice will be responsible for overall supervision of the program, and will sign as the supervisor on all request for leave forms and overtime forms and will serve as rater on all performance evaluations of pre-release staff.

2. Grievant will relinquish duties as direct supervisor of the pre-release staff, but will remain as functional supervisor of the program.

3. At some time in the future decreased enrollment in the pre-release program will dictate that a plan be implemented to start integrating pre-release staff members into the academic education staff. Ms. Justice will develop the plan to accomplish this.

4. At the time that Grievant is integrated into the academic education staff, Ms. Justice will assume responsibility for the functional as well as direct supervision of the pre-release program.

The above outlined actions should help to facilitate a smooth transition while keeping us in compliance with the SCOPE contract. (Union Exhibit 4)

December 18, 1991. A Personnel Action reassigning and changing the position of the Grievant was signed by the Warden as Appointing Authority (Union Exhibit 3).

January 15, 1992. Meril J. Price of DAS wrote to Henry Stevens of SCOPE/OEA. The pertinent part read as follows:

The Pickaway Correctional Institution in Orient wishes to change the following employees' classifications.

<u>Name</u>	<u>Current Classification</u>	<u>Proposed</u>
Grievant	Parole Program Specialist 2	Teacher

Rehabilitation and Correction have made system-wide changes in the administration of the Pre-Release Program and need to change the classifications of these positions from pre-release to education.

Please let me know what your position is on this. (Union Exhibit 2(c))

February 21, 1992. The Grievant received a Corrective Counseling from D.L. Justice. The Grievant was titled "Teacher." The first sentence of the Counseling stated "Effective January 8, 1992, [the Grievant] was relieved of his pre-release supervisory duties." (Union Exhibit 6)

February 26, 1992. Meril Price of DAS wrote to Henry Stevens of SCOPE/OEA. The letter read as follows:

Back in January, I wrote to you requesting your position on changing four (4) Education Specialist 2's to Teachers and one (1) Parole Program Specialist 2 to Teacher.

Rehabilitation and Corrections is anxious to have your response on this matter.

Please let me know what your position is on this as soon as possible.

March 2, 1992. Henry Stevens wrote to Meril Price of DAS as follows:

In response to your letter dated February 26, 1992, I am again informing you that the Association has already signed off on the Educational positions you inquired about.

Further, I have contracted both the employees at the institutions and the Department of Rehabilitation and Correction. It is my understanding that these changes have already been made.

If I can be of further assistance, please feel free to contact me. Thank you.

March 12, 1992. The Grievant received a Corrective Counseling from Denise Justice. The Grievant was entitled "Teacher." (Union Exhibit 5)

March 21, 1992. The Personnel Action signed by the Warden on December 18, 1991 was approved by the Personnel Division of DAS (Employer's Exhibit 2).

March 23, 1992. DAS approved the Position Description Authorization signed by Anna M. Lawless on August 7, 1991 (Employer's Exhibit 3).

August 13, 1992. Ted Durkee, Labor Relations-ODRC wrote to Henry Stevens, OEA. The letter was Re: 4-1/2 Status Report. The letter in pertinent part read as follows:

This letter is to update you on the status of grievances pending arbitration scheduling. As a result of our discussions I have contacted the respective institution warden and/or labor relations officer and presented the settlement proposal.

<u>Grievant</u>	<u>Grievance No.</u>	<u>Issue</u>	<u>Status</u>
"Grievant"	?	B.U. Assignment	No record of grievance

As I receive more information or approval of settlement terms I will forward them to you.

December 30, 1992. A grievance was filed by the Grievant as SCOPE/OEA. The date of the Incident Giving Rise to the Grievance was dated December 18, 1991. The explanation of the Grievance was as follows:

Grievant was "promoted" to a position which carried a higher salary base rate than previously held. He was given the pay raise some time later, but never the raise from the date he assumed the position. (Joint Exhibit 2)

January 7, 1993. Roger Coe, LRO (ODRC), wrote a Step Two Response to the December 30, 1992 Grievance. The Employer denied the Grievance on three (3) grounds.

1. The Grievant was not a member of the bargaining unit at the time the alleged facts took place.
2. The Grievant was reclassified, not promoted.
3. Grievance is not timely (December 30, 1992) when Grievant was reclassified on April 5, 1992. (Joint Exhibit 2)

January 20, 1993. Henry Stevens, SCOPE/OEA, wrote to Ted Durkee, LRO-ODRC. The content of that letter is as follows:

Enclosed please find a Step 2 response from Roger Coe concerning the grievance of [the Grievant]. Enclosed also find a copy of the Step 3 grievance sent to your office on December 30, 1992. This letter will act as the Association's necessary document for the adjudication of grievances.

July 8, 1993. Step 4 was sent to Grievant. (Joint Exhibit 2)

Ann Lawless, Personnel Director, of Pickaway Correctional Institution testified that on August 7, 1991 she had, as Acting Authority, requested of DAS a Reclassification of the Grievant from a Parole Program Specialist (PPS) to a Teacher. She stated that as a PPS, the Grievant was not a member of the bargaining unit but was an exempt employee. Ms. Lawless indicated that the requested reclassification was finally approved by DAS on March 23, 1992 (Employer's Exhibit 2). Ms. Lawless said that from August 7, 1991 to March 23, 1992 the Grievant was officially a PPS and an exempt

employee. She said the Grievant, according to her records, started paying Union dues on April 5, 1992.

Denise Justice, who was school administrator at Pickaway from August 1987 to June 1992, also testified. She said that the centralization of pre-release programs meant that Pickaway would no longer need a PPS but would need teachers. She said that Grievant and other PPS were switched to teaching sometime in January 1992. Ms. Justice also testified that in early January, 1992, she asked the Grievant to stand in for the librarian who needed to be out for an operation. Ms. Justice said that portions of the librarian's work did involve bargaining unit work. She said the Grievant cheerfully agreed to do the work.

The Union Advocate referred Ms. Justice to Union Exhibits 5 and 6. She said that at those times (February 21, 1992 and March 12, 1992), the Grievant was still exempt and that she was his immediate supervisor. She also indicated that the Grievant was relieved on January 8, 1992 of his PPS supervisory duties and was engaged in "teaching." Although the Grievant was "teaching," he was still exempt because DAS had not as yet approved the reclassification.

Roger Coe, the LRO of Pickaway also testified. He testified that he received the Grievance (Joint Exhibit 2) on January 6, 1993 and that the Grievance was dated December 30, 1992. Mr. Coe said that he authored the Step 2 response but that to the best of his knowledge no Step 1 had occurred. He said at the hearing no allegation was made that the Grievance was a class grievance. Mr.

Coe was shown Union Exhibit 5 (Corrective Counseling on March 12, 1992). Mr. Coe maintained that the Grievant was, on that date, still an exempt employee; therefore, Mr. Coe alleges he told Mr. Stevens that he (Mr. Coe) would not entertain a bargaining unit grievance because the proper mechanism was the exempt employee grievance process. According to Mr. Coe, no exempt process grievance was filed by the Grievant.

For the Union, Mr. Thomas A. Burney, testified. He had been the librarian at Orient and was now the Librarian at Hocking since 1986. He stated that librarian work was and is bargaining unit work.

The Grievant testified in his own behalf. He said that he was totally unaware that he was going into the bargaining unit until he received the Personnel Authorization in the mail from Mr. Stevens.¹ The Grievant alleged that he began bargaining unit work "before Christmas" (1991). He also claimed he did Librarian's work in January until she returned from sick leave, and then he (the Grievant) began teaching. He said that after January 1992 he looked every payday for the increase. When the increase did not appear, he said that he called Ms. Lawless. He testified that she told him she had to await DAS official approval. The Grievant testified that the pay increase appeared in his pay check in April 1992.

¹This testimony was inherently ambiguous. The same Personnel Authorization was introduced into evidence at 3 different stages of the process. The Arbitrator has reviewed all the evidence and cannot ascertain to which stage the Grievant referred.

On cross examination, the Grievant said he sat in for librarian "because he did not want to raise a fuss." He also said that he had no knowledge of a job audit or its process. He said he did fill out a OEA/SCOPE dues form but could not remember the date. He maintained that even though he looked at his pay check every pay period since December 1991, he did not notice when the dues charge appeared. During cross examination, he agreed that he had been "teaching" since mid-February 1992.

Parties' Positions

The primary question before the Arbitrator is whether an arbitrable grievance exists. The Employer has stipulated that should the Arbitrator find the Grievance to be properly before the Arbitrator, the Employer will grant the substantive merit of the Grievant's claim.

Employer's Position

1. During the period of time during which any grievable event occurred, the Grievant was not a bargaining unit employee. Hence, he had no standing to bring a grievance under the Contract; moreover, the Union was similarly barred.

2. The Employer restructured the pre-release program. The Grievant was an exempt worker who was a supervisor in the pre-release program. The Employer could have simply laid off the Grievant. However, instead the Employer sought to reclassify the Grievant. The Union was informed in writing of the whole process.

Neither the Union nor the Grievant availed themselves of any remedy. The Grievant could have, when moved temporarily to library supervision or when moved permanently to teaching, grieved these actions through the grievance process available to exempt employees. He did not. The Union could have claimed the bargaining unit work was being improperly performed by a supervisor (Grievant was a PPS II and previously had supervised PPS I's). The Union could have requested a cease and desist order. The Union did not.

3. The Grievant was not properly reclassified until April 5, 1992. Officially (i.e., DAS) on that day, he became a bargaining unit employee responsible for Union dues and entitled to the pay of a "teacher."

The Grievant was clearly on notice by his own words either in December 1991, or January 1992 or mid-February 1992 that he was not doing PPS work but was teaching. Between those times and April 5, 1992, the Grievant took no action.

Therefore, at all the times when the Grievant knew or should have known of any alleged contract infractions he did nothing and only acted long after the timelines for the filing of a grievance had passed. The purported grievance is untimely.

4. No evidence adduced at the Hearing supports a claim of a "continuing grievance."

5. Under 5.05, the Grievance as filed does not meet the standards of a "class grievance."

6. The Grievant violated the Collective Bargaining Agreement by failing to follow 5.05(B). No Step 1 was filed and, hence, any purported grievance is null and void.

The Union's Position

1. The Grievance is a "reoccurring continuing grievance." The Union argues that every pay day when the Grievant was improperly paid is a reoccurrence of the original violation. Sometime after the April pay period, the Union allegedly sought to settle with Employer with regard to the purported grievance of the Grievant. The Union claims that the Union believed, until December 1992, that the matter was settled. Therefore, not until late December did the "incident" giving rise to the Grievance actually occur, i.e., the rejection of the proposed settlement by the Appointing Authority. (To support this proposition, the Union created an Outline of Events on pages 10-11 of its post-hearing brief.)

2. The Employer through its witness Denise Justice admitted that while the Grievant temporarily replaced the Librarian that the Grievant had done bargaining unit work. Failure to pay the Grievant violated Article 24.

3. "Arbitrators have held that when parties have been lax (sic) observing time limits in the past, strict adherence to contractual requirements would only be when the party has informed the other party that it would comply with time limits set in the Agreement." Post-Hearing brief at p. 13. According to the Union,

its witness provided sufficient evidence that ODRC had been lax in the adjustment of grievances. Union Exhibit 8 also proves this point. Therefore, the Union should not be held to contractual time lines.

Discussion

Per the Contract at Article 6.05, this Arbitrator can only hear "disputes involving the interpretation, application or alleged violation of provisions of this Agreement..." (p. 24) Thus, the Arbitrator can only hear Grievances. A Grievance pursuant to Article 5.02 "refers to an alleged violation, misinterpretation or misapplication of specific provision(s), article(s), and/or section(s) of this Agreement." (p. 13) A grievance ... "may be brought by any employee or group of employees or the Association setting forth the name(s) or group(s) of the grievant(s)." (p. 14) Under Article 1.02, employee means "employees within the bargaining unit." (p. 1) Class grievances are defined in Article 5.03. A class grievance must "affect more than one (1) employee in the same way." (5.03 at p. 14) Moreover, "[t]he caption of the Grievance shall bear the name of one (1) affected employee with the designation et al. (emphasis added) (5.03 at p. 14)

The Contract, like most labor agreements, provides for time limits for the filing of grievances. Pursuant to Article 5.03, a class "grievance shall be filed within fifteen (15) working days of the date on which ANY of the affected employees knew or

reasonably could have had knowledge of the event giving rise to the class grievance." (at p. 14)

With regard to individual grievances, time lines are provided in Article 5.05 pp. 14-17. Time extensions and step waivers are discussed in 5.07 at pp. 18-19. The Contract requires that "an employee having a grievance shall first attempt to resolve it informally with his/her immediate supervisor within fifteen (15) working days of the date on which the employee knows or reasonably could have had knowledge of the event giving rise to the grievance, but no later than thirty (30) days after the event." (5.05 A. p. 15) 5.05(B) specifically states "if the requirements of Step 1 have not been attempted by the employee, the employee shall have no right to file a formal grievance." (p. 15)

Joint Exhibit 2 is the purported Grievance. The date (given in 2 places) is December 30, 1992. The Employee name is "Grievant's name/association." The Grievance form is signed by the Grievant and a representative of the Union. The date given as the "Date of the Incident Giving Rise to Grievance" is December 18, 1991. The Explanation of Grievance is as follows: Grievant "was 'promoted' to a position which carried a higher salary base than previously held. He was given the pay raise some time later, but never the raise from the date he assumed the position."

This Grievance is not a class grievance. First, the Contract expressly specifies the proper designation of class grievances. This Grievance on its face fails to meet those standards. Second,

no proof was offered by the Union as to how any one else but the Grievant was "affected."

The Grievance procedure requires in explicit terms that Step 1 must be taken within 15 days of the incident but no later than 30 days after the event. (B) p. 15 expressly states that "if the requirements of Step 1 have not been attempted by the employee, the employee shall have no right to file a formal grievance." The Union presented absolutely no evidence to indicate that Step 1 was attempted within 15 days but no later than 30 days of the event giving rise to the grievance, NO MATTER WHICH DATE OF THAT event is used. Therefore, prima facially, the Grievant had no right to file the Grievance.

Section 5.07 allows that "[a]ny step in the grievance procedure may be waived by written mutual consent." Was Step 1 so waived? Grievant and the Union attempted to start this Grievance at the Second Step. (A procedure that is permitted for a class grievance; however, this Grievance did not, in any way, comply with the requirements of the class grievance. See supra.) The Employer did provide a Step 2 response. Did this response constitute a waiver of Step 1? No. Within the Step Two response (Joint Exhibit 2), the Employer expressly asserts the failure of the Union and/or the Grievant to undertake Step 1. No mutual written waiver existed. The Union made no specific response to this later argument.

The gravamen of the Grievance is that between January 15, 1992 (approximate) and April 5, 1992, the Grievant did work that

entitled him to more pay. What event in such a case would give rise to the Grievance? This Arbitrator finds that on the first pay day after a full two weeks of the "new work," the Grievant either knew or should have known he was (allegedly) being paid improperly. Even giving the Grievant the full benefit of doubt, the last possible date would be April 5, 1992 when the raise kicked in. Even if the Step 1 argument of the Employer had failed, the Union would have to show that the Step 2 was filed properly. The last possible date from which to begin to count was April 5, 1992.

This alleged Grievance was not properly filed under the rules of the Contract. The Union attempts to abrogate these specific express Contract provisions with an argument that appears to this Arbitrator to be a form of equitable estoppel. In essence, the Union argues that the failure of the Employer to expeditiously move grievances through the system, creates a situation where an injustice would occur if the Employer was allowed to assert the explicit contractual time lines. An equitable estoppel requires four factors: 1) a misrepresentation of fact by a party who 2) knows the other party is likely to rely on that misrepresentation and 3) the reliance of the other party so that 4) injustice would exist if the first party asserts the misrepresented fact. The Union claims that the issue of the Grievant's pay was apparently settled and that the Union relied on this apparent settlement to the detriment of the Grievant and the Union. This argument fails. Even assuming a "misrepresented" settlement, the Union was not entitled reasonably to rely because at the time of the alleged

settlement, no grievance had ever been filed that needed "settlement."

On pages 10 and 11, the Union stated an "outline of events." In the Post-Hearing brief, no party may assert facts unless evidence was adduced at the Hearing as to that asserted fact. Such a false assertion would amount to unsworn testimony and would create an inequity with regard to the other party. Items No. 5 and No. 7 are at least questionable on those grounds in this Arbitrator's mind. Second, on p. 13 of the Post-Hearing brief at paragraph one, the Union asserts both arbitral law and fact. However, absolutely no citation was provided for the asserted arbitration awards, and this Arbitrator does not recognize the alleged principle in the form stated by the Union. With regard to the asserted facts, the Arbitrator's extensive perusal of her notes reveals only uncorroborated anecdotal references to support these assertions. Estoppel is an equitable remedy. The party seeking equity must have given equity. A primary rule of equity is that one may not sit on one's rights (laches). Here, both the Union and the Grievant sat on their rights.

Award

This matter is not properly before the Arbitrator. Neither the correct procedure nor the contractual guidelines were followed by the Union and the alleged Grievant.

November 30, 1993
Date


Arbitrator