OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
OHIO EDUCATION ASSOCIATION (GRETCHEN ZART)
-AND-
OHIO DEPARTMENT OF YOUTH SERVICES

APPEARANCES
For OEA/NEA
Bonnie Joseph, Labor Relations Consultant
Dominic Marsano, SLOPE President
Gretchen A. Zart, Teacher 3 CJCF

For DEPARTMENT OF YOUTH SERVICES
Larry L. Blake, Labor Relations Officer 3
Raymond Blevins, Assistant Principal
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Pat Mogan, Labor Relations Advocate
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Case-Specific Data
Hearing Held
May 29, 2012

Grievance Number
35-18-20110720-0046-06-10

Last Brief Received
July 11, 2012

Case Decided
August 24, 2012

Subject: Propriety of Rejecting Alleged Temporary Teaching Reassignment

Decision
Grievance: **DENIED**

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I. The Facts

A. Introduction

The parties to this contractual dispute are the Ohio Department of Youth Services[1] and the Ohio Education Association,[2] representing Ms. Gretchen Zart ("Grievant"), an English Teacher III with approximately six years and four months of quality service.[3]

DYS comprises four juvenile correctional facilities that house youthful felons, ages 10 through 20, throughout their sentences or until their twenty-first birthday, whichever comes first. Upon entering the facilities, the youths receive mental and physical examinations to assess the proper security level: (1) Minimum security—lowest custody; greatest liberty; (2) Medium security—higher security; less liberty; (3) Close security—highest security; least liberty.

Youths that hold neither a high school diploma nor a General Educational Development Certificate (GED) must attend classes offered by the Buckeye United School District (BUSD), which is fully charted and located in all DYS institutions. The Grievant teaches English at Circleville Juvenile Correctional Facility (CJCF), which has the Ralph C. Starkey High School and which imposes medium or close security.

DYS announced that reductions in funding forced it to discontinue Reading 180 effective June 30, 2011. When the reduction was to begin, the Grievant taught English and Social Studies at CJCF where she was the most qualified English Teacher.

In April 2011, Principal Kirk Cameron asked the Grievant to teach Reading 180 because Ms. Veach was leaving. The Grievant allegedly agreed to teach Reading 180 until June 30, 2011, after which she would resume teaching English and Social Studies. Principal Cameron resigned before June 30, 2011, and DYS decided to retain Reading 180 beyond June 30, 2011. The new Principal and Assistant Principal kept the Grievant in Reading 180 rather than allowing her to resume teaching English and Social Studies.

[1] Hereinafter referenced as "Agency," "DYS," or "Management."
[2] Hereinafter referenced as "Association" or "OEA."
[3] Hereinafter referenced as "The Parties." Union's opening statement.

The Grievant objected to being kept in Reading 180 and unsuccessfully applied for a subsequently posted position teaching English.

On July 19, 2011, the Association filed Grievance No. 35-18-20110720-0046-06-10, claiming the Grievant's retention in Reading 180 violated Article 17, Section 17.06 ("Section 17.06"), and demanding her reassignment to teach English and Social Studies.[4]

DYS denied the Grievance at Step-2[5], and the Association requested arbitration.[6] The Parties presented their cases to the Arbitrator on May 29, 2012 at the Ohio Office of Collective Bargaining in Columbus, Ohio. The hearing commenced at approximately 9:00 A.M., when the Parties stipulated that the instant dispute was properly before the Undersigned.

During the arbitral hearing, the Parties' advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings. At the close of the hearing, the Parties elected to submit written closings, the last of which reached the Undersigned on July 11, 2012, at which time the Arbitrator closed the record.

II. The Issue

Whether DYS violated Article 17, Section 17.06 by not allowing the Grievant to resume teaching English and Social Studies.

III. Relevant Contractual Provisions

Article 3.01 Management Rights

The Association 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.

[4] Joint Exhibit 3A
[5] Joint Exhibit 3B.
[6] *Id.,* at C.

Accordingly, the Employer retains the rights to: . . . 6) determine the work assignments of its employees; . . . 15) terminate or eliminate all or any part of its work or facilities.

Article 17.06 Reassignment

A reassignment is a change of assignment of an employee within the same work facility, which may be temporary or permanent effected upon the Employer's initiative. The Employer will first attempt to effectuate reassignments by seeking volunteers. If the employee's reassignment is temporary, the employee will be allowed to return to his/her prior position at the end of the temporary period.

Article 6.05 Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation ***not specifically required*** by the ***express language*** of this Agreement. Questions of arbitrability shall be determined by the arbitrator.

IV. Summaries the Parties' Arguments

A. Summary of OEA's Arguments

1. Article 17 and Section 17.06 limit the Agency's rights under Article 3 and Section 3.01 of the Management Rights Clause.

2. The Management Rights Clause does not authorize DYS to unilaterally convert the Grievant's temporary assignment into a permanent one.

3. DYS violated Articles 3, 17, and Section 17.06 of the Collective-bargaining Agreement.

4. DYS never impeached the Grievant's direct knowledge of either her agreement with Principal Cameron or her testimony in general.

5. If DYS decided to discontinue Reading 180, it should have invoked Article 18 Section 18.12, which has a two-year recall window for either bargaining-unit members laid off or those holding recall rights. Those rights then would have been extended to June 2013. If a recall list is exhausted, DYS must post openings pursuant to Article 17, Section 17.02.

B. Summary of the Agency's Arguments

1. Funding for Reading 180 ceased on June 30, 2011, but ODYS continued the program.

2. The Grievant's testimony that Principal Cameron promised her return to English and Social Studies after June 30, 2011 is hearsay, and Principal Cameron did not testify at the arbitration hearing. Also, the Association never adduced independent corroborative evidence supporting the Grievant's testimony about Principal Cameron's alleged intent.

3. Assistant Principal Blevins testified that he first heard of Principal Cameron's alleged promise during grievance negotiations in this case. He testified further that since the Grievant never relinquished her position as English Teacher III (PCN 20019319), she could not be "returned" to that position.

4. Assistant Principal Blevins also testified under Section 17.06 Management may unilaterally reassign employees temporarily or permanently within the same work facility. Union witness Marsano essentially corroborated that point.

5. Even if the Grievant was temporarily reassigned, DYS may modify that reassignment, since Management is not contractually prohibited from: (1) interchanging temporary and permanent assignments; and (2) extending temporary assignments. Nor is there a contractual provision that prevents Management from extending temporary assignments

6. The Grievant's applications for posted English teaching vacancies are irrelevant.

7. The mission of educating ODYS youths requires broad discretion in order to optimize educational resources and educational results.

V. Evidentiary Preliminaries

Because this is a contractual dispute, OEA has the burden of proof. More important, OEA has the burden of persuasion and, hence, must establish the alleged contractual violations by preponderant evidence in the arbitral record as a whole, doubts about which will be resolved against OEA. DYS has the burden of persuasion regarding its affirmative defenses, doubts about which will be resolved against DYS.

VI. Analysis and Discussion

A. Impact of Section 3.01

The issue here is to assess the scope of Management's rights under Article 3, Section 3.01 ("Section 3.01") to reassign employees. DYS claims Section 3.01 grants Management plenary discretion to reassign employees. In contrast, the Association claims that Section 3.01 ***limits*** managerial discretion to reassign employees and cites the following language in support of this position:

> "[A]uthority 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. . . . Accordingly, the Employer retains the rights to: . . . 6) ***determine the work assignments*** of its employees. . . .

DYS prevails on this issue. The cited language hardly helps the Association. Instead, it virtually quotes the Reserved Rights Theory of management rights, which is intended to optimize Management's contractual rights. Specifically, Section 3.01 reserves to DYS any authority it has not ***expressly*** and ***specifically*** relinquished elsewhere in the Collective-bargaining Agreement.[7] More important, Part 6 of Section 3.01 explicitly grants the Agency broad discretion to "***determine" the work assignments of its***

[7] Many arbitrators interpret management rights clauses to reserve unto Management those rights neither ***explicitly*** nor ***implicitly*** relinquished in other contractual language.

employees,"[8] Together this language allows Management to retain any authority not explicitly relinquished elsewhere in the Contract and to determine work assignments. In light of this language, the only remaining issue is whether another contractual provision(s) *explicitly* or specifically limits Management's reassignment authority under Section 3.01 and Part 6.

B. Impact of Article 17

In its Post-hearing Brief, the Association cites Article 17 as contractually limiting the Agency's authority either to issue or to modify employee reassignments under the Section 3.01. The Agency disagrees, stressing the foregoing language in Section 3.01.

Nothing in Article 17 (as distinguished from Section 17.06) addresses Management's authority either to issue or to modify employee reassignments. Nor does the Association cite any such language. Consequently, the Arbitrator holds that Article 17 does not limit Management's 3.01 authority regarding employee reassignments.

C. Impact of Section 17.06

The Association's Post-hearing Brief also cites Section 17.06 as a limit on Management's reassignment rights under Section 3.01. Specifically, the Association maintains that Article 17.06 prohibits the Agency from ***unilaterally*** converting the Grievant's temporary reassignment to a permanent one. The Agency insists that nothing in Article 17.06 expressly prohibits it from effecting such conversions.

Article 17.06 states in relevant part: "A reassignment is a change of assignment of an employee within the same work facility, which may be ***temporary or permanent*** effected upon the Employer's ***initiative***. The Employer will first attempt to effectuate reassignments by seeking volunteers. If the

[8] The Parties do not attempt to distinguish between "assign" and reassign. Therefore, the Undersigned ignores any such distinction

employee's reassignment is **temporary**, the employee ***will be allowed*** to return to his/her ***prior position*** at the end of the ***temporary period***.[9]

For the reasons discussed below, the Undersigned holds for the Agency on this issue. First, the Agency correctly points out that no language on the face of Section 17.06 limits Management's Section 3.01 authority to reassign employees. Therefore, absent evidence of a ***contrary intent***, Section 17.06 accords Management very broad, if not complete, authority to reassign employees either temporarily or permanently and to modify those reassignments consistent with the Agency's needs.[10] Second, nothing in the arbitral record establishes that the Parties embraced a ***contrary intent*** with respect to employee reassignments.[11] Third, the Grievant testified that Principal Cameron asked her to consider teaching Reading 180. That testimony establishes that Management observed Section 17.06's procedural precondition, requiring Management to first seek volunteers for reassignments before reassigning employees. In light of the foregoing analysis, the Arbitrator holds that Section 17.06 imposes no limits on Management's reassignment rights.

D. Whether Grievant Was *Temporarily* Reassigned to Reading 180

Here, the issue is whether the Grievant was ***temporarily*** reassigned to teach Reading 180. The Association makes that claim, but Management challenges it as self-serving hearsay.

As discussed below, the Grievant's claim is uncorroborated hearsay, which does not demonstrate that the Grievant's reassignment was temporary. The Arbitrator admits hearsay into the arbitral record for "what it is worth." However, such hearsay carries very little probative value, unless there is independent corroborative evidence in the arbitral record to support it. The Grievant testified that she voluntarily

[9] Joint Exhibit 1, at 69 (emphasis added).
[10] Of course, any exercise of managerial authority must be reasonable, but nothing in the arbitral record suggests that the Agency acted unreasonable when it decided to retain the Grievant in Reading 180.
[11] The Association's Post-hearing Brief cites numerous other contractual provisions but does not argue that any particular provision limits the Agency's authority to reassign employees. Furthermore, after perusing all of those contractual provisions, the Arbitrator finds none that either implicitly or explicitly limits the authority of DYS to reassign employees.

offered to teach Reading 180 after Principal Cameron asked her to consider it and they agreed to a temporary reassignment. Although the Grievant's entire account of her conversation with Principal Cameron is hearsay,[12] the troublesome part is what ***Principal Cameron allegedly said or agreed to.*** Principal Cameron, rather than the Grievant, was authorized to make the reassignment. Therefore, proof of his intent is pivotal to assessing whether the Grievant was temporarily reassigned. The Agency is entitled to cross-examine the Principal about whether he temporarily reassigned the Grievant, and the Principal's absence at the arbitral hearing effectively deprived DYS of this procedural entitlement. Unfortunately, the Grievant's uncorroborated, hearsay testimony cannot establish Principal Cameron's intent about the duration of the Grievant's reassignment.

The Arbitrator finds no independent corroborative evidence of Principal Cameron's agreement or intent to reassign the Grievant temporarily. This is not to say that the Grievant was not, ***in fact***, temporarily reassigned. Instead, preponderant evidence in the arbitral record does not ***demonstrate*** that allegation, thereby leaving the Arbitrator with only the Grievant's uncorroborated hearsay testimony. Moreover, as mentioned above, the Association shoulders the burden of persuading the Undersigned of her temporary reassignment. With only the Grievant's testimony in the arbitral record and with Management stoutly challenging the probative value of that testimony, there is legitimate doubt about the temporary nature of the Grievant's reassignment. Because the Association has the burden of persuasion, such doubts surrounding the Grievant's reassignment are resolved against the Association. Ultimately, then, the Grievant's hearsay testimony about her conversation and alleged agreement with Principal Cameron is ***admissible***, but probatively challenged, absent Principal Cameron's corroborative testimony. The Arbitrator, therefore, holds that preponderant evidence in the arbitral record as a whole does not establish that Principal Cameron intended to temporarily reassign the Grievant to teach Reading 180.

E. Impact of Management's Rights on Duration of Grievant's Reassignment

[12] The entire conversation is hearsay because it occurred ***outside of the arbitral hearing,*** and the Grievant is offering the conversation for the truth of the subject matter therein. Because the Grievant testified at the arbitral hearing, she was available for the Agency's cross-examination, thereby curing the hearsay nature ***of her part*** of the conversation with Principal Cameron.

In addition to challenging whether Principal Cameron temporarily reassigned the Grievant, the Agency argues that, taken together, Section 3.01 of the Management Rights Clause and Section 17.06 authorize DYS to ***modify*** the Grievant's reassignment, ***irrespective*** of whether it was temporary or permanent. The Association disagrees, contending that DYS violated Sections 3.01 and 17.06 by forcing the Grievant to continue teaching Reading 180 after June 30, 2011.

Again, the Agency prevails. Section 17.06 states: "A reassignment . . . ***may be temporary or permanent effected*** upon the Employer's ***initiative.*** . . . If the employee's reassignment is ***temporary***, the employee ***will be*** allowed to ***return*** to his/her **prior** position at the end of the temporary period. The first sentence grants DYS authority to assign (reassign) employees either temporarily or permanently upon its ***initiative***. Without more, that sentence affords DYS wide discretion to initiate either temporary or permanent reassignments.

The second sentence, ("Employee ***will be*** allowed"), however, ***obliges*** DYS to allow temporarily reassigned employees to return to their original positions at the end of their reassignments. Therefore, if the Association would have established that the Grievant's reassignment was temporary, the second sentence in Section 17.06 would require DYS ***to return the Grievant to her prior teaching position*** after June 30, 2011.[13]

But, as pointed out above, preponderant evidence in the arbitral record does not establish the alleged temporary assignment. To establish that her reassignment was, indeed, temporary, the Grievant needs to proffer independent, corroborative evidence (testimonial or documentary) of her claim. Such evidence is not forthcoming.

[13] Even if DYS reassigned the Grievant to teach English and Social Studies, the first sentence in Section 17.06 would allow DYS to reassign the Grievant again to teach Reading 180. Thus, any reassignment of the Grievant from Reading 180 to her prior teaching duties would not prevent DYS, pursuant to its Section 17.06 authority, from subsequently reassigning her to Reading 180.

VI. The Award

For all of the foregoing reasons, the Grievance is hereby **DENIED**.

Robert Brookins

Labor Arbitrator, Mediator, Professor of Law, J.D., Ph.D.