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In the Matter of Arbitration	
Between	Case Number:
OCSEA/AFSCME Local 11	02-10-951016-0011-01-00
and	Before: Harry Graham
The State of Ohio	

Appearances: For OCSEA/AFSCME Local 11:

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For The State of Ohio:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on January 20, 1996 and the record in this case was closed.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> May an arbitrator award back pay to an OCSEA represented bargaining unit member if that person is found to be working in a classification represented by another bargaining unit.

Background: As will be readily apparent, the events prompting this dispute may be succintly presented. There is one person proximately involved in this proceeding. Nancy Johnson was employed in the Department of Taxation for many years as a Tax Commissioner 1, 2 and 3. As a Tax Commissioner she was in a bargaining unit represented by OCSEA/AFSCME Local 11. In due course Ms. Johnson became an Agent Supervisor. As such, she was not in the bargaining unit represented by the Union.

The Union (OCSEA/AFSCME) came to allege that an OCSEA represented employee who grieves claiming performance of duties contained in a classification receiving higher pay should be entitled to pay as a remedy. The State disagrees.

Position of the Union: The parties agree that Article 19 of the Agreement governs situations such as this. Nothing within Article 19 prohibits the Union from seeking a monetary remedy for work out of classification disputes when the higher paid classification is represented by a different Union. Section 19.02 provides that an arbitrator determines that an employee is performing duties associated with a higher pay range the arbitrator shall order such duties discontinued. The language of Section 19.02 continues to provide that "The determination of a monetary award shall be in accordance with Section 19.02 Step 1 above." Section 19.02 Step 1 provides:

> If the duties are determined to be those contained in a classification with a higher pay range than that of the employee's current classification, the Director or designee shall issue an award of monetary relief,

provided that the employee has performed the duties as previously specified for a period of four (4) or more working days.

There is no exclusion coving the circumstances of this dispute. The language, in the opinion of the Union, is clear. It provides for monetary relief. No limitation is contained in the contract. Furthermore, the Union would not agree to a situation in which work out of classification (WOC) grievants working in a different union's bargaining unit would not secure pay when similarly situated people in an OCSEA bargaining unit received compensation. It is unnecessary that reclassification of an employee occur in order to trigger the remedy features of Article 19. All that is necessary is work in a higher paid classification, regardless of what union may represent employees in that classification.

When the parties came to negotiate Article 19 they both sought to maintain the integrity of the job classification system. They agreed that if Union members work outside of their own, specific, classifications that they should be properly compensated. That principle extends to people working in non-OCSEA represented classifications as well according to the Union. In the absence of monetary relief the State will have no disincentive to work employees out of their classification.

If members of OCSEA/AFSCME represented units cannot secure monetary relief they will not bother to bring

grievances if they feel they have been assigned to work out of classification. This situation erodes the Agreement. In the absence of grievances, the Union cannot police the terms of the Contract.

In the opinion of the Union it is improper for the State to assert that monetary relief is available only when the possibility of reclassification exists.

At the hearing the State acknowledged that people who grieve exempt classifications under Article 19 and prevail are entitled to compensation. No conceptual difference exists between that situation and the one under review in this proceeding in the Union's view.

Should the position of the State be adopted an absurd result will occur. It is bizarre to deprive some State employees and Union members of a remedy when a finding that the State has violated the Agreement is made.

The Union stresses that this is not a reclassification dispute. No reclassification is involved in the grievance.

The public sector collective bargaining law of Ohio is found in Chapter 4117 of the Revised Code. There is nothing there that prohibits an arbitrator from awarding money to grievants represented by a Union other than OCSEA. To the contrary, if the State is permitted to work employees out of their classifications with impunity, no matter what Union may represent employees in those classifications it will

encourage a violation of Agreement to occur regularly. That should not be the case according to the Union. It urges an award permitting it to seek monetary relief when it grieves WOC classifications in a bargaining unit represented by another Union.

Position of the Employer: The State points out that since the inception of the Collective Bargaining Agreement in 1986 Article 19, dealing with work out of classification has been the subject of repeated negotiations. As the State reads the present language it provides that should a person in a OCSEA/AFSCME bargaining unit perform work within the province of the bargaining unit represented by some other union (eg. District 1199, OEA, FOP) that the only remedy an arbitrator may issue is a cease and desist order. No monetary award is appropriate in the State's view. In support of this view the State points to the present collective bargaining agreement. Article 19 provides in part "If the duties are determined to be those contained in a classification with a higher pay range than that of the employee's current classification, the Director or designee shall issue an award of monetary relief provided that the employee has performed the duties as previously specified for a period of four (4) or more working days." (Page 59, paragraph 2). Attention should then turn to the last line on page 59 according to the State. It reads, "If the higher level duties are of a permanent nature as

agreed to by the Union and the Employer, the employee shall be reclassified to the higher classification." On page 61 is found an identical provision governing the authority of an arbitrator.

The contract language cited above should be read in connection with the Ohio public employee collective bargaining act, ORC 4117. The statute provides for the establishment of bargaining units, represented by an exclusive bargaining agent. In Ohio Board of Tax Appeals, HO 1994-HO-005 (3-3-94) the Employer had unilateraly removed two positions from the OCSEA represented bargaining unit and considered them to be exempt. The State Employment Relations Board (SERB) found this to have violated the statute.

The State does not dispute that if a bargaining unit employee performs tasks associated with an exempt position, payment must be made. That is not the case if OCSEA represented employees perform tasks associated with positions represented by other bargaining agents. The State may place OCSEA represented employees only into OCSEA represented classifications or those exempt from collective bargaining. If it desires to do otherwise, it must negotiate per the holding in Board of Tax Appeals.

In the opinion of the State no language distinguishes the availability of monetary relief from that of reclassification except that the parties must agree to reclassification. If

the arbitrator were to have authority beyond this, the Agreement would say so. It does not. The Agreement does not provide that employees who perform higher rated duties in bargaining units represented by other unions are entitled to compensation.

Other sections of the Agreement, specifically Article 13, Sections 17 and 18 which the State anticipates will be cited for support by the Union, are irrelevant according to the Employer. Section 13.17 provides a mechanism for the State to fill a temporarily vacant position. It does not have to use the Section 13.17 provisions in all instances. Section 13.18 tends to support the State in this dispute it urges. It provides that bargaining unit members may be appointed to non-bargaining unit positions. The State does not dispute this is the case. Under Article 19, the State believes people performing tasks associated with an exempt position are entitled to the appropriate pay. That is not the case if OCSEA represented people perform tasks properly within the jurisidiction of other bargaining representatives. As that is the case, the State urges the grievance be denied.

Discussion: Article 19 provides a comprehensive statement of the agreement between the parties concerning the manner in which working out of classification situations are to be resolved. The second paragraph of Section 19.02 (p. 59) provides "If the duties are determined to be those contained

in a classification with a higher pay range than that of the employee's current classification, the Director or designee shall issue an award of monetary relief...." (Emphasis supplied). At Section 19.02 the Agreement clearly specifies money shall be the remedy if a person is working in a higher ranked job classification. The Agreement is silent concerning the question of whether or not that remedy is applicable if the position in which the employee is or has been working is within a bargaining unit represented by a union other than OCSEA/AFSCME Local 11. There is no reason to believe the parties desired to exclude people who are in that circumstance. Had they agreed to do so they doubtless would have indicated as much in the Agreement. They did not.

That conclusion is applicable to the provision for arbitration of classification disputes set out at pages 60-61 of the Agreement. On page 61 the Agreement provides "The determination of a monetary award (by the arbitrator) shall be in accordance with Section 19.02 Step 1 above." As set out by the Arbitrator above, Section 19.02 Step 1 provides for monetary relief in circumstances when State employees work in a higher rated job. That is the case no matter what bargaining unit the position may fall into. The operative condition is the job, not the labor organization that may represent people performing the job.

On page 61 the parties have directed that if an

arbitrator determines an employee is performing tasks associated with a higher classification an order may issue directing the Employer to cease such tasks. Under specified circumstances, an arbitrator may direct the Employer to reclassify an employee so situated. Those provisions do not serve to prohibit or limit an arbitrator from awarding monetary relief if the different classifications are in a bargaining unit represented by a union other than OCSEA/AFSCME Local 11. To the contrary, the arbitrator is specifically authorized to direct a monetary award in accordance with Section 19.02, Step 1 of the Agreement.

The phraseology on pages 59 and 60, "If the higher level duties are of a permanent nature..." does not serve to prevent an arbitrator from issuing a monetary award in the circumstances at issue in this proceeding. That language merely provides that if the Union and the State agree that the duties are permanent, the employee is to be reclassified. It does not serve to limit the authority of an arbitrator as urged by the State. Had the parties desired to place such a limit on the arbitrator, they would have done so. They did not.

The holding in this dispute is not at variance with 4117 of the Ohio Revised Code. To the contrary, the statute deals with such matters as establishment of bargaining units, unfair labor practices and machinery for resolving labor

disputes. If the Arbitrator were to credit the position of the State in this matter it would be necessary to find that the Agreement of the parties contravenes the statute. That finding is specifically not made. The parties reached an understanding on the manner in which work out of classification disputes are to be resolved. They did not limit the authority of an arbitrator to award pay if the disputed position happens to be represented by a union other than OCSEA/AFSCME Local 11.

Award: The grievance is sustained. An arbitrator has authority under the Agreement to award pay to a person working in a higher rated position in a bargaining unit that may be represented by a union other than OCSEA/AFSCME Local 11.

Signed and dated this 8th day of Feb. 1996 at Solon, OH.

Harry Graham

Harry Graham
Arbitrator