#1948

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTIONS

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Michael Keltner, et al

Case No. 27-02-2006-05-24-2300-01-03

Date of Hearing: July 17, 2007

Place of Hearing: Allen Correctional Institution – Lima, Ohio

APPEARANCES:

For the Union:
Advocate: James Hauenstein, OCSEA Staff Representative
2nd Chair: Paul Trame, Chapter Representative
Witnesses:
Michael Kaskel – President, Union Local
Tammy Martin – Correction Officer
Rosalyn Parker – Correction Officer

For the Employer:
Advocate: Chris Lambert, Labor Relations Officer
2nd Chair: Ray Mussio, Office of Collective Bargaining
Witnesses:
John Moore – Inspector
Mark Bishop – Major
Vince Luchini – Food Service Manager

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: October 4, 2007

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio Department of Rehabilitation & Corrections ("DR&C) and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether DR&C violated the CBA by assigning correction officers duties associated with the feeding of inmates who are based in satellite locations. The grievance cites Articles 2.02 (Agreement Rights), 5 (Management Rights), 13.02 (Work Schedules), 13.07 (Overtime), 24.01 (Discipline - Standard), 24.03 (Supervisory Intimidation), 44.01 (Agreement) and 44.03 (Total Agreement).

This matter was heard on July 17, 2007 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were agreed to be submitted by both parties on or about August 24, 2007. The matter is before the Arbitrator for resolution.

BACKGROUND

This matter involves whether Correction Officers ("COs") who are assigned to high-security areas at Allen Correctional Institution ("ACI") are performing duties outside of their job classification.

The facts indicate that three (3) satellite food serving operations exist at ACI, in the Segregation Unit ("Seg"); the Mental Health Residential Unit ("H1A"); and Health Services Unit ("IHS"). The meals in Seg are prepared from a steam table, and delivered to the inmates by a CO. The inmates in H1A are allowed to obtain their food from the steam table cafeteria style, unless confined to a cell wherein a CO would deliver the tray to the inmate. The meals in IHS are prepared in the central kitchen on trays and given to the inmates by the COs.

In Seg and H1A, COs are required to monitor the temperature of the food, ensure serving portions are adequate and perform utensils inventories on a daily basis. The dispute centers upon the meal duties performed by COs in Seg and H1A.

Inmates housed in the Seg and the H1A units do not eat with the other inmates in the commissary, but are fed their meals in the cellblock. COs perform the functions cited above, to which the Union objects.

The Union contends that duties associated with inmate feeding at these satellite locations are the responsibility of the Food Service Coordinator, not the COs. The Union contends that the Department of Administrative Services ("DAS") developed specific job classifications for institutional services. Each classification contains a concept, job duties and major work characteristics ranging from general to very detailed and requiring knowledge, skills and abilities.

The duties of a Food Service Coordinator include ". . . food preparation and serving, cleaning and storing . . . " (Joint Exhibit (JX) E) whereas no such duties are included in the COs' classification series. Furthermore, little training is given to the COs which is required to ensure proper procedures occur in the serving and feeding of the inmates.

The Union further contends that if and when adjustments are needed, several methods exist. The position description could be modified and/or a job audit could occur to reflect changes.

Contrary to the Union, DR&C contends the following:

1. The duties have been performed by COs for over twenty years in the segregation unit, and nine years in the mental health unit;

2. Article 19, Working Out Of Class, is the appropriate forum for resolution of this matter since the parties negotiated a specialized process for this precise issue; and

3. Management rights govern the staffing levels within each classification and cannot be altered by the back door strategy pursued herein.

DR&C points out that no specialized training, knowledge or skills are required of the COs who feed the inmates. COs take and log the temperature of the food, supervise inmates who assist in serving the food, and deliver the trays to the inmate cells. If any problems with the food occur, the COs are required to contact a Food Service Coordinator and not make any independent judgment on the appropriateness of serving the food or not.

DR&C and the Union agree that the above duties are performed three times a day and take about forty-five minutes to one hour for all meals to be served.

The Union alleged a violation of multiple articles and seeks a cease and desist of future use of COs to perform the feeding functions at ACI. The Employer opines that the Union seeks the hiring of additional staff for duties properly performed by COs and this grievance should be denied.

ISSUE

Has the Employer violated the CBA by assigning feeding duties to Correction Officers who work in satellite locations at Allen Correctional Institution? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA

ARTICLE 2 – NON-DISCRIMINATION

2.02 – Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees; 2) determine the number of persons required to be employed or laid off; 3) determine the qualifications of employees covered by this Agreement; 4) determine the starting and quitting time and the number of hours to be worked by its employees; 5) make any and all rules and regulations; 6) determine the work assignments of its employees; 7) determine the basis for selection, retention and promotion of employees to or for positions not within the bargaining unit established by this Agreement; 8) determine the type of equipment used and the sequences of work processes; 9) determine the making of technological alterations by revising the process or equipment, or both; 10) determine work standards and quality and quantity of work to be produced; 11) select and locate buildings and other facilities; 12) transfer or sub-contract work; 13) establish, expand, transfer and/or consolidate, work processes and facilities; 14) consolidate, merge, or otherwise transfer any or all of its facilities, property, processes or work with or to any other municipality or entity or effect or change in any respect the legal status, management or responsibility of such property, facilities, processes or work; 15) terminate or eliminate all or any part of its work or facilities.

ARTICLE 13 – WORK WEEK, SCHEDULES AND OVERTIME

13.02 – Work Schedules

It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time, including persons on leave (excluding disability leave).

For purposes of this Agreement, 'work schedules' are defined as an employee's assigned work shift (i.e., hours of the day) and days of the week and work area. Work areas, for the Departments of Mental Health, Mental Retardation, Youth Services and the Ohio Veterans Home are governed by the August 31, 1987 Memorandum of Understanding between the Employer and the Union as set forth in Appendix N. Pick-A-Post Agreements shall remain in effect for the duration of this Agreement, unless otherwise mutually agreed and/or as modified in the agency specific agreements. It is agreed that work area schedules established under Pick-A-Post Agreements do not preclude the incidental, short-term assignment of an employee out of the work area to meet unforeseen circumstances, provided such assignments are not inconsistent with the provisions of Section 13.05.

Work schedules for employees who work in five (5) day operations need not be posted. However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such.

13.07 – Overtime

The Employer has the right to determine overtime opportunities as needed. Employees shall be canvassed according to agency policy. If no policy exists then, employees shall be canvassed quarterly as to whether they would like to be offered overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor . . . .

ARTICLE 19 – WORKING OUT OF CLASS

19.01 – Position Descriptions

New employees shall be provided a copy of their position description. When position descriptions are changed, employees shall be furnished a copy. Any employee may request a copy of his/her current position description and classification specification.

19.02 – Grievance Steps
Step One (1) – Filing the Grievance with the Agency Director or Designee

If an employee or the Union believes that he/she has been assigned duties not within his/her current classification, the employee or the Union may file a grievance with the Agency Director or designee. The Agency Director or designee shall investigate and issue a decision after review and approval by the Office of Collective Bargaining, within thirty-five (35) calendar days. A grievance form shall be provided to the grievant and OCSEA Central Office. If

the parties mutually agree, a meeting to attempt to resolve the grievance may be held at the grievant's work site prior to the issuance of the decision of the Director or designee. A request by the Office of Collective Bargaining to discuss the resolution of the grievance shall not extend the twenty (20) day period within which the Union has a right to appeal the matter to arbitration under Step Two (2). If the Director or designee determines that the employee is performing duties which meet the classification concept and which constitute a substantial portion of the duties (i.e., twenty percent (20%) or more of the employee's time if to a higher classification or eighty percent (80%) of the employee's time if to a lower classification) specified in another classification specification, the Director shall order the immediate discontinuance of the inappropriate duties being performed by the employee, unless the parties agree to the reclassification of the person and position pursuant to the provisions of this Article. If the duties are determined to be those contained in a classification with a lower pay range than the employee's current classification, no monetary award will be issued.

Step Two (2) – Appeal to Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing a written appeal and a legible copy of the Working Out of Class grievance form to the Deputy Director of the Office of Collective Bargaining within twenty (20) days of the Step One (1) answer or the date such answer was due. If the Employer fails to issue the answer and legible copy of the grievance form to the Central Office, the Union may appeal the grievance to arbitration at such time as it discovers such failure to timely answer, but not more than one-hundred twenty (120) days from the original filing of the grievance.

The parties shall schedule an arbitrator to determine if an employee was performing the duties which meet the classification concept and consist of a substantial portion of the duties (i.e., 20% or more of the employee's time if to a high classification or eighty percent (80%) of the employee's time if to a lower classification) as specified in the classification specification other than the one to which the employee is currently assigned and for what period of time.

The determination of a monetary award shall be in accordance with Section 19.02 Step One (1) above. However, if the Union and the Office of Collective Bargaining agree that the higher level duties are of a permanent nature and that the situation is otherwise in compliance with the provisions of this Article, they may mutually agree to reclassify the employee to the higher level classification. Likewise, the parties may mutually agree to reclassify the employee to a lower classification.

The remedy ordered at any step of the grievance procedure, including a monetary award, shall be in accordance with Section 19.02 – Step One (1), above.

The expenses of the arbitrator shall be borne equally by the parties.

ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 377.02(1).

24.03 – Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

ARTICLE 44 – MISCELLANEOUS

44.01 – Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4417, this Agreement shall take precedence and supersede all conflicting State laws.

44.03 – Total Agreement

> This Agreement represents the entire agreement between the Employer and the Union and unless specifically and expressly set forth in the express written provisions of this Agreement, all rules, regulations, practices and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer. This section alone shall not operate to void any existing or future Ohio Revised Code (ORC) statutes or rules of the Ohio Administration Code (OAC) and applicable federal law.

POSITIONS OF THE PARTIES

UNION'S POSITION

The DAS has created separate classifications containing specific job duties that are required to be performed by employees working in that classification. The serving of food functions are exclusively in the Food Service Coordinator classification.

The duties of a Food Service Coordinator require specific skills and cannot be safely performed by others unskilled in food service. At ACI Food Service Coordinators work the first and second shift and sometimes overlap, leaving extra workers to serve meals at the satellite locations. The Employer's contention that additional staff would be employed is false in that sufficient staff could be deployed at the satellite locations without hiring new employees.

Regarding past practice, the Union disputes that the serving of food by COs has been consistent over the years. Since 1987, COs in IHS have always received food from Central Food Service. The Union agrees that in IHS this service is essential to the job and does constitute past practice. Therefore, the dispute involves the Seg and H1A units.

According to the testimony of Mark O. Bishop ("Bishop") and the memorandum he issued February 24, 2006 (JX JK, p. 2), the Employer expanded the past duties of the COs necessitating additional training. COs are now required to serve diet meals immediately and clean the food thermometer with alcohol pads after taking the temperature of each food item.

These changes represent another example of the alleged "past practice" that has changed many times over the years. The Employer's claim of past practice has been inconsistent at best, and not established by the evidence.

The Employer's contention that Article 19, Working Out-Of-Class, applies and is dispositive of this matter is misplaced for several reasons. First, Article 19[1] is intended to apply only to individual employees, not a group. Second, an Article 19 grievance if initiated would result in an uneven remedy since two meals are served on the first shift and only one meal on the second shift. Therefore the 20% standard would be met for some officers and not others.

Finally, the use of COs increases security risks, in that officers are required to divert attention to food service duties as opposed to utilizing their skills on monitoring inmates as their primary task.

EMPLOYER'S POSITION

DR&C urges the Arbitrator to deny the grievance for the following reasons:

1. "The appropriate venue is within prescribed mechanism for Working Out Of Class ("WOC") issues found in Article 19;

2. Duties at issue do not fall outside the scope of the officer classification; and

3. The Union sat on its rights to dispute the duties giving rise to the instant grievance for at least ten years and in doing so gave tacit approval to the Employer to assign these duties to officers." (Post Hearing Statement, p. 1).

Article 19 was intended to address the performance of duties by an employee which properly belong in another job classification. Once an analysis occurs to ascertain the duties and amount of time spent on a daily basis to perform such tasks, a remedy including arbitration is

[1] Article 19.02 provides that if a substantial portion of the duties, i.e., 20% or higher, is not within an employee's classification an immediate discontinuance would be ordered as a remedy.

contained in Article 19. The Union's evidence was devoted to alleged nuances of the Employer's classification system without acknowledging the existence of Article 19.

Article 19 was specifically intended for WOC grievances and no contractual language prohibits each affected employee from filing an Article 19 grievance. The Union seeks to avoid Article 19 and treat this classification dispute as a routine violation of the CBA. Article 19 prescribes a specific process ending in binding arbitration, and the Union seeks to back door the process in this proceeding.

COs' duties include supervision over inmates and inmate work crews. (JX D, p. 3). The food functions in the segregation and mental health units are incidental and would not be considered WOC if analyzed under Article 19. The taking of food temperatures and following serving size guidelines would not be a violation of the contract and merely incidental to COs' work assignment at those sites.

COs Michael Kaskel ("Kaskel") and Rosalyn Parker ("Parker) testified that they are not expected to make an independent judgment on whether the food is appropriate to serve. If any questions regarding food readiness occur, all COs are trained to contact a Food Service Coordinator for resolution. Finally Vince Luchini ("Luchini"), Food Service Manager, testified that a coordinator prepares and supervises preparation of the food. COs do not. Luchini further added that COs in Seg and H1A supervise porter inmates in unpacking the food cart and serving food to other inmates.

From 1981 COs have supervised meal service at ACI in Seg and H1A units, according to John Moore ("Moore"), inspector. The Union allowed this process to exist and cannot terminate this practice. The termination of a practice must be in accord with Article 44.03, at the sole

discretion of DR&C. (JX 1, p. 130). Therefore, this past practice was not ended at the filing of this grievance and the Union's disagreement is insufficient to terminate this practice.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, exhibits and the post hearing statements, the grievance is denied. My reasons are as follows:

The Union's grievance as filed alleges a straightforward violation of the CBA, in that COs are working out of classification by performing duties of another position. The Union believes that the classification series buttressed by the job descriptions provides sufficient proof that the food service coordinators' duties are being performed by COs. Both parties would agree that the food service coordinators classifications are part of a grid that is authorized by the Ohio Revised Code ("ORC") and the Ohio Administrative Code ("OAC"). Therefore, the overall stability of the job classification system must be given deference by this Arbitrator in recognizing the terms and conditions of employment for jobs under its framework.

The bulk if not all of the evidence presented by the Union was in support of the proposition that COs were working out of classification. Testimony through witnesses Kaskel and Parker indicated that Post Orders are not aligned with what occurs; there is a lack of training regarding the food cart; and no one from food service comes to the unit to assist in the "serving" of food to inmates. Additional evidence was proffered demonstrating that the job classifications and position descriptions of COs and Food Service Coordinators are significantly distinct regarding the duty of "serving food." The Union's issue as presented is: Did the Employer violate the CBA by having COs perform duties of another job classification?

If the Union's position is accurate, an analysis is required to assess the actual work performed by COs on the first shift in each unit, as well as the second shift. Recognizing the

grievance alleges a systemic violation to the "class", sufficient evidence is required to establish a harm to all similarly situated COs in Seg and H1A. To find for the Union on this issue only, additional evidence such as: any distinction between first shift and second shift food cart preparation; number of inmate porters used in segregation versus mental health unit; whether portion control contributes to the time it takes to serve the inmates; in addition to preparing food, whether Food Service Coordinators are involved in "security" related activities; any records of the actual time spent by COs in "serving" inmates on either the first or second shift; any examples of COs using independent judgment regarding the feeding of inmates; any examples of COs seeking assistance from the Food Service Department that were not resolved; and some evidence that Food Service Coordinators had, in fact, served inmates in the units. The path is circular and returns to the question of whether or not COs were working out of classification.

There seems to be two different lines of thinking regarding classifications. One states that when the Collective Bargaining Agreement sets forth a comprehensive structure, the terms of the bargained for exchange cannot be unilaterally altered. American Cement Corp., 48 LA 72, 76 (Block, 1967). A second line of thinking, and one that is more consistent with the present weight of authority on this issue, is that the Agreement does not guarantee the classifications will remain unchanged throughout the life of the agreement (economic necessity in a competitive market demands some flexibility). Id. Arbitrators in this line have upheld management's rights to eliminate jobs or classifications and reallocate residual jobs for a number of reasons including changes made in good faith, technological improvements, established past practice, etc. Id. Arbitrators have also upheld combination of jobs or classifications where there is insufficient work in one or both of the jobs/classifications for a normal day's work. Container Corporation of America, 91 LA 329, 331 (Rains, 1988).

Article 19 contains a "specific" dispute resolution for WOC issues. The Union argues that Article 19 is inapplicable since the instant matter is a "class grievance" as opposed to an individual claim. The Employer argues that Article 19 does not limit the number of grievances individual employees or the Union could file if ". . . he/she has been assigned duties not within his/her current classification." (Article 19.02, emphasis added). I concur.

No language in Article 19 limits or restricts individual employees or the Union from filing a plethora of grievances on behalf of COs if WOC is at issue.

Moreover, the conduct of the employee resulted in "substituting one established classification for another classification . . ." is reserved for an Article 19 WOC analysis in my opinion. (Union Opening Statement, p. 1). The Union recognizes that duties may be expanded outside a classification as an employee becomes more experienced or additional duties are added. Under the "position creep" theory, Article 19 is the appropriate remedy according to the Union but on the other hand contends that substitution of job duties by classification is not covered by Article 19. I disagree.

To underscore the intent of the parties regarding WOC grievances, the parties inserted into the CBA a specific resolution mechanism to solve all disputes. Simply, the plain language of Article 19 does not forbid multiple grievances over a similar infraction, but only limits the remedy to individual claims.

As an example, an arbitrator refused to interpret a new provision that prohibited air traffic controllers from being assigned duties not having a reasonable relationship to their primary function in a "restrictive and limited fashion." Federal Aviation Administration, 68 LA 1213, 1216-17 (Yarowsky, 1977). The assignment of the task of changing and filling tapes was upheld because it would be economically wasteful to call a technician to change the tapes when

controllers had previously shared the task and the task was not "far removed from the essential function of traffic controllers." Id.

The Union also contends that expanded duties COs were required to perform after February 24, 2006 required training and skills not associated with the CO classification. The Employer submits that the tasks do NOT require special skills and only minimum training. Arbitrators have a variance of opinions in this area but use several factors as guiding principles: are duties reasonably related to the primary function (Federal Aviation Administration, 68 LA 1213, 1216-1217 (Yarkowsky, 1977)); economically wasteful to assign duty to someone else (Mid-American Energy Co., 108 LA 103 (Jacobowsky, 1997)); and amount of skill required to perform the task (Kimberly-Clark Corp., 54 LA 250 (Larkin, 1970)).

Arbitrators are divided on the issue of assignment of work outside an employee's classification. For example, one decision upheld management's rights to assign an employee small amounts of work outside his classification, finding that work strictly along jurisdictional lines could have a "very crippling" effect on efficiency of operations. Phillips Petroleum Co., 29 LA 226, 228 (Beatty, 1957). However, another decision held that management may not require performance of duties outside classification as a regular or continuing part of their job (but okay for temporary periods). Linde Air Prods. Co., 20 LA 861, 864 (Shister, Green & Boyd, 1953).

The analysis sought to resolve each claim needs to occur in accord with Article 19 to determine the appropriate remedy.

Moreover, the parties intended under appropriate circumstances for monetary compensation to be paid for employees who worked in a higher pay range, and immediately cease the duties if performed in a lower classification. To hold Article 19 inapplicable to the

instant grievance would require this Arbitrator to ignore the parties' CBA and the plain meaning of Article 19. That I cannot do.

Therefore, without addressing the other issues and/or defenses raised by both parties, the proper resolution of this issue lies within the ambit of Article 19, and to that extent the grievance is denied.

Respectfully submitted this 4th day of October, 2007.

Dwight A. Washington, Esq., Arbitrator