#1091

IN THE MATTER OF ARBITRATION

BETWEEN

SCOPE/OHIO EDUCATION ASSOCIATION/NEA

AND

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

Before: Robert G. Stein, Arbitrator

Grievant(s): Paul Bogatko
Case # 27-19-32-2003-0923-0550-01-10
Recruitment and Retention Pay

Advocate(s) for the UNION:

Vickie A. Miller, Labor Relations Consultant
OHIO EDUCATION ASSOCIATION/SCOPE
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Advocate for the EMPLOYER:

David Burrus, DRC Labor Rel.
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS
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INTRODUCTION

This matter came on for a hearing before the arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between the State of Ohio/Department of Rehabilitation and Corrections (herein "Employer") and the State Council of Professional Educators (hereinafter "Association", "Scope" or "Union"). The 1997 through 2000 and 2000-2003 Collective Bargaining Agreement and a 2001 Memorandum of Understanding include the conduct that is the subject of this grievance.

A hearing on the above referenced matter was held August 17, 2004 in Columbus, Ohio. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted post-hearing closing statements in lieu of making closing arguments. The statements were received and the hearing was closed on September 17, 2004. A decision in this matter is due within forty-five (45) days following the day the hearing is closed.

Both parties agreed to the arbitration of this matter pursuant to Article 6.

ISSUE

The parties agreed to the following definition of the issue:

Has the Grievant complied with the provisions of the Memorandum of Understanding/Agreement in order to receive or continue to receive a compensation supplement? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference see Agreement for language)

BACKGROUND

The Grievant in this matter is Paul Bogatko (herein "Bogatko" or "Grievant"), an Education Specialist-3 at Noble Correctional Institution ("NCI"). The central focus of this grievance is whether Bogatko met the conditions of a 2001 Memorandum of Understanding between the parties to continue to receive a Retention and Recruitment Supplement. The Supplement was first based upon a new contract provision, Article 21.06, of 1997-2000 collective bargaining agreement. Subsequently, the Retention and Recruitment was placed in a Memorandum of Understanding agreed upon by the parties that was designed to avoid a reduction in force (Joint Ex. 5). On July 19, 2002 the Employer stopped paying the supplement, after the Grievant had received it for approximately five (5) years. The Employer claims it erroneously started to

pay the Grievant a 10% supplement, but has a right to correct an error regardless of when it was discovered. The Grievant rejected the Employer's contention and filed a grievance.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that the Grievant mistakenly received a Retention and Recruitment Supplement as a result of a clerical error by DAS. The Employer having discovered the error attempted to assist the Grievant in securing the necessary educational certificate in order to continue to receive the supplement. When this course of action was unsuccessful the Employer argues it corrected its mistake and did not attempt to recoup the approximate $30,000 in supplemental pay the Grievant had mistakenly been paid for several years.

The specific arguments of the Employer are stated in its written closing statement as follows:

> The union's argument regarding management's inability to take away a supplement once it is awarded presupposes the critical assumption that it was designated properly in the first place. In this instance it was not. The collective bargaining agreement is clear and unambiguous in two pertinent points. The first is that according to Section 21.06, Retention and Recruitment Supplement, #5, effective with 7/1/97, the Department of Rehabilitation and Correction will apply a 10% supplement to, Guidance Counselors, Special Education Teachers, and Literacy Pod Teachers. The grievant's classification of Educations Specialist is specifically excluded from this provision. Such exclusion was not accidental and is significant as detailed in How Arbitration Works (6th Ed., pp 467-468) with respect to the concept of *expressio unius est exclusio alterius ('the expression of one thing is the exclusion of another').*
>
> The second point is #5 of the same section in that it is the **agency (emphasis added) that** shall have the sole authority to designate any positions to which a supplement will apply. The record has established that the agency in this case is the Ohio Department of Rehabilitation and Correction, not the Department of Administrative Services, and that any such designations are processed through the area of Labor Relations where Mr. Burrus works. The fact is that while a few people may have known the grievant was receiving a supplement those with the authority to designate it did not. The un-rebutted testimony of Mr. Burrus remains in the record that prior to the 2001 MOU the Agency made no designation to apply a Retention and Recruitment Supplement to the grievant's rate of pay and that the future designation of the supplement was

dependent upon the Agency being able to secure a temporary certificate for the grievant in the area of Guidance and Counseling.

From a reasonable person approach it must be pointed out that if the Agency already knew that the grievant was receiving a supplement then why was he included in the September 2001 MOU in the manner in which he was. The tone and intent of the document clearly demonstrates that the Agency was not aware that the grievant was already receiving a supplement and in fact placed the condition of the Agency being able to secure a temporary certificate for him as a qualifier for it being initiated. The record establishes that he failed to do what he needed to do therefore the certificate could not be obtained, thus he was ineligible to receive the supplement. In fact, it was the grievant's own testimony that he had no idea he was going to receive the supplement when he did and he considered it "a gift from heaven" when it showed up on his paycheck.

It is management's position that the 2001 MOU modifies the specific provisions of Section 21.06 numbers 3 and 4 in that it places specific requirements upon the grievant to do something in order for the Agency to process the paperwork for him to receive a temporary certificate and that it does not apply the supplement to all employees holding the same classification. Mr. Arbitrator, the language of Section 21.06, Retention and Recruitment Supplement, is clear and unambiguous as it relates to who has the authority to designate the positions to which a supplement will apply and specifically who was to receive it effective 7/1/97. The record of this arbitration further emphasizes the significance of this language in that any extensions of the supplement to positions other than those specifically included in #5 has been done by written agreement or MOU. Since the Agency did not designate or grant the grievant a supplement it would be a violation of Section 6.05, Arbitrator Limitations for the supplement to be initiated as a result of this proceeding.

Mr. Arbitrator, the essence of this case is quite simple. A Retention and Recruitment Supplement was mistakenly applied to the grievant's rate of pay by an entity (DAS) that is responsible for the clerical implementation of such changes **but** is without the contractual authority to designate and grant it to anyone. A mistake was made and in the spirit of Section 1.01 of the contract management worked with the grievant in an attempt to help him secure the certificate required by the MOU in order to continue receiving it. When it became apparent that the grievant would not be able meet the requirements for the certificate to be issued the Agency had an obligation to correct the mistake it had not made, and in further recognition of Section 1.01 made no attempts to recoup the grievant's $30,000.00 windfall.

On the basis of the evidence and testimony management respectfully requests that you deny the grievance in its entirety.

SUMMARY OF UNION'S POSITION

The Union argues that "...the only error the Employer made in this matter was to remove the Grievant's supplements because they want to change the rules after the fact." The Union's arguments are contained in its written closing statement as follows:

> Grievant received his Retention and Recruitment Supplement through the process of a signed Personnel Action dated August 12, 1997. Dully noted on the Personnel Action are the remarks, "10% Retention & Recruitment Supplement per Contract." Signed by Thomas B. Haskins (Warden DR&C Noble). Signed Reginald A. Wilkerson (Director of Department of Rehabilitation & Corrections) and Sandra Draluk (Department of Administrative Services). This is the proper procedure for any employee to receive a Recruitment & Retention Supplement.

- The Memorandum of Understanding dated 9-14-01, states at Noble

Correctional, Pam Cass and Paul Bogatko were to receive classification changes. This Memorandum of Understanding does not speak to the Retention and Recruitment Supplement that the Grievant was currently receiving since 8-12-97. This Memorandum of Understanding is 3 years after the fact.

- On July 19, 2002 an attempt was made to attach requirements to the Recruitment and Retention Supplement by Dr. Jerry McGlone. The grievant did not receive his 10% Recruitment & Retention Supplement with stipulations. The grievant received his supplement for performing the required duties of his position. His position being Education Specialist while performing Guidance Counselor responsibilities for the Institution. The grievant was never required to earn his Guidance Counselor Certification. Only after a traveling Counselor with a 20% supplement was hired has an attempt been made to remove the Recruitment & Retention Supplement from the Grievant.

- The Grievant attended College to advance on the pay scale, which he completed on 3-25-2000. This was not a requirement by Management but a desire from the grievant to enhance his skills as a Professional.

- The grievant earned his Recruitment and Retention Supplement for his Professional level of work in the Educational Field. The grievant performed his duties as well as those of a Guidance Counselor. The Noble Correctional Facility never had a Guidance Counselor during the Grievant's term of employment

- The only error in this case is Management's attempt to remove the Grievant supplements, because they want to change rules after the fact.

Based upon the above, the Union urges the Arbitrator to sustain the Grievance.

DISCUSSION

When confronted with plain contract language that conveys a straightforward course of conduct, arbitrators assume that the parties knew what they were doing when they drafted their collective bargaining agreement incorporating the language used. Arbitrators are necessarily constrained to apply separate standards of interpretation in an attempt to give the language employed any meaning beyond the plain language used to express a distinct thought or idea. *Oak Grove School Dist.*, 95 LA

653, 655 (Concepcion, 1985); *Independent School Dist., No. 47*, 86 LA 97, 103 (Gallagher, 1985).

An arbitrator must apply contracts and collective bargaining agreements as they have been written and adopted by the parties' mutual consent. The primary role in interpreting a written instrument is to determine from the instrument, as a whole, the true intent of the parties. *Dayton v. Fraternal Order of Police* (1991), 76 Ohio App. 3d 591, 597, 602 N.E.2d 743. Ohio courts have consistently held that "[t]he overruling concern when construing a contract is to ascertain and effectuate the intention of the parties." *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.* (1989), 40 Ohio. St.3d 51, 544 N.E.2d 244; *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374. The clearest indication of the parties' intent is found in the written language incorporated in their Agreement. *Volvo GM Heavy Duty Truck Operations and UAW, Local 2227*, Summary of Labor Arbitration Awards, 365-3, May, 1989. The parties' intent as to the meaning of disputed language in a collective bargaining agreement must be considered in light of the facts and circumstances present when the agreement was negotiated. *Maple Heights Teachers Ass'n v. Maple Heights Bd. of Educ.* (1983), 6 Ohio St.3d 214, 218, 453 N.E.2d 619.

As indicated in the parties' arguments at hearing and also in their written closing statements, the instant grievance is based on the

interpretation and application of Article 21.06(Joint Ex. 1) and a 2001 Memorandum of Understanding (Joint Ex. 5). As the grieving party, the burden in this matter was on the Association to prove that the Grievant is entitled to a continuation of the Retention and Recruitment Supplement. Based on a thorough review of the evidence and the parties' respective arguments presented during the hearing and in their written closing statements, the arbitrator finds that the Grievant and the Association have failed to meet that burden.

The plain language of former Article 21.06 did not include the Grievant's job title of Education Specialist, yet he was given a pay supplement under this provision. The 2001 Memorandum of Understanding placed the Grievant in a Teacher Classification with a Guidance Counselor subtitle (necessary to ensure eligibility for the Retention and Recruitment Supplement), contingent upon ODRC being able to secure a Temporary Certificate in that area for the Grievant. Unfortunately, the Grievant was unable to qualify for a Temporary Certificate.

Joint Exhibits 7 and 8 demonstrate the Employer made a good faith effort to encourage the Grievant to obtain documentation in order to secure a temporary guidance certificate, which would have continued his Supplement on the basis of the wording of the Memorandum of Understanding. Unfortunately this did not occur. Joint Exhibit 9

demonstrates that the Grievant never held certification as a Guidance Counselor, yet received a 10% Retention and Recruitment Supplement in error that added up to more than $30,000 over a five year period. The weight of the evidence also supports the Employer's position that until 2002 it was unaware it had mistakenly paid the Grievant the Retention and Recruitment Supplement since 1997.

The facts indicate the Grievant did not qualify for the Temporary Certificate. More importantly, he originally received a Retention and Recruitment Supplement, due to a clerical error by another entity, DAS, independent of the provisions of the Agreement (Joint Ex. 13, 14). The Grievant's own testimony supports this finding; he testified he was surprised when the supplement appeared on his paycheck. Errors of this nature are not unusual particularly in large organizations. As a matter of sound management, it is unreasonable to insist that an employer perpetuate an error in wages that is not supported by the Agreement once it is discovered.

An arbitrator cannot ignore clear-cut contractual language or language that is contained in a mutually developed memorandum of understanding. Arbitrators apply the principle that parties to a contract are charged with full knowledge of its provisions and of the language they chose to include. The parties to a collective bargaining agreement are presumed to have understood what was written and adopted, and there

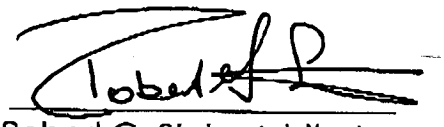
can be no alteration of the Agreement's language merely because one party later claims that it did not realize nor intend the full implications of the Agreement that was ratified and signed. *Schuller Int'l, Inc. and Glass, Molders, Pottery, Plastics, and Allied Workers Union,* 103 L.A. 1127 (Allen, 1995).

When the language on its surface appears to be unambiguous, an arbitrator cannot give one party rights not specified or obtained in the actual negotiations process. *Michigan Dept. of Soc. Servs.*, 82 LA 114, 116 (Feiger, 1983). An arbitrator must apply the Agreement exactly as the parties wrote it. *Lorillard, Inc.*, 87 LA 272, 277 (Chalfie, 1986). Any "equity" arguments advanced by the Grievant and Association cannot be used as a substitute for express contractual language. *Los Angeles School Dist.*, 85 LA 905, 908 (Gentile, 1985). An arbitrator's decision cannot be made on the basis of competing equities or sympathies, but rather on the basis of the contract (or MOU extension thereof) that the parties have written and adopted to govern their relationship. Arbitrators cannot search for inferences or intentions that are not apparent and not supported by words documenting that intent.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 1st day of November, 2004.



Robert G. Stein, Arbitrator