

In the Matter of the
Arbitration Between

SCOPE/OEA/NEA

Union

and

Ohio Department of
Mental Health
c/o OCB

Employer.

Grievance No. 23-08-(93-02-19)-
0944-06-10

Grievant(s): Steve Sellers, et. al.

Hearing Date: September 27, 1993

Brief Date: October 28, 1993

Award Date: December 2, 1993

Arbitrator: R. Rivera

For the Employer: Jeff Fogt
Michael Duco

For the Union: Henry L. Stevens

Present at the Hearing in addition to the Grievant and Advocates were Carrie Smolik, SCOPE (witness), Meril Price, DAS (witness), and Nona West, Personnel Officer III, ODMH (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. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract

2. Grievance Trail

- a) Grievance dated February 12, 1993
- b) Step III dated May 11, 1993. Step III response in pertinent part read as follows:

The Union argued that the Department incorrectly generated the recall list and that Grievant should have been put on the list for any position for which he was qualified for at the time of his layoff.

Management stated that if Grievant's name had appeared on the recall list he would have been awarded the position but since it did not there was no contractual obligation to hire Grievant.

Decision: The Union's grievance stated that management had violated Articles 18 by not awarding the position to Grievant. The contract states, under Article 18.12, that "each agency which had implemented a reduction in force shall prepare recall lists of all employees displaced or reduced as a result of a reduction in force. Such recall lists will be by classification and parenthetical subtitles and will include the employee's seniority, appointment type, and the counties to which the employee wishes to be recalled." Oakwood Forensic Center did prepare a recall list on which Grievant's name appears, this was done by classification, and since no parenthetical exists for the classification of Education Specialist II (69652), he was only placed on the list for this classification and the related class of Educational Specialist I (69651). Dayton Mental Health Center was under no contractual obligation to recall Grievant because he only has recall rights to the classification from which he was laid off. (Joint Exhibit 2)

- c) Request for Arbitration dated March 4, 1993

Union Exhibits

0. Pre-Hearing Memo and Opening Statement

1. a) August 29, 1985 Certification of Grievant by Ohio Department of Education for Special Education (K-12) valid from July 1, 1985 through June 30, 1993
- b) August 23, 1990 Certification of Grievant by Ohio Department of Education as High for High School (7-12) valid from July 1, 1990 through June 30, 1998
2. a) A notarized affidavit made August 31, 1993 from N. Henry (former Teaching Supervisor II) with regard to the Job Responsibilities of Grievant at Lima State Hospital/Oakwood Forensic Center
- b) Position Description for Oakwood Forensic Center PCN No. 83509.1(10) -- entitled Educational Specialist II and dated May 4, 1987
- c) Position Description of PCN No. 83503.0(10) entitled Teacher (Oakwood Forensic Center) and dated June 4, 1987
- d) Position Description of PCN No. 83509.1 entitled Educational Specialist II and dated December 27, 1990
3. a) December 26, 1990 letter to Meril Price of OCB from Carrie Smolik, President SCOPE/OEA which read in pertinent part as follows:

Enclosed with this letter is a summary of what the duties are of the Educational Specialists who have responded to my questions. I have sent a letter to all the employees listed on the Educational Specialist list which Gail Lively sent to me. As you will see in the summary, there are some Educational Specialists who do teach and some who do not.

I will be looking forward to meeting with Gail and you so we may discuss and hopefully come to some conclusion about this classification specification and it's requirements. I will also be looking forward to the letter of understanding we discussed at our last meeting concerning the parenthetical subtitles and displacement rights of employees. (Union Exhibit 3)

- b) January 11, 1991 letter to Meril Price of OCB from Carrie Smolik, President SCOPE/OEA which read in pertinent part as follows:

At our Jan. 9, 1991 meeting between Gail Lively, you and I concerning the classification modernization, we agreed that I would write a letter clarifying the concern of the Association with some of the parenthetical subtitles created. I stated that some of the parenthetical subtitles created are not areas of certification acknowledged by the Ohio Department of Education. These subtitles are:

Teacher 1-4 (Elementary Education/GED)
Teacher 1-4 (GED)
Teacher 1-4 (Adult Basic Education)
Teacher 1-4 (Adult Basic Education/GED)
Teacher 1-4 (Math Improvement)
Teacher 1-4 (Life Skills)
Teacher 1-4 (Language Arts)
Teacher 1-4 (Vocational - Pre-Vocational)

I believe that these parenthetical subtitles were created because many Unit 10 members do teach these classes at the various facilities. However, these are not areas of certification and certification plays an important part when an employee may be laid off and needs to exercise their displacement rights.

What the Association is requesting is that we receive written assurance that if an employee within one of the above parenthetical subtitles is laid off, they will be able to use their area of certification, not their parenthetical subtitle, in the application of Article 18 (Reduction In Force) of our Agreement. (Union Exhibit 3)

Attached to 2(b) was a list of employees and duties. The Grievant's name was not on this list.

4. a) Social Studies (71731-4) Seniority List by Institution (as of March 20, 1992)
- b) Reading (71271-4) Communications Skills Improvement - CSI (71161-4) and GED (71751-4) Seniority List by Institution (as of March 20, 1992)

- c) English (71171-4) Seniority List by Institution (as of March 20, 1992)

Employer's Exhibits

0. Opening Statement

1. Dayton Mental Health Center Vacancy Announcement Bargaining Unit Positions A.B.E. Teacher dated December 16, 1992
2. Article 18.12 of Contract A Recall Rights, pp. 64-65 and pp. 160-161
3. a) Personnel Action of Grievant Layoff as Educational Specialist II dated January 7, 1992 (DAS approval)
b) Letter to Grievant from ODMH re: layoff which read in pertinent part:

This abolishment, therefore, is requested for reasons of economy and a permanent lack of work.

Because there are no available vacancies in your classification or classification series, in accordance with Article 18 of the OEA contract, you may have the right to displace an employee at Oakwood Forensic Center.

If you wish to exercise your displacement rights, you must do so in writing within five (5) calendar days from receipt of this letter. Please complete the attached ADM 4138 Form and return it to Ann Henry, Personnel Director. If you do not give notice of your decision concerning displacement rights, you will forfeit your right to displacement.

You shall have recall rights, pursuant to Article 18 of the OEA contract at Oakwood Forensic Center and within the recall jurisdiction for a period of two years. Please complete the bottom half of the ADM 4138 Form within five (5) calendar days of receipt of this letter and return it to Ann Henry, Personnel Director. It is your responsibility to maintain your current

address with the Personnel Office at Oakwood Forensic Center. (Employer Exhibit 3)

Attached were the forms referred to. Grievant indicated he wished to exercise displacement rights. He also indicated he was available for either reinstatement or re-employment.

- c) Letter of December 10, 1991 from ODMH that informed Grievant that no positions exist in which he could have exercised displacement rights either in Oakwood Forensic Center nor Contiguous Counties.
- 4. Department of Mental Health Oakwood Forensic Center (580-451) Certified Recall List OEA

Grievant is listed as eligible for recall as either Educational Specialist II or I for all counties
- 5. December 23, 1992 letter of application to Dayton Mental Health Center for ABE Teacher position. Attached were the Grievant's resume, letter of recommendation from CEO of Oakwood, a copy of his certifications, and a OCS application. All items clearly referred to Grievant's 17 year position with ODMH at Oakwood.
- 6. a) March 19, 1991 letter to Carrie Smolik, President SCOPE/OEA from Deputy Director Wilson of OCB/DAS. The letter read as follows:

This letter supersedes the letter which was mailed to you February 26, 1991 wherein we incorrectly stated "this area of certification" in the first paragraph of the letter. Per last week's telephone conversation with Michele Faiella please find enclosed the corrected copy of our letter. (Employer Exhibit 6)

b) Letter to Smolik from Wilson dated March 1, 1991
- 7. Section 18.06 from 1989-92 Contract
- 8. June 2, 1992 letter to Personnel Directors and Staff from Personnel re: Checking for Layoff List that read in pertinent part as follows:

Due to the large number of layoffs throughout the State system you must check for layoff lists before you post all positions. You must also check before the positions are filled; this includes checking before the

personnel actions are typed. Layoff lists can change every day. No one should start before the paper work is approved. So please submit your paper work at least three or four weeks in advance of the expected effective date.

To check for a layoff list enter TESL on the CRT and you will get a format (See attachment #1). Enter the classification number and the first 4 letters of the County and press enter. You will get either a layoff list (attachment #2) or no record found (attachment #3).

Union's Issue

Did the Employer and Management at Dayton Mental Health Center violate, misinterpret or misapply the 1992-94 agreement between the State Council of Professional Educators and the State of Ohio when they failed to recall Grievant, a 17 year teacher at the Oakwood Forensic Center, to a bargaining union position at the Dayton Mental Health Center.

If so, what shall be the appropriate remedy?

Employer's Issue

Was the Grievant improperly denied recall to a position as a Teacher at Dayton Mental Health Center?

Relevant Contract Sections

ARTICLE 18 - REDUCTION IN THE WORK FORCE 18.01 - Pre-Reduction in Force Action

- A. A reduction in force of employees may only be effected by the employing agency when such action is based upon any of the following reasons: (1) a reorganization for the efficient operation of the employing agency;

(2) for lack of funds or lack of work to sustain current staffing; (3) for reasons of economy; a reduction in force may be either of temporary (less than one year) or permanent (more than one year) duration.

At least forty-five (45) days prior to the anticipated effective date of a reduction in force, the Association must be afforded an opportunity to meet with the Employer. At this meeting, the Association must be provided a written rationale, with supporting documentation if any has been prepared, setting forth the basis for the reduction in force. At this meeting, the Employer must also inform the Association of the anticipated classification(s) where reductions may occur, the particular position(s) and their appointment types which may be reduced, the names of employee(s) in the classification(s) where the reduction is anticipated with the seniority dates of employees within the classification(s) and series affected, the expected duration of the reduction in force, the facility or facilities to be affected and a listing of any vacancies which might be available for displacement.

Either at this meeting or within ten (10) days thereafter, the Association shall be provided an opportunity to challenge the rationale offered and/or to discuss the reduction in force with the Employer so as to offer suggestions as to how the reduction in force may be avoided or its impact lessened. Input from the Association shall be seriously considered before any final decision is made as to a reduction in force.

Within five (5) days after the Association provides its input, but no later than thirty (30) days prior to the proposed effective date of the reduction in force, the Employer shall make a final decision as to whether it will effect a reduction in force. Such final decision shall be communicated to the Association. If a reduction in force is to be effected, the Employer shall supply to the Association a written rationale, with supporting documentation if any, revised if necessary, setting forth the basis for the final decision.

The Association shall also be provided with a final listing of the classification(s) where reduction in force will occur, the particular position(s) and their appointment types, names of employees affected with their seniority and work facility or facilities, vacancies available, and the expected duration of the reduction in force. The Association shall also be provided a complete seniority list of all employees within each facility affected, and the facilities within the county and counties contiguous to each facility affected.

When the Employer makes its final decision to effect a reduction in force, it may not move employees into or out of affected classifications within the affected facility and facilities in the county of or counties contiguous to the affected facility by means of promotions, transfers, voluntary reductions (as per Article 17), classification changes, or reassignments, except that transfers out of a classification or implementation of the findings of a position audit commenced prior to the employing agency's final decision may be implemented.

18.05 - Displacement Rights

- A. Each employee reduced in force or displaced as a result of a reduction shall have the right to displace another employee in the manner and order provided in subparagraphs 1-10, subject to the requirements set forth in Section 18.06, only if the affected employee has given the employing agency written notification of intent to exercise his/her displacement rights within five (5) days of the date he/she is notified of the reduction in force or displacement. In the order specified in subparagraphs 1-7, full-time employees are to displace first against other full-time employees. After subparagraphs 1-7 have been applied, full-time employees may displace part-time, interim and intermittent employees as specified in subparagraphs 8 and 9. Part-time employees may only displace other part-time employees. Displacement shall occur in the manner and order specified below:

1. Within any available vacancy in the classification title and/or same parenthetical subtitle from which the employee was reduced in force or displaced: first, within the work facility of the reduction or displacement, second, within work facilities within the same county operated by the employing agency implementing the reduction in force or displacement, and third, within work facilities within contiguous counties which are operated by the employing agency implementing the reduction in force or displacement;
2. Within any available vacancy in the classification title and different parenthetical subtitle from which the employee was reduced in force or displaced: first, within the work facility of the reduction or displacement, second, within work facilities within the same county operated by the employing agency implementing the reduction in force or displacement, and third, within work facilities within contiguous counties operated by the employing agency implementing the reduction in force or displacement;
3. Against the employee with the least state seniority within the same classification title and/or parenthetical subtitle from which the employee was reduced in force or displaced: first, within the work facility of the reduction or displacement, second, within work facilities within the same county operated by the employing agency implementing the reduction in force or displacement, third, within work facilities within contiguous counties operated by the employing agency implementing the reduction in force or displacement;
4. Against the employee with the least state seniority in the same classification title from which the employee was reduced in force or displaced and different parenthetical subtitle; first, within the work facility of the reduction or displacement, second, within work

facilities within the same county operated by the employing agency implementing the reduction in force or displacement, and third, within work facilities within contiguous counties which are operated by the employing agency implementing the reduction in force or displacement;

5. Against the employee with the least state seniority within the next lower classification title to include parenthetical subtitles or successively lower classification titles as set forth in Section 18.07 in which the reduction in force or displacement occurred; first, within the work facility of the reduction or displacement, second, within work facilities within the same county operated by the employing agency implementing the reduction in force or displacement, and third, within work facilities within contiguous counties which are operated by the employing agency implementing the reduction in force or displacement.
6. Against the employee with the least state seniority in the classification title to include parenthetical subtitles most recently held by the employee within the last five (5) years provided that the classification is a lower or equivalent classification to the employee's current classification and further provided that the classification is included within the bargaining unit; first, within the work facility of the reduction or displacement, second, within work facilities within the same county operated by the employing agency implementing the reduction in force or displacement, and third, within work facilities within contiguous counties which are operated by the employing agency implementing the reduction in force or displacement;
7. Against the employee with the least state seniority in the classification title he/she next previously held, and in successive previous classifications, provided that the classification(s) is included within the bargaining unit; first, within the work facility of the

reduction or displacement, second, within work facilities within the same county operated by the employing agency implementing the reduction in force or displacement, and third, within work facilities within contiguous counties which are operated by the employing agency implementing the reduction in force or displacement;

8. If a full-time employee is unable to exercise displacement rights against another full-time employee under subparagraphs 1-7 above, then the most senior full-time employee may displace in the order specified in subparagraphs 1-7 the least senior part-time employee even if the part-time employee has more seniority than the full-time employee. However, a full-time employee may waive the right to displace a part-time employee without adversely affecting the full-time employee's right to recall;
9. If a full-time employee is unable to exercise displacement rights against another full-time employee under subparagraphs 1-7 above, and is unable or unwilling to exercise displacement rights against a part-time employee under subparagraph 8 above, then the most senior full-time employee may elect to displace in the order specified in subparagraphs 1-7 first, the least senior interim employee at the work facility only and secondly, the least senior intermittent employee at the work facility only, even if the interim or intermittent employee has more seniority than the full-time employee exercising displacement rights. A full-time employee may waive his/her right to displace an interim employee without prejudicing his/her right to displace an intermittent employee. A full-time employee's right to recall will not be affected regardless of whether the displacement option against an interim or intermittent employee is exercised as herein provided.
10. An employee so displaced by an employee possessing more state seniority may

displace an employee in the order and manner specified in paragraph A (1-9) subject to exceptions set forth in Section 18.06.

18.12 - Recall Rights and Procedures

During the two (2) year period following the reduction in force or displacement, the employing agency shall not hire, transfer, or promote any person into a classification title and or parenthetical subtitle in a facility operated by the employing agency for which a recall list exists.

Employees reduced in force or displaced as a result of the reduction in force shall have recall rights for a period of two (2) years from the effective date of reduction in force or displacement.

A. Recall Rights

1. Recall rights shall exist statewide within the employing agency in which the reduction in force or displacement occurred. Within five (5) days of the notification of the reduction in force, the employee who is subject to recall may select the counties in which he/she is willing to accept recall. If no counties are designated, the employee shall be placed on the agency statewide recall list.
2. Within five (5) days of the notification of the reduction in force or displacement, the employee who is qualified for reinstatement in two (2) or more parenthetical subtitles may select in writing the parenthetical subtitles for which the employee wishes to be recalled. If the employee makes no selection, then the employee shall only be placed on the recall list for the classification and parenthetical subtitle held at the time of the reduction or displacement.
3. Each agency which has implemented a reduction in force shall prepare recall lists of all employees displaced or reduced as a result of a reduction in force. Such recall lists will be by

classification and parenthetical subtitles and will include the employee's seniority, appointment type, and the counties to which the employee wishes to be recalled. Employees who have been reduced in force or displaced to a classification title and different parenthetical subtitle, or a lower classification title in their classification series shall be placed on recall lists for each classification in the classification series equal to or lower than the classification in which the employee as employed at the time of reduction or displacement.

4. The reduced in force employee or an employee who exercised displacement rights with the most seniority shall be the first recalled to a position within the specific classification title and/or parenthetical subtitle which the employee held at the time of reduction in force or displacement, or into any classification in which displacement occurred, provided that the recalled employee is currently fully qualified for the position as established by the classification specification. If the employee displaces outside his/her classification series, the employee shall only be recalled to the classification (including different parentheticals) held at the time of displacement.

Facts

The Grievant was employed as an Educational Specialist II from September 27, 1976 to January 10, 1992. On December 9, 1991, the Grievant was notified by letter (Employer's Exhibit 3(b)) that he would be laid off on January 10, 1992. The letter stated that the reduction in force was for "reasons of economy and permanent lack of work." The Grievant was informed by that same letter of

his displacement and recall rights under the Contract. (For exact words, see 3(b) in List of Exhibits.) The Grievant completed the forms necessary to claim those rights and returned them seasonably to the Employer. (Employer's Exhibit 3(b)) On December 10, 1991, the CEO of Oakwood Forensic Center informed the Grievant that under 18.06 of the Contract he had no current displacement rights at either Oakwood itself or in other ODMH facilities in contiguous counties. (Employer's Exhibit 3(c)) Upon his layoff, the Grievant was placed on the Oakwood Forensic Center (580-451) Certified Recall List (OEA). He was listed as having recall rights in all counties for 69632 Educational Specialist I and 69631 Educational Specialist II. (See Employer's Exhibit 4)¹

On December 16, 1992, the Dayton Mental Health Center posted a Vacancy Announcement of a Bargaining Unit Position A.B.E. Teacher. (See Employer's Exhibit 1)

On December 23, 1992, the Grievant applied for the Teacher A.B.E. position. (Employer's Exhibit 5) He was not chosen. Ms. Nona West, Personnel Officer III of the Dayton Mental Health Center, testified that she was directly involved with the hiring of that position. She stated that on June 2, 1992, her office

¹The Union's Advocate objected to the introduction of this document on two grounds a) list was un-dated and b) list was incorrect. The question of the "correctness" of the list is one of the issues that the Union believes to be at issue. Therefore, the admission of the document is solely for the purpose of indication of the Recall lists on which the Employer placed the Grievant. Since the Employer admits this fact, the lack of a specific date is irrelevant for these purposes.

received a memo from Central Office Personnel reminding each local Personnel Office and Officer to thoroughly check recall lists. (Employer's Exhibit 8) This memo explicitly laid out the method to check the recall lists. Ms. West testified that she checked the list for the classification number of the A.B.E. teacher, to wit, 51075.0. She stated that the Grievant's name was not found on that recall list. At Step III, the Employer stipulated that had the Grievant's name been on the recall list for Teacher A.B.E. that Dayton had a contractual obligation to hire him. (Joint Exhibit 2(b))

The Grievant testified that he was hired at Oakwood Forensic Center as an Educational Specialist II on September 27, 1976. The Grievant claimed that from September 27, 1976 to January 10, 1992 (the layoff date) that he did not carry out the duties of an ESII but rather he carried out the duties of a Teacher for which he was certified. (Union Exhibits 1a and 1b) To support his testimony, the Grievant offered as evidence the Notarized Affidavit of his former supervisor. This sworn statement explicitly supported the Grievant's testimony as to the nature of his duties. (Union Exhibit 2a)

The Grievant stated that between 1976 and 1992 he had never grieved the allegedly inappropriate classification because an ESII was paid 5% more than a teacher. The Grievant also stated that he had applied for the Dayton position as an "off the street" application because until February 1993 he did not know that his

recall rights could apply to the Dayton position. He said he applied to Dayton for recall rights after his Union representative told him to do so.

Ms. Carrie Smolik testified for the Union with regard to her activities while she was President of SCOPE/OEA. Ms. Smolik testified that on December 26, 1990, she wrote to Meril Price of OCB/DAS with regard to the anomalous position of some Educational Specialist (I and II) who she (Smolik) believed were essentially employed as teachers. (See content of Union Exhibit 3 under Exhibits.) On January 11, 1991, Ms. Smolik again wrote to Ms. Price. (Union Exhibit 3b) In that letter, Ms. Smolik referred to a meeting held January 8, 1991 with Ms. Price. The gist of the letter was that as a part of the employment classifications of some OEA members, the parenthetical subtitles of those classifications did not coincide with the certification of teaching areas used by the Ohio Department of Education. Ms. Smolik maintained that parenthetical subtitles were crucial to layoff and displacement rights. SCOPE/OEA stated in Ms. Smolik's letter that the Union wanted "written assurance" from the Employer that laidoff OEA members could use their certification area not their parenthetical subtitle to assert Article 18 recall and displacement rights. (Union Exhibit 3b) At the hearing, Ms. Smolik explained that in the case of some Educational Specialists their classification, and hence their parenthetical subtitles, did not reflect that such persons were carrying out teaching duties.

The Union was concerned that in case of a "RIF," these persons would have limited and improper recall rights.

Ms. Smolik was directed by the Employer's advocate to Employer's Exhibit 7, a copy of Contract Article 18.06-18.07 for the 1989-1992 Contract. Ms. Smolik said that both her December 26, 1990 and January 11, 1991 letters were directly concerned with the 1989-92 Contract. She agreed that the Union took these same concerns to the bargaining table for the 1992-1994 Contract. Ms. Smolik was shown Article 18.12A (Recall Rights) in the 1992-1994 Contract and the Appendix G -- Classification Specifications on pp. 161-171 (covering ESI and II and a variety of teaching positions). (Employer's Exhibit 2) Ms. Smolik agreed that the Grievant's layoff and Grievance arose under the 1992-1994 Contract.

The Employer called Meril Price, OCB/DAS, whose career for the Employer has dealt with personnel/classification issues. Ms. Price said that given Appendix G (Employer's Exhibit 2) that an Educational Specialist had no recall rights as a teacher. Classification numbers 69651 and 69652, i.e., ES I and II, are not within the classification of teachers. The first four digits of the classification codes determine recall rights. All teacher's classification numbers run from 71111 to 71814. Ms. Price remembered Ms. Smolik's letters and their meetings. She agreed that Ms. Smolik had stated fairly and accurately the Union's concerns as expressed to the Employer. Ms. Price stated that

those concerns were raised under the 1989-92 Contract, not the current Contract. Ms. Price said that Director Wilson's letter of March 1, 1991 represented the Employer's position on the Union's request. Essentially, Mr. Wilson's letter refused to give the written assurances requested and referred the Union to the express words of the Contract in 18.01. (Employer's Exhibit 6)

Discussion

The Union specifically states in its brief that the Contract violation alleged is the "failure to recall" the Grievant. (Union's Post-Hearing brief) Moreover, the Grievance itself alleges that the Grievant "was not afforded the opportunity to 'recall rights' pursuant to the Agreement." (Joint Exhibit 2) The date of Grievant's layoff was January 10, 1992; the date of the alleged failure to recall was subsequent to January 10, 1992. Therefore, the Grievance arose under the 1992-1994 Contract. (Joint Exhibit 1)

Recall Rights and Procedures are covered by Article 18.12 pp. 63-67. 18.12(A)(2) states "... the employee shall only be placed on the recall list for the classification and parenthetical subtitle held at the time of reduction or displacement." (p. 64 (Emphasis added) At the time of the RIF, the Grievant was an Educational Specialist II. Pursuant to 18.12(A)(3), "[e]ach agency ... shall prepare recall lists...." "Such recall lists will be by classification and parenthetical subtitles." (p. 64)

Pursuant to 18.12(A)(4) the employee "shall be the first recalled to a position within the specific classification title and/or parenthetical subtitle which the employee held at the time of reduction in force...." The Employer has consistently maintained that the Grievant's position was not within the specific classification title and/or parenthetical subtitle of teacher. (See Appendix G) The Union tacitly admitted the position of the Employer by the words and letters of President Smolik to Meril Price. The Union recognized that Educational Specialists were not in the teacher classifications and hence, if a RIF were to occur the ES's who were in effect teaching would be ineligible for recall to teaching positions. The Smolik/Price letters culminating in the Wilson reply clearly indicate that the Employer refused to agree to an unbargained for change. A close reading of the 1992-94 Contract shows that the Union did not accomplish the desired change through bargaining, as well. The Arbitrator is bound to the express words of the Contract, and the express words give no recall rights to teaching positions to Educational Specialists I or II.

The Union points to § 18.06(E) which states that "the employee may displace within the classification series for which he/she meets the minimum qualifications as outlined in the classification specification and/or position description." (Emphasis added) (p. 61) This section has no relevance to recall rights. The Union and the Grievant did not grieve "displacement"

but recall. (The Arbitrator takes no position on whether Grievant was denied appropriate displacement.)

In addition under 18.13 (pp. 67-68), the employee could file a grievance within ten (10) days of receipt of the notification of reduction in force, displacement, or recall. Under 18.13(4) (at p. 65), the employee can grieve "failure to be placed on a recall list." Thus, the employee is given a specific, but time limited, right to grieve an improper recall list.

Under the express provisions of the Contract, the Grievant was not denied any proper recall rights. However, the Union attempts an equitable argument to estop the Employer from asserting the express provisions of the Contract. In particular, the Union points to the fact that for all his years in the system the Grievant was not functioning as an Educational Specialist but as a teacher. In essence, the Union argues that the Employer is estopped to rely on the Grievant's official title because the Employer has employed the Grievant for numerous years as a teacher. Unfortunately, that argument cuts more strongly in the opposite direction. The Grievant admitted that for all those years he knew he was not performing the duties of an Educational Specialist II, but he never grieved, requested a job audit, etc. because he knew he was getting a higher pay (5%) as an ESII than a teacher. Equity would not be served if the Grievant, after admitting he played the system to his own financial advantage for over 17 years, could now rely on the opposite position because


after a RIF the different position (claiming to be a teacher) is now in his best self-interest.

Award

The Arbitrator finds that the Employer followed the express words of the Contract. The Wilson letter was certainly fair warning of the Employer's position. Grievance denied.

December 2, 1993

Date


Arbitrator