

ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1196

OCB GRIEVANT NUMBER: 27-11-960110-0390-06-10

GRIEVANT NAME: John Arvai

UNION: OEA

DEPARTMENT: Rehabilitation and Corrections

ARBITRATOR: James Mancini

MANAGEMENT ADVOCATE: David Burrus

2ND CHAIR: Brian Walton

UNION ADVOCATE: Henry Stevens

ARBITRATION DATE: January 30, 1997

DECISION DATE: April 8, 1997

DECISION: Denied

**CONTRACT SECTIONS
AND/OR ISSUES:** Article 3, 14, Did management violate the Agreement?

HOLDING: Arbitrator Mancini stated that management clearly has the right to make basic security decisions at the prison and as a result, it must be held that the new entrance procedure which was designed to enhance security was properly promulgated. The question as to whether the Employer is violating the Fair Labor Standards Act by not compensating employees for waiting time falls outside the scope of this arbitrators jurisdiction. Arbitrator Mancini determined that management has not violated the Agreement and denied the grievance.

ARB COST: \$ 1,337.30

IN THE MATTER OF ARBITRATION
BETWEEN

STATE OF OHIO)	
)	CASE NO. 27-11 (1-10-96) 390-06-10
)	
AND)	<u>OPINION AND AWARD</u>
)	
)	
STATE COUNCIL OF PROFESSIONAL)	JOHN ARVAI, et al., GRIEVANT
EDUCATORS, OEA/NEA)	

JAMES M. MANCINI, ARBITRATOR

APPEARANCES:

FOR THE STATE

David Burrus
Brian Walton

FOR THE ASSOCIATION

Henry L. Stevens
John Arvai

SUBMISSION

This matter concerns a class action grievance filed on January 9, 1996 by the State Council of Professional Educators, OEA/NEA (hereinafter referred to as the Association). The grievance alleged that the terms and conditions of employment have been improperly altered in violation of the Collective Bargaining Agreement between the Association and the State of Ohio (hereinafter referred to as the Employer). An arbitration hearing was held on January 30, 1997 with the parties subsequently submitting post-hearing briefs.

BACKGROUND

The bargaining unit employees involved in this dispute are all employed at the Lebanon Correctional Institution. The bargaining unit consists of teachers, librarians, guidance counselors, educational specialists, and job coordinators. There are approximately fifteen employees in the bargaining unit. The Lebanon Correctional Institution is a close security facility that houses approximately two thousand inmates and employs over five hundred staff members.

On December 20, 1995 through a memo issued by Major Stephen Bowman, all employees were notified that they would be required to clear the metal detector in the front

lobby before clocking-in or entering the secure area of the facility. The new entry procedures were to be effective on January 7, 1996. Prior to the December 20, 1995 letter, bargaining unit employees were allowed to enter the facility through another door which provided access to the time clocks where they could clock-in without going through the metal detector. With the change in procedure which became effective January 7, 1996, this second door is now locked and all employees including bargaining unit members involved herein must now clear the metal detector prior to punching-in on the time clock.

The evidence shows that in October, 1991, an Entrance Security Policy was issued by the Director of the Department of Rehabilitation and Correction. The policy basically provided that all employees entering an institution would be required to clear a metal detector. The purpose of the policy was to prevent the introduction of contraband from entering the prisons. The former Warden at the Lebanon Correctional Institution, William Dahlman, chose not to require employees to clear the metal detector prior to entering the institution. Employees were allowed simply to clock-in and then go to work. According to one bargaining unit member, Ben Zella, teachers had been allowed over the past twenty-four years to proceed directly to the time clock and clock-in without going through the metal detector.

During 1994, Harry Russell was appointed Warden at the Lebanon Correctional Institution. Warden Russell testified that he decided that his facility was going to strictly follow the department's entrance policy. He stated that when he first arrived at Lebanon, he asked for a security audit. As a result of that security audit conducted in September,

1994, a recommendation was made that all employees be searched each time they entered the secure area of the prison. Warden Russell stated that as a result of the recommendations made by the consultant as well as his own experience at other correctional facilities, he decided to implement the department's Entrance Security Policy. Mr. Russell displayed several contraband knives which were discovered in the prison since he was appointed Warden. He stated that these weapons were introduced into the facility by either employees or inmate visitors prior to the implementation of the metal detector policy. He also described one incident where an employee had smuggled in bullets for an inmate and an officer was held hostage by the inmate who used the bullets. In order to prevent further introduction of contraband into the facility, Warden Russell stated that he decided to implement procedures which required all employees to clear the metal detector prior to being allowed to enter the facility.

Several Union witnesses testified that there were many difficulties which occurred when the new Entrance Security Policy was implemented on January 7, 1996. Because Bargaining Unit 10 employees were required to stand in line with other employees in order to pass through the metal detector, they were forced to wait for long periods of time. Mr. Zella indicated that there have been occasions when he has been forced to wait for approximately twenty minutes out in the cold prior to going through the metal detector. Mr. John Arvai, Job Placement Specialist, stated that on January 7th he actually fell down the steps going to clock-in after waiting in a long security line which had formed. He

stated that twenty employees were attempting to clear security at the same time on the morning of January 7th. Mr. Arvai stated that he now shows up twenty to thirty minutes early so that he can clear security and punch-in on time. According to Mr. Arvai, there are some seventy employees who must pass through the metal detector daily before the 7:00 a.m. clock-in time. As a result, Bargaining Unit 10 employees are required to stand in long waiting lines which causes them to be late for work.

Mr. Ron Hart, Labor Relations Officer, acknowledged that there were difficulties at first in the operation of the new security procedure. On the very first day that the SCOPE employees had to comply with the new procedure, there was an extremely heavy snowfall which resulted in a long line of employees who were waiting to clear the metal detector. As a result, some employees were late punching-in and had to utilize their leave to cover the time. Mr. Hart stated that no employees were disciplined for being late. Warden Russell issued a memo to all employees on January 18, 1996 which indicated that due to severe weather coupled with a new metal detector process, the department would not take any disciplinary action for those employees who were tardy during the days of January 7 through January 12, 1996. There was also an indication that any such employee could use personal leave, compensatory time, or vacation leave to makeup their time lost.

Correction Officer Paul Czaiks stated that he has worked at the metal detector post since January, 1996. He stated that first shift employees report for duty at 6:00 a.m. The teachers in the bargaining unit here must punch-in at 7:00 a.m. According to Mr. Czaiks, it normally takes thirty-five to forty seconds for an employee to clear the metal

detector. He also indicated that the length of the lines for employees depended upon what activities were taking place at the facility on a particular day. He stated that usually there is not much occurring at around 7:00 a.m. There are times when the teachers come through the line and there is no one waiting. In the worse case scenario, teachers could wait from eight to ten minutes in order to clear the metal detector.

Mr. Hart further testified that he conducted a study to determine the amount of time it took for bargaining unit members to process through the metal detector. He observed SCOPE members reporting to work on the mornings of January 23 and 24, 1997. According to this survey, SCOPE members took from five seconds to one minute and 15 seconds to process through the detector. Mr. Hart also indicated that the most time it took a bargaining unit member to actually clock-in following their arrival at the facility was five minutes.

The Union witnesses stated that some maintenance employees are allowed to report and clock-in at the Powerhouse, which is another building on the premises. Mr. Hart acknowledged that certain maintenance employees are allowed to punch-in at the Powerhouse because this is where their work assignment occurs. Unlike SCOPE employees, not all of these particular employees must enter the main facility in order to perform their duties. Warden Russell indicated that it would not of course be possible to allow SCOPE to clock-in at the Powerhouse. He also stated that it was not feasible to move the time clock upstairs because the lobby area was not large enough to accommodate all of the staff members who need to clock-in and out. He stated that during the last year,

there were some 29,000 inmate visits in which the visitors had to be processed through the lobby area.

Mr. David Burrus, Labor Relations Officer, stated that from firsthand knowledge, he is aware of at least nine other correctional institutions which require employees to clear a metal detector prior to clocking-in. He stated that he did a survey of twenty-nine correctional facilities and discovered that two-thirds require employees to pass through a metal detector prior to clocking-in. Mr. Burrus also indicated that in his opinion, the time clock could not be located in the lobby because it has to be in an area where it can be connected to the computer. Mr. Burrus acknowledged that this was the first incident where a change had occurred requiring employees to first be cleared by the metal detector prior to punching-in.

Ms. Tammy Shelton, a teacher at the Institution, testified that she has had problems in going through the metal detector. She stated that on January 30, 1996, she was detained at the metal detector for forty-five minutes because the hairpins in her hair kept setting off the metal detector. As a result, Ms. Shelton was late clocking-in and was subsequently docked \$1.70 for being late. According to Mr. Hart, Ms. Shelton did not submit a request for leave to cover her late clock-in and therefore personnel had to dock her the pay. He stated that Ms. Shelton was not disciplined.

Both parties presented evidence pertaining to the Association's claim that the Employer is violating the Fair Labor Standards Act (FLSA) by not compensating employees for time spent waiting in line to clear the metal detector. Mr. Robert Sauter,

Attorney at Law, testified on behalf of the Union that in his view waiting time to pass through metal detectors appears to be an integral part of SCOPE employees' principal work activity and thus constitutes "hours worked" under FLSA. Mr. Sauter stated that it appeared that the Employer was in violation of FLSA Section 785.14 for not compensating SCOPE employees for waiting time that should properly be deemed "hours worked." Mr. Brian Eastman, Chief Legal Counsel for the Office of Collective Bargaining, testified that the time which SCOPE employees spent waiting in line to clock-in is not compensable under FLSA guidelines. Mr. Eastman stated that such time could not be considered to be an integral part of the principal duty of teaching. Moreover, Mr. Eastman stated that spending less than ten minutes to go through the metal detector would be considered de minimis under FLSA and therefore not compensable.

POSITIONS OF THE PARTIES

POSITION OF THE ASSOCIATION

The Association contends that the Employer improperly changed a term and condition of employment in violation of the parties' bargaining agreement. The policy implemented on January 7, 1996 which required all Unit 10 employees to pass through the metal detector prior to clocking-in constituted a change in the conditions of their employment. The evidence clearly showed that there had been a twenty year past practice of allowing SCOPE 10 employees to proceed directly to the time clock in order to punch-in prior to going through the metal detector. This constituted an economic benefit which was to remain in effect without alteration during the term of the agreement.

Moreover, the Employer was required to bargain over any change in the terms and conditions of employment with the Association prior to implementing any new procedure. The evidence shows that the Employer made no attempt to bargain with the Association over the new procedure which requires bargaining unit employees to pass through the metal detector prior to clocking-in. The Employer also violated Article 14, Work Rules, which states the Association is to be furnished with a copy of the work rules a minimum of fifteen working days in advance of the effective date. The Association received no notice of the December 20, 1995 letter pertaining to the new procedure until well after it was placed into effect.

The Association further maintains that the new procedure works an undue hardship on Bargaining Unit 10 employees who are required to stand in line for long periods of time in order to clear the metal detector. Due to the long waiting time involved, it is difficult for Bargaining Unit 10 employees to predict their arrival or starting time. At least one bargaining unit member has been disciplined or docked pay because of the new arbitrary procedure. Moreover, the evidence shows that other employees are allowed to clock-in without first going through the metal detector. The new procedure has been unfairly applied to bargaining unit members in this case.

The Union also claims that the Employer is violating the Fair Labor Standards Act by not compensating SCOPE employees for the time spent waiting in line to clear the metal detector. As attested to by Mr. Sauter, waiting time to pass through the metal detector appears to be an integral part of SCOPE employees' principal work activity and thus constitutes "hours worked" within the meaning of FLSA. The Union cites court decisions as well as the Department of Labor regulations in support of its positions that the Employer is in violation of FLSA for not compensating SCOPE employees for waiting time that should properly be considered "hours worked."

As a remedy, the Association asks that all Bargaining Unit 10 employees be allowed to return to the practice of clocking-in prior to going through the metal detector. If the Employer wishes to change that procedure, it should be directed to negotiate with the Union over the matter. The Association further states that it will seek the assistance of the

United States Department of Labor, Wage and Hour Division, to determine the exact monetary amount for each employee for the Employer's violation of the Fair Labor Standards Act.

POSITION OF THE EMPLOYER

The Employer contends that it did not alter a term and condition of employment or violate the FLSA by requiring employees to process through a metal detector prior to clocking-in for duty. Management had the right under the contract to implement the new metal detector process for Unit 10 employees. The new procedure did not represent a change in the terms and conditions of employment for SCOPE employees and therefore it was not necessary to bargain with the Union over the issue. The Employer claimed that the new procedure requiring the employees to clear the metal detector represents a condition of necessity similar to wearing appropriate attire to work which of course is not bargained over with the Association.

The Employer disputes the Union's claim that the new procedure works an undue hardship on SCOPE employees. The evidence clearly shows that processing through the metal detector is usually a relatively simple procedure. Management's survey clearly demonstrated that the longest period of time between an employee entering the lobby, going through the detector, and proceeding downstairs to clock-in took no more than five minutes. Contrary to the Union's contention, there are no long lines of people

reporting for duty at the same time. Only on rare occasions does it take employees any extended period of time to process through the detector.

Moreover, the new procedure was established by Management for a legitimate reason which was to enhance the safety and security of all employees who work at the prison. Management has the right to determine the exact location of the time clock for unit employees. It was shown that it was not feasible to place the time clock in the lobby area. Certain maintenance employees are allowed to clock-in at the Powerhouse because this is where their work assignments occur. There was no showing that Unit 10 employees have been subjected to unequal treatment because they are now required to process through the metal detector prior to clocking-in.

The Employer submits that if the Union believed that Management had improperly changed a term or condition of employment, the proper forum for such a claim would be the State Employment Relations Board. Likewise, any contention that the Employer has violated the Fair Labor Standards Act should have also been brought before the Wage and Hour Division of the Department of Labor. This arbitration proceeding is not a proper forum for the resolution of either of the issues raised by the Union. This arbitrator would be exceeding his authority under the contract if he ordered that the employees be compensated under FLSA for time spent waiting in line to be processed through the metal detector. The Union here has failed to advance its claims in the proper forums and as a result the grievance presented should be denied.

OPINION

The basic issue presented is whether the Employer violated the parties bargaining agreement by implementing a new procedure which required employees to clear the metal detector prior to being able to clock-in. The association contends that the implementation of the new procedure violated various sections of the agreement and represented an improper alteration of the terms and conditions of employment for SCOPE employees. The Employer counters by arguing that management had the right under the agreement to implement the new entrance procedure for Unit 10 employees. Thus the question becomes one of determining if the Employer had the managerial right in this case to promulgate the new procedure which required employees to pass through the metal detector prior to clocking-in for duty.

After carefully reviewing the record presented, this arbitrator has determined that the Employer did not act improperly in issuing the new entrance procedure for Unit 10 employees on January 7, 1996. Management clearly has the right to make basic security decisions at the prison and as a result, it must be held that the new entrance procedure which was designed to enhance security was properly promulgated. Moreover, the evidence did not support the Association's contention that management relinquished its right to establish a new entrance procedure by allowing employees in the past to simply clock-in without going through the metal detector. There was no binding past practice which by implication restricted management's right to unilaterally implement a new

entry policy for employees. The new entry policy has been fairly applied to Unit 10 employees and there was no showing made that it has worked an undue hardship on them. The Employer's action in this case did not violate any term of the parties' agreement.

It is clear in this case that management has the right to make basic security decisions at the prison. The management rights clause specifically provides in relevant part that management can "determine matters of inherent managerial policy" and "manage its facilities, equipment, operations, programs and services..." Considering that the Lebanon Correctional Institution is a prison which houses approximately 2,000 inmates and employs over 500 staff members, it is apparent that security plays a predominate role in the management of the prison. As such, it must be held that the Employer's contractual right to manage the facility provided it with the authority to issue security procedures for employees entering the prison. Thus the Employer had the managerial right to implement the entry policy which was intended to enhance security at the prison.

Moreover, it cannot be implied here that the Employer waived its managerial right to promulgate a new entry policy because it had in the past permitted employees to merely clock-in without passing through the metal detector. It is apparent in this case that the past privilege of being able to simply clock-in was not a binding past practice which grew into a condition of employment. A past practice must be based on mutual agreement and in this case there was no showing made that there was ever a joint understanding reached between the parties regarding the continuation of the practice. Rather, the practice followed by the previous Warden which permitted Unit 10 employees to clock-in and then

proceed directly to work merely represented a present manner of doing things and did not constitute a binding past practice which ripened into a condition of employment. There simply is no indication in this case that management ever intended to relinquish its right to issue a change in the entry procedure for employees. There was no binding past practice which by implication restricted management's right to unilaterally implement a new entry policy for employees. As a result, it must be held that management did not improperly alter a condition of employment and was under no contractual obligation to bargain with the Association over the implementation of the new entry procedure for Unit 10 employees.

This arbitrator does not find that the entry policy implemented by management constituted a new work rule under Article 14 of the agreement. That provision provides in part that work rules are directives which "regulate conduct of employees in the performance of the Employer's services and programs..." The Employer here has such work rules which are commonly referred to as the Standards of Employee Conduct. It is evident that the new entry policy established for Unit 10 employees did not in any way change those standards of employee conduct. In that the new procedure did not constitute a work rule under Article 14, there was no need for the Employer to furnish the Association with a copy of the policy prior to its effective date. It should be noted however that all employees were provided with fair and ample notice of the entry procedure prior to its implementation.

This arbitrator further finds that the new entry procedure was reasonably related to the security issue presented at the Lebanon Correctional Institution. As attested to by Warden Russell, the new entry procedure was implemented in order to improve security at the facility. When Warden Russell took over control at the prison, he discovered that the Entrance Security Policy developed by the Department of Rehabilitation and Correction had not been implemented at the facility. That policy provided that all employees should be processed through the metal detector in order to prevent the introduction of drugs or weapons from entering the institution. Warden Russell displayed several contraband knives which had been discovered in the facility that apparently had been introduced by either employees or inmate visitors. A security audit also concluded at the time that all staff needed to be searched prior to entering the facility. Thus it is evident that the new entry procedure which required employees to first clear the metal detector was a reasonable means to accomplish a legitimate management objective which was to enhance security at the prison.

It is important to also point out that the evidence shows that the new entry procedure has not worked an undue hardship on Bargaining Unit 10 employees. The Association argued that the procedure was unreasonable because it worked an undue hardship on bargaining unit employees by requiring them to stand in long lines in order to clear the metal detector. However, the evidence presented clearly indicates that Unit 10 employees typically spend very little time in being processed through the metal detector. Correction Officer Cziaks testified that it normally takes thirty-five to forty seconds for an

employee to clear the metal detector. He also indicated that when teachers arrived at 7:00 a.m., there usually are few others who must also be processed through the metal detector. Moreover, a recent survey indicated that SCOPE employees took from five seconds to one minute and fifteen seconds to clear the detector. Typically, it took no more than five minutes for bargaining unit members to actually clock-in following their arrival at the facility. During the first few days of the new procedure, there were problems due to inclement weather as well as the new metal detector process itself. However as attested to by Mr. Hart, these early problems were quickly resolved and no employee was disciplined for being late during the initial days under the new procedure.

Certainly, there are exceptions where employees do have difficulties depending upon their circumstances in processing through the metal detector. There was the case of Ms. Shelton who on one occasion was late in reporting to work because she was delayed in attempting to go through the metal detector. However even in this case, Ms. Shelton was only docked \$1.70 and was not disciplined in any other way. It is apparent that Ms. Shelton's one time incident represents the exception rather than the rule when it comes to Unit 10 employees being processed through the metal detector. Significantly, there was no evidence presented which showed that any bargaining unit member has been disciplined for being late to work as a result of delays in clearing the metal detector. Thus considering Unit 10 employees typically take only a minimum amount of time in clearing the metal detector, it must be held that the new procedure has not worked an undue hardship on them.

This arbitrator further finds no merit to the Association's contention that Unit 10 employees are being treated unfairly because other employees are able to clock-in at other locations on the premises prior to clearing the detector. The evidence shows that with the exception of a few maintenance employees, all employees employed at the Lebanon Correctional Institution must clear the metal detector prior to clocking-in and entering the secured area of the institution. Some maintenance employees are allowed to punch-in at the Powerhouse because this is where their work assignment occurs. Of course, it would not be possible to allow SCOPE employees to clock-in at the Powerhouse. It was also shown here that it would not be feasible to move the time clock upstairs to the entrance lobby area so that employees could punch-in prior to being processed through the metal detector. The lobby area is simply not large enough to accommodate all of the daily visitors as well as the staff members who need to clock-in and out each day.

It should also be pointed out that Unit 10 employees employed at the Lebanon Correctional Institution are being treated the same as SCOPE employees at most of the other correctional institutions in the state. A survey indicated that of the twenty-nine correctional facilities, approximately two-thirds require employees to pass through a metal detector prior to clocking-in. Both Warden Russell as well as Mr. Burrus stated that they had firsthand knowledge that there were many other correctional institutions that require employees to clear a metal detector prior to clocking-in. The fact that the Employer has followed the same entry procedure at other correctional institutions once again demonstrates the reasonableness of the policy as it applies to Unit 10 employees here.

This arbitrator finds no merit to the Association's contention that employees should be provided with overtime compensation under Section 23.06 of the agreement for the time spent in waiting in line to clear the metal detector. Section 23.06 provides in part that overtime compensation is to be paid "for any authorized hours in active pay status..." In this arbitrator's view, the waiting time spent by employees in passing through the metal detector cannot be considered to be time spent "in active pay status." Moreover as indicated previously, the evidence demonstrates that employees typically take only a few minutes to process through the metal detector and clock-in. Considering the minimal amount of time involved, it must be held that employees are not contractually entitled to overtime compensation under the terms of Section 23.06 of the agreement.

The Association also claimed that the Employer is in violation of the Fair Labor Standards Act in that employees are not being compensated for time spent waiting to pass through the metal detector. The Association is basically asking this arbitrator to interpret the FLSA and find that the Employer violated the Act. However, it is evident that such an issue goes beyond this arbitrator's contractual jurisdiction. It is apparent that FLSA is a complex statute and that any decision concerning the issues raised in this case must be based upon the interpretive rulings issued by the Department of Labor as well as judicial interpretations which provide necessary direction. The expert witnesses presented by each party in this case gave conflicting opinions as to whether or not waiting time to pass through a metal detector constitutes "hours worked" under the Act. This arbitrator would agree with the assessment made by Justice Brennan in a prior Supreme Court ruling

wherein he indicated that FLSA rights are “better protected in a judicial rather than an arbitral forum.” Considering the complexity of the issues raised under the FLSA as well as the conflicting evidence presented herein, it must be concluded that the question raised by the Association regarding compensation for SCOPE employees for their “waiting time” cannot be resolved in this arbitration proceeding.

In conclusion, this arbitrator finds that the Employer had the managerial right to unilaterally promulgate a new entry procedure which required all employees to be processed through the metal detector prior to clocking-in. The previous privilege of clocking-in without proceeding through the metal detector was not a binding past practice that had ripened into a condition of employment which could not be unilaterally changed by management. The Employer did not improperly alter a condition of employment and was not contractually obligated to bargain with the Association over the new entry procedure. The new entry policy was reasonably related to a legitimate management objective which was to enhance the security at the facility. The evidence does not support the Association’s claim that Unit 10 employees are contractually entitled to overtime compensation for time spent waiting to pass through the metal detector. The question as to whether the Employer is violating the Fair Labor Standards Act by not compensating employees for waiting time falls outside the scope of this arbitrator’s jurisdiction. Therefore, this arbitrator has determined that there has been no violation of the parties’ bargaining agreement in this case and as a result, the grievance presented must be denied.

AWARD

The grievance is denied.

April 1, 1997


JAMES M. MANCINI, ARBITRATOR