

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO

Arbitration Dates: April 17, 2013

Grievant Jacqueline McClain: # 70-00-20120203-0001-01-14

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Victor Dandridge
Office of Collective Bargaining
Labor Relations Administrator
100 East Broad Street - 14th Floor
Columbus, Ohio 43215-3607

Advocate for the Union:

Dan Ely
Staff Representative - 1st Chair
OCSEA, AFSCME Local 11
390 Worthington Rd., Suite A
Westerville, OH 43082

I. HEARING

The hearing was held at the Corrections Reception Center on April 17, 2013. The hearing commenced at 9:00 A.M. The joint issue before the arbitrator is "Did Management violate Article 11.09 and 36.05 of the Collective Bargaining Agreement by not granting the grievant hazardous/supplement pay, if so, what shall the remedy be?"

Testifying for the Ohio Civil Service Employee's Association, Local 11 AFSCME ("the Union") were Jacqueline McClain, the Grievant, John Morrissey, Corrections Officer "CO", and Sandy Friel, Arbitration and Classification Coordinator for the "Union".

Testifying for The Office of the Ohio Public Defender, ("the Employer") was Theresa Haire, Deputy Director.

II. STATEMENT OF THE CASE

On February 3, 2012 a grievance was filed by Jacqueline McClain asking for a Hazard pay supplement. The grievant seeks the "hazardous duty" supplement as prescribed in OAC 123:1-37-04; retroactive to one year prior to the date the Grievant became a Bargaining Unit member.

III. UNION'S CASE

The Union's first witness was Jacqueline McClain, the Grievant.

She testified that she is an Administrative Professional 3 and has worked for the Public Defender for fifteen (15) years. Ms. McClain testified she works at the Correction Reception Center in an Inmate Housing Unit.

Ms. McClain said she comes in the Entrance, goes to Control and picks up her keys and

her spider alarm. She then goes through the Yard to the Captain's Office and gets Kites. Ms. McClain then testified she walks through the Yard passing among Inmates to the Sally Port. From there she goes through the Inmate Housing Unit to her Office. She testified that she does this without an Escort.

Ms. McClain testified that she wears a spider alarm. This is a Panic Alarm that sends a signal to Control. This causes Control to send Cos to her. She further testified that the spider alarm doesn't work in the Yard but only in the building. Ms. McClain then said when the batteries run down the spider alarm sends a false signal.

Ms. McClain was then asked to describe the Housing Unit. She testified her office is inside the Unit and there may be as many as one hundred eighteen (118) Inmates on either side of her office. There are three (3) Cos assigned to her area. She testified there are tables, a TV and a podium. She then said the Cos are letting out Inmates when she comes in. There are two (2) man cells on each side.

Ms. McClain then testified that there are Inmate fights in the Unit and fights outside that she can see from her window. She also said there are fights in the Chow Line.

Ms. McClain then read Joint Exhibit 3 Page 5 and said it was her assigned Classification and it made no reference to working with Inmates. She then read Joint Exhibit 4 which is her position description. This says the work will be at the Corrections Reception Center and refers to Inmate Kites.

Ms. McClain then testified she assists with the Law Library and Inmate Orientation which generates a Report. She does legal packets for each Inmate. The first two (2) pages of the packet

refer to the individual Inmate, the rest of the information is common to all Inmates. Ms. McClain uses a class room setting for her Orientation which is for the Inmates who arrived yesterday. She has twenty (20) to one hundred (100) Inmates at her Orientation meetings. She tells the Inmates not to walk behind her. She passes out legal packets and explains them. Inmates talk to her about improper jail time credit and about appeals.

Ms. McClain further testified there are two (2) Cos and one (1) CO is keying doors letting Inmates in from Medical, Dental, and Education passes. She said there is a constant movement of Inmates. There are Porters out of their cells also.

Ms. McClain then read Joint Exhibit 5 which is the Security Levels. Level 1 is minimum security. Level 5 is maximum security. She said Level 5 Inmates are escorted by Cos every where they go. Ms. McClain said there are two (2) Cos assigned to her Unit but they have other duties than watching her.

Ms. McClain then testified that she has Orientation about once a week. She said Inmate Kites are letters to staff. She said the Inmates think she is an employee of the Department of Rehabilitation and Corrections. Ms. McClain testified she only answers Kites that concern Legal Services.

Ms. McClain then testified that she helps Inmates fill out the packet and that no CO is present. She said Inmates Legal Mail is signed for by the Inmate. The Sergeant opens the Legal Mail and advises her if the Inmate has a problem with the Mail.

Ms. McClain says she gets books from the Law Library and Inmates can sign up to go. There is a CO down the hall. She said she goes through the Library to get to the Law Library. Ms.

McClain said she talks to Inmates in the Law Library. There are three (3) Inmates who work in the Law Library and there is a CO in there. She testified there is one way in and one way out. The CO in the hallway can't see the Librarian. She also said she asked for supplemental pay prior to filing the grievance.

On Cross-Examination Ms. McClain said she was not grieving "out of Class". She testified she asked for supplemental pay about a month before filing grievance.

Ms. McClain testified she has been at the Corrections Reception Center almost her entire fifteen (15) years. She was an Exempt employee and then was put in the Union. She then went through the Contract. Ms. McClain said the spider alarm is used by Department of Rehabilitation and Corrections employees. She said there are two (2) Cos and one (1) Float NCO in her area. She also testified this is a current contract grievance under Article 11.09 and 36.05. Ms. McClain read Article 11.09 and said it refers to working alone. It does not refer to Hazard Pay. She then read Article 36.05 and testified it has no reference to Hazard Pay. She said the Article refers to discussion. She testified she asked Management for Hazard Pay and was told "NO".

Ms. McClain then read Joint Exhibit 7 which is the Ohio Administrative Code on Hazard Pay. This says Hazard Pay is up to the Director. Ms. McClain testified there was no approval by the Director and the Administrative Code says must have approval.

On Re-Direct Ms. McClain said she went in the Union in November 2011 and the Grievance was filed in February 2012.

The Union's next witness was John Morrise who is a CO. CO Morrise is assigned to Building 8 Alpha 4. This is the same Building as the Grievant. CO Morrise was asked about the

Building's Lay-Out. CO Morrise testified there is a Sally Port, Cells, a big and little T.V. room. He said the Grievant works alone and he doesn't patrol her area very much.

CO Morrise testified that one (1) CO was taken away. He also said the Float CO is gone all the time doing Escorts. If there are eight (8) Inmates or more there has to be an Escort.

CO Morrise said there are one hundred eighteen (118) Inmates in the Unit. There could be one hundred thirty-eight if the bed area is full. CO Morrise then testified that Inmates fight all the time and over anything. He then said he doesn't escort Grievant anywhere. There are not enough Cos to escort her around. CO Morrise said the spider alarm is for trouble.

On Cross-Examination CO Morrise testified that there are two (2) Cos in the Building and that Grievant wears a spider alarm. He testified that he had responded to Grievant's spider alarm.

The Union's last witness was Sandy Friel. Ms. Friel has been with the Union for nineteen (19) years of which seven (7) have been as Arbitration and Classification Coordinator.

Ms. Friel testified that the purpose of Article 36.05 is to bring Management and the Union together to review job requirements and Pay. Ms. Friel read the Contract's first paragraph on Page 140 and said it read "Review in Good Faith".

Ms Friel testified a segment is like the Building Trades which has Carpenters and Plumbers. A series example is Account Clerk 1, 2, and 3. A Portion is where you look at Classifications and separate out Portions. Ms. Friel said she had done the Building Trades and also did IT Classifications. Ms. Friel said she did a Portion on Account Clerks 2 about Billing and Payroll.

Ms. Friel then testified that Pay Supplements are not precluded by Article 35.06. She further said the parties have agreed upon Pay Supplements. The Meat Inspectors got a Pay Supplement for Pickaway Correctional. The Insurance Examiners Analyst got a Pay Supplement for extended over nights. She also said the Corrections Sergeants' Counselors also got Pay Supplement. She also testified that this is not a complete list.

Ms. Friel then testified that Article 36.05 does not forbid Arbitration. Ms. Friel then testified regarding Classification. She said you look at twelve (12) different factors. The factors are on a point system and points equal pay range. She testified that some examples are Supervision; assets; personal contact; and unusual conditions.

Ms. Friel said the Union asked for a review with the Department of Rehabilitation and Corrections and the Office of Collective Bargaining. Ms. Friel was given Exhibit Union 1 and said it was a letter to Mike Duco about this case. Mr. Duco declined to review it. She said Patty Rich also talked to Mike Duco.

Ms. Friel then read Joint Exhibit 3 which is Grievant's Classification and said it made no reference to Inmates. She then read Joint Exhibit 4, which is Grievant's Position Description and said it does refer to working with Inmates.

Ms. Friel then read Exhibit Union 2 and said it was a Position Description for an Administrative Professional 1 at the Department of Rehabilitation and Corrections. This does refer to Inmates and this job gets Supplemental Pay.

Ms. Friel testified that Class Specification list all possible duties. A Position Description is a sub-set of particular duties. The Classification doesn't refer to Inmates but the Position

Description does.

Ms. Friel was then given Joint Exhibit 8 which is a 1994 Fact Finder's Report concerning Supplemental Pay for Correctional Staff in a prison environment other than Corrections Officers. She then read Joint Exhibit 8 Page 10 which shows the Fact Finder recommended additional Compensation by Supplemental Pay to non Correction Officers at the Department of Rehabilitation and Corrections.

Ms. Friel testified that Article 36.05 came into the Contract in 1994 so the Union had to rely on Fact Finding. Ms. Friel then read Joint Exhibit 7 which is Ohio Administrative Code Hazard Pay Levels. Ms. Friel said Article 36.05 doesn't preclude Arbitration nor does it refer to the Director.

On Cross-Examination Ms. Friel testified that Article 36.05 says to discuss Supplemental Pay but does not demand it. Ms. Friel then said Article 11.09 refers to working alone and has no demand for Supplemental Pay.

Ms. Friel then reviewed the Agency Specific Department of Agriculture Article in the Contract. She testified that Meat Inspectors get 5% Supplemental Pay while at Pickaway Correctional Institution. The Public Defender has no Agency Specific language. Ms. Friel then read Joint Exhibit 8 Page 10 and said it was the Fact Finder's Recommendations.

Ms. Friel then read Management 1 which is past Collective Bargaining Agreements (CBA). The 2006-2009 CBA has no Supplemental Pay for Department of Agriculture employees. Ms. Friel looked at the current CBA and said the Fact Finders Recommendation went into the 2012-2015 CBA. The Fact Finders Report only concerned the Department of Rehabilitation and

Corrections. Ms. Friel then read Joint Exhibit 7 and said it required Director approval.

On Re-Direct Examination Ms. Friel read part of Article 36.05 on Classifications and Pay Ranges and said if the parties can't agree then the Union can go to Article 25 within 30 days. She also said Article 36.05 came in, in 1994.

Ms. Friel then testified that Hazardous is for things that may occur. You look at the Class not the individual. What could occur injury or accidents.

On Re-Cross Examination Ms. Friel reviewed part of Article 36.05 and said if parties agree the change doesn't start until the next fiscal year. Ms. Friel was then asked "If there is no Classification Review then the Contract Article does not apply?" Ms. Friel said NO.

On Re-Direct Ms. Friel testified the Union had requested a Review but the Office of Collective Bargaining refused.

IV. THE EMPLOYER'S CASE

The only witness for the Employer was Theresa Haire, Deputy Director for the Office of Ohio Public Defender.

Ms. Haire testified that Hazard Pay was discussed and the decision was made not to pay it. She said the Grievant's job was to disseminate messages to the Inmates.

On Cross-Examination Ms. Haire was asked "Why was Grievant refused Supplemental Pay?" She replied, "That's what we do, we deal with Criminals. We go into institutions all the time. The attorneys are Exempt. Their title is Assistant Public Defender."

Ms. Haire was then shown the Classification Series for Assistant Public Defenders. This says Criminal Defendants. Ms. Haire then read Joint Exhibit 3 Page 5 and said it makes no

Reference to Criminal Defendants or Inmates.

Ms. Haire was then asked how many Public Defender employees were assigned to Institutions. She said there are some at Loraine, one (1) at Ohio Reformatory for Women and one (1) at Corrections Reception Center. She said the Grievant may be the only Administrative Professional 3.

On Rebuttal Ms. Friel said Exhibit Union 3, Series Purpose, says "Provide Service to Criminal Defendants." Ms. Friel says this is Hazardous. Ms. Friel then read Exhibit Union 4 which is the Point Evaluation System. This refers to unavoidable hazards. Ms. Friel then read Joint Exhibit 3 Page 5 and said Class doesn't mention Inmates.

On Cross-Examination Ms. Friel said an Administrative Professional 3 could be the subject of discussion but it was not mandated.

On Re-Direct Examination Ms. Friel testified that Article 36.05 allows the Union to grieve to Arbitration. Ms. Friel also said the Grievant has similar duties to the Department of Rehabilitation and Correction.

On Cross-Examination Ms. Friel was asked "Articles 11.09 and 36.05 do not mandate Supplemental Pay so there is no violation?" She replied, "An Arbitrator has to decide".

The parties agreed to file written closing arguments by the Close of Business May 1, 2013.

The hearing ended at 12:16 P.M.

The advocates have done an excellent job presenting their respective cases.

V. OPINION AND AWARD

The Union argues that this grievance is properly before the Arbitrator. The Union asserts that even though the Employer says the issue is covered solely by the Ohio Administrative code, the Union grieved Article 11.09 and Article 36.05 and all applicable Articles and the remedy may be met through the Contract or the Ohio Administrative Code.

The Union also notes that Item 1 of the Joint Stipulations states that the grievance is properly before the Arbitrator.

The Employer says the Union argument that the Grievant was stationed inside the confines of the Correction Reception Center mandates a Hazard Pay Supplement of five (5) percent has no basis in the Contract.

The Employer argues that this situation is covered solely by the Ohio Administrative Code (OAC) 123:1-37-04; the first condition of which says (A) “the granting of hazard pay is subject to the approval of the director”.

The Employer says the Union contends Article 11.09 (Working alone) was violated. The Employer points out that there is nothing in this Article that speaks to the “Joint issue” supplied by the parties. The Employer also said that the Grievant and Sandy Friel, both witnesses for the Union testified that Article 11.09 did not address the Hazard Pay Supplement.

As to Article 36.05 the Employer points out that upon Cross-Examination the Grievant acknowledged that Hazard Pay was not defined or mandated by the language in Article 36.05. Further, the Grievant testified that her grievance was not a working out of class grievance.

The Employer then argues that Sandy Friel, the Union’s subject matter expert testified upon Cross-Examination that Article 36.05 did not mandate a Hazard Pay Supplement. The

Employer also argues that upon Cross-Examination Sandy Friel testified that some discussions had taken place, however the matter had not been presented to the Classification Joint Committee. The Employer also argues that upon Cross-Examination Sandy Friel testified that Article 36.05 had not been violated by Management.

The Employer then asserts that the grievance is outside the confines of the Contract. The Employer maintains Article 25.03 of the Contract governs. Article 25.03 says, “only disputes involving the interpretation, application, or alleged violation of a provision of the 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 he/she impose on either party limitation or obligation not specifically required by the expressed language of this Agreement”.

The Employer then says this supplement can only be bargained for.

The Union argues that Article 36.05 allows the parties to review pay issues for a Classification series, a segment or positions of a class plan. The Union asserts that Article 36.05 does not preclude an Arbitrator rendering Supplemental Pay.

The Union also argues that Ms. Friel testified that Patty Rich, Grievance 1 Classification Manager sent a letter, Union Exhibit 1 to the Office of Collective requesting supplemental pay for the position in question. The response back from OCB was for the Union to handle this through the grievance procedure.

Further the Union points out that the Grievant made the same request of the Public Defender’s Office prior to filing the Grievance.

The Union argues there was no mutual agreement as the agency refused to discuss any

details and just said “NO”.

The Arbitrator has reviewed Article 36.05 and finds the Article has three (3) references to Arbitration.

Article 36.05 (A) (1) says in pertinent part: “The Employer, through the Office of Collective Bargaining ... change the pay range of classifications”... This section of Article 36.05 also says “Should the Union dispute the proposed action of the employer and the parties are unable to resolve their differences, they shall resolve the issue through arbitration pursuant to Section 25.03 of this Agreement.

The evidence is the Union made due demand upon OCB and there was no agreement.

Article 36.05 (A) (2) has two (2) arbitration provisions.

Article 36.05 (A) (2) provides “If the parties cannot mutually agree to the implemented pay range assignments or compensation method, the Union shall have the right to appeal the pay range determination directly to Step Five (5) of Article Twenty-five (25)”.

The third reference in Article 36.05 (A) (2) refers to the employee’s proposed classification assignment” and is appealed by the “Working Out of Class” form.

The Arbitrator finds that this dispute concerns “Pay Ranges” and “other compensation” not “Classification” and is properly before the Arbitrator.

The Arbitrator finds Article 11.09 does not apply. While the Grievant may be “alone in the crowd” Article 11.09 seems to be concerned with “alone” as in by yourself. The Article is primarily then concerned with the reduction of risk to the Employee.

As to the merits of the case the Employer argues that Ms. Friel testified that Article 36.05

had not been violated. The Arbitrator's notes show that Ms. Friel was asked "If there was no classification review the contract Article (36.05) does not apply". She said "No". Ms. Friel then testified the Union had asked for Review.

The evidence here on the merits is that the Grievant is an Employee of the Office of the Ohio Public Defender and is the sole Employee of this Agency assigned to the Corrections Reception Center. Her office is in an area where there are many male Inmates. The testimony from the Grievant and the CO is that while there are COs in the areas within which the Grievant works, these COs have numerous other duties than protecting the Grievant.

The evidence also is that the Grievant meets with new Inmates prior to their classification into the various security levels.

The Employer contends that Supplemental Pay can only be bargained for. The Union relies on a 1994 Fact Finders Report decided before Article 36.05 was put into the Contract.

The Employer also argues that there should not be supplemental pay because "dealing with criminals is what we do". The evidence is that Corrections Sergeants, Counselors and Non-COs at penal institutions get Supplemental Pay.

Based upon the evidence the Arbitrator finds that the Grievant works in a hazardous environment and is entitled to three (3) percent Supplemental Pay from the date of this decision.

The Arbitrator will retain jurisdiction for sixty (60) days.

Entered at Ironton, Ohio this 8th day of May, 2013.


Craig A. Allen
Arbitrator