

**ARBITRATION DECISION NO.:**

406

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Correction  
Marion Correctional Institution

**DATE OF ARBITRATION:**

November 14, 1991

**DATE OF DECISION:**

December 11, 1991

**GRIEVANT:**

Joe Sorrell

**OCB GRIEVANCE NO.:**

27-16-(89-06-07)-0920-01-06

**ARBITRATOR:**

Hyman Cohen

**FOR THE UNION:**

Butch Wylie

**FOR THE EMPLOYER:**

Ted Durkee

**KEY WORDS:**

Bargaining Unit Work by  
Supervisors  
Increase in Bargaining Unit  
Work by Supervisors  
Erosion of Bargaining Unit  
Remedy: Post a Position

**ARTICLES:**

Article 1 - Recognition  
§1.03-Bargaining Unit Work

**FACTS:**

Ohio Penal Industries (OPI) operates a sheet metal shop at the Marion Correctional Institution. Prior to June, 1989, the Sheet Metal Shop consisted of three Penal Workshop Supervisors (bargaining unit positions) and two Management positions. On approximately June 2, 1989, a vacancy was created by the resignation of John Eilerman, a Penal Workshop Supervisor. This position was not posted or filled and was subsequently abolished. In the absence of the Penal Workshop Supervisors, Mr. Schenk, a management

employee within the shop, took over supervision of inmate crews.

### **UNION'S POSITION:**

The union contends that Schenk assumed most of Eilerman's responsibilities which constitutes an erosion of bargaining unit work. Prior to Eilerman's departure from state service, he had the responsibility for the grinding area and the paint room. There were grinders and painters who worked directly for him. Eilerman supervised and trained inmates in grinding and in the "D.A." which is a special kind of grinder; he was also responsible for the operation of the paint room. When Eilerman left in May, 1989, Schenk assumed responsibility for the powder paint and grinding areas. Schenk also assumed responsibility over "tool control." If an inmate had a problem in grinding and painting, Schenk showed them how to perform those duties. When an inmate was grinding a chair improperly, the QA Inspector would report to Schenk who showed or trained the inmate on doing the job properly. After Eilerman's resignation, Schenk took over Eilerman's duties of filling out quantity of materials inventory reports and controlling the use sanding discs which are used to smooth the chairs.

The second sentence of Section 1.03, in part, prohibits the increase of bargaining work done by supervisors. The State's action in assigning Schenk the bargaining unit work previously performed by Eilerman is a clear violation of this section. There was no showing by the State that such work was performed in order to cover for situations of emergency, relief, or release of employees for union time. Schenk performed the day to day essential elements of bargaining unit work in carrying out direct supervisory responsibilities over inmates in addition to his assumption of responsibility for the grinding and power paint areas. Consequently, the appropriate remedy is for the employer to cease performing the bargaining unit work and to post the position.

### **EMPLOYER'S POSITION:**

The employer argues that it has not been performing bargaining unit work. Schenk said that since June, 1985, his duties in the Sheet Metal Shop have included safety, making work orders for supervisors, inventory control, responsibility over tool control and shipping and receiving. Between June, 1985 and July, 1986, Schenk has supervised inmates. He has always been in charge of maintenance clerks, and a porter for the office and restroom. After Eilerman resigned Schenk said that he supervised more inmates but it was not a drastic change. He said that he now "checks on" the inmates in the paint room but that this is for security and safety purposes. Schenk also testified that his supervisory duties in the grinding area have increased. However, the employer asserts that Schenk's supervisory duties have not increased enough to the point where it constitutes the performance of bargaining unit work.

### **ARBITRATOR'S OPINION:**

Schenk did not merely perform bargaining unit work to the extent that he had previously performed such work. The extension of his responsibility to the paint and grinding areas and the direct supervisory responsibility over approximately 35 inmates constitute a substantial increase in the bargaining unit work that he performed prior to May, 1989. Before Eilerman ceased working, Schenk performed some direct supervision over inmates. However, such supervisory responsibility and direction increased to a material extent after Eilerman went on extended sick leave in May, 1989. The additional bargaining unit work which Schenk was assigned to perform after May, 1989 was not incidental or of a small nature. Schenk assumed an integral part of the bargaining unit work that had been performed by Eilerman.

The second sentence of Section 1.03, in part, prohibits the increase of bargaining work done by supervisors during the life of the Contract. The State's action in assigning Schenk the bargaining unit work previously performed by Eilerman is in clear violation of this unequivocal contractual prohibition. Contrary to the second sentence of Section 1.03 the State failed to heed its obligation whereby it is required to make every reasonable effort to decrease the amount of bargaining unit work done by supervisors. There was no showing by the State concerning an emergency, relief or release of employees for union time.

### **AWARD:**

The grievance is sustained. Schenk is to cease performing bargaining unit work duties which he began in

May, 1989. The State is required to post a vacancy for Penal Workshop Specialist in the Sheet Metal Shop consistent with the terms of the Contract.

**TEXT OF THE OPINION:**

**VOLUNTARY LABOR ARBITRATION**

In the Matter of the Arbitration

-between-

**STATE OF OHIO, MARION CORRECTIONAL  
INSTITUTION**

-and-

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

**ARBITRATOR'S  
OPINION**

27-16-(89-06-07)-0920-01-06

**FOR THE STATE:**

TED DURKEE

Labor Relations Officer

Department of Rehabilitation

and Correction

State of Ohio

Ohio Dept. of Administrative

Services, Office of Collective Bargaining

65 East State Street, 16th Floor

Columbus, Ohio 43215

**FOR THE UNION:**

BUTCH WYLIE

Staff Representative

Ohio Civil Service Employees Assoc.

Local 11, AFSCME, AFL-CIO

1680 Watermark Drive

Columbus, Ohio 43215

**DATE OF THE HEARING:**

November 14, 1991

**PLACE OF THE HEARING:**

Marion Correctional Institution Marion, Ohio

**ARBITRATOR:**

HYMAN COHEN, Esq.  
 Impartial Arbitrator  
 Office and P. O. Address:  
 Post Office Box 22360  
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\* \* \* \*

The hearing was held on November 14, 1991 at Marion Correctional Institution, Marion, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:05 a.m. and was concluded at 3:05 p.m.

\* \* \* \*

On or about May 33, 1989, Steward Joseph H. Sorrell, on behalf of **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the “**Union**” filed a grievance with the **OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, MARION CORRECTIONAL INSTITUTION**, the “**State**” in which he claimed that Shop Superintendent 1, Gerald E. Schenk was performing bargaining unit duties in the Sheet Metal Shop in violation of the Labor Agreement between the parties. The grievance was denied by the State after which the State's decision was appealed to the various steps of the grievance procedure contained in the Agreement. Since the parties were unable to resolve their dispute it was carried to arbitration.

### FACTUAL DISCUSSION

The Ohio Penal Industry (OPI) operates two (2) industrial shops at the Marion Correctional Institution. The two (2) shops are the sheet metal and wood shops. The instant dispute focuses on the sheet metal shop.

At the arbitration hearing, the parties stipulated to the following facts:

- “1. Prior to June, 1969, the Sheet Metal Shop consisted of three Penal Workshop Supervisors (bargaining unit positions) and two Management positions.
2. Approximately May 15, 1989, John Eilerman, Penal Workshop Supervisor went on extended sick leave and subsequently resigned June 2, 1989.
3. The vacancy created by Mr. Eilerman's resignation, Penal Workshop Supervisor, PCN 6016.0, was never posted or filled, and the position subsequently abolished.
4. In the absence of one of the Penal Workshop Supervisors, Mr. Schenk took over supervision of their inmate crews.\*\*.”

The instant dispute emerges from the stipulated facts when Eilerman resigned his position which was not posted or filled and was subsequently abolished. The Union contends that Schenk assumed most of Eilerman's responsibilities which constitutes a violation of the applicable terms of the Agreement. Thus the focus of the dispute concerns the job duties performed by Eilerman and the “two (2) other bargaining unit employees in Sheet Metal, and Schenk, who is a non-bargaining unit employee before and after approximately May 15, 1989 ,when Eilerman went on extended leave after which he subsequently resigned on June 2, 1989.

At the outset of this discussion it should be pointed out that in March, 1990 a “Job Modernization” went into effect. As a result, the bargaining unit position of Penal Workshop Supervisor was changed to Penal Workshop Specialist (for purposes of this decision, the titles are one and the same). The evidentiary record establishes that the job duties of the Supervisor did not change; only the title or job classification changed.

In 1985, when Penal Workshop Specialist William Edward Walsh was hired by the State, his classification was Penal Workshop Supervisor 1. His duties in the Sheet Metal Shop included fabrication of different products and maintaining the security of the inmates. Walsh described the work performed in the shop. He

said that raw materials are off-loaded by Schenk who then gives him (Walsh) a work order which indicates the quality and quantity of finished product. Walsh proceeds to fill out the "first article of inspection". He discusses the work order with the Quality Assurance (QA) Inspectors and then fills out the work order which might require a certain number of chairs or quantity of product. Walsh then instructs the inmates to take the raw materials which have been off loaded and place them onto conveyors. The materials are then fed into a cut-off saw. Walsh provides the inmate with the specifications which are to be cut and he (Walsh) and the QA Inspectors inspect the materials before it is run.

In light of the nature of the instant Grievance, it is important to set forth an overview of the duties that were performed by Eilerman before May 15, 1989 when he went on extended sick leave and the duties performed by Schenk and the Penal Workshop Supervisors before and after May 15, 1989.

### **EVENTS PRIOR TO MAY 15, 1989**

Before Eilerman's extended sick leave in May, 1989 he, Walsh and Ervin Davis were the supervisors and bargaining unit members in the Sheet Metal Shop. Each of them supervised an average of thirty (30) inmates who worked directly for each of them.

Eilerman had responsibility for the grinding area and the paint room. There were grinders and painters who worked directly for him. Walsh said that Eilerman may have had a few "porters" working for him. Davis had a "chair assembler and a couple of production clerks who are responsible for the boxing of product" working for him in addition to clerks who made labels for the destination of the finished product and who prepare the product for shipping. Walsh indicated that machine feeders, material handlers, porters and welders were directly assigned to him.

Before May, 1989 Eilerman supervised and trained inmates in grinding and in the "D.A.", which is a "special kind of grinder"; he also was directly responsible for the operation of the paint room. Prior to May, 1989 Eilerman also "ran the fabrication shop."

In addition to what has been set forth, it should be noted that Sorrell, who had previously served as a Supervisor in the Sheet Metal Shop until November, 1989 indicated that the Supervisor is responsible for "logging in inmates." As a Supervisor, Sorrell "performed inventory control" every day; while Schenk performed a consolidated inventory control. Each Supervisor reported to Schenk in telling him what they "did and what was needed."

When Sorrell worked in the Sheet Metal Shop as a Supervisor, he was assigned to the powder paint area, and the grinding and metal areas. Each Supervisor trained inmates in their respective areas. In the absence of the Supervisors, Schenk trained the inmates in the Supervisor's particular area of work.

Before May, 1989 as Superintendent, Schenk walked the floor of the Shop "and checked on the Supervisors, inmates and office procedures." Occasionally, Schenk performed the duties of a Supervisor before June, 1989. Schenk was the immediate supervisor over the Supervisors in the shop prior to Eilerman's resignation. He "saw to it that Supervisors checked on inmates and that the product was boxed and shipped properly." Occasionally, Schenk supervised inmates but he did not train inmates or set up jobs for them before May, 1989.

### **EVENTS SUBSEQUENT TO MAY, 1989**

After May, 1989 Walsh replaced Eilerman in running the Fabrication Shop. Walsh added that he "assumed" responsibility "over the entire area." Walsh said that there are only two (2) machines that are not assigned to him at the present time. Those two (2) machines are assigned to Davis.

After May, 1989, Schenk assumed responsibility for the powder paint and grinding areas. Schenk also assumed responsibility over "tool control."

If an inmate has a problem in grinding and pointing, Schenk shows them how to perform those duties. Walsh also indicated that when an inmate is grinding a chair improperly, the QA Inspector reports to Schenk who "shows or trains the inmate on doing the job" properly. After Eilerman's resignation, Schenk took over Eilerman's duties of "filling out quantity of materials inventory" and in the use of sanding discs which are used to "smooth" the chairs.

Walsh indicated that he and Davis supervise the inmates which are within Schenk's area of responsibility. When Schenk is on vacation, Walsh and Davis cover the paint and grinding areas.

Walsh indicated that after May, 1989 Schenk was no longer a "walk-through Superintendent." The Supervisors, namely, Walsh and Davis were required to monitor more of the movement of inmates on the Shop. There have been occasions when Schenk has operated the tow motor to unload materials and Walsh has been left alone to supervise and monitor the inmates both in his own area and Schenk's area of responsibility. At times when Schenk was engaged in unloading product, Walsh and Davis were left alone on the floor of the shop. Since Eilerman resigned, Schenk "is limited in walking the floor." As a result, there have been problems with inmates on the floor of the shop concerning the security in the shop area.

### **QA INSPECTORS**

There was testimony provided on QA Inspectors who are inmates. There is a "Head QA Inspector" and QA Inspectors that cover different areas of the Sheet Metal Shop. A QA Inspector inspects fabrication, welding, the paint and grinding areas, and another Inspector performs duties concerning the final product "before it is boxed up and shipped."

Schenk supervises the QA Inspectors. Two (2) inmates take attendance of the inmates. Schenk fill out the performance evaluations of the QA Inspectors. Before May, 1989, Schenk also supervised inmates in maintenance.

### **SCHENK'S TESTIMONY**

Schenk said that since June 1985 his duties in the Sheet Metal Shop have included safety, "making work orders" for Supervisors, seeing to it that Supervisors and inmates are doing their jobs, inventory control, responsibility over tool control and shipping and receiving. He said that he relies upon Supervisors for quality control. Between June, 1985 and July, 1986, Schenk has supervised inmates. He has "always been in charge of maintenance clerks, and a porter for the office and rest room". He is also responsible for paper work, daily product reports, security and safety checks and he logs out daily tools.

After Eilerman's extended sick leave which was followed by his resignation, Schenk admitted that he supervises "more inmates". At the time of the hearing he said that he supervises about thirty-five (35) inmates. Prior to Eilerman's extended sick leave, Schenk said that he supervised "about a dozen to fifteen (15) inmates." The additional inmates over which he has direct responsibility are assigned to the paint room and the grinding area. Schenk said that he "probably spends about one (1) hour a day to see what is going on" in the paint area. His purpose in checking on the inmates in the paint area "is for security and safety purposes." Since the inmates in the paint area are capable, Schenk said that there is no need to supervise them.

Since Eilerman's departure from the OPI, Schenk said that he sits at his desk where he can observe the grinding area in the center of the shop. He was unable to determine the amount of time that he spent in grinding. However, included within the seventy percent (70%) of the time that he spends in the shop is time spent in the grinding area.

Schenk stated that he had responsibility for the inmates' security and safety. He sees to it that all safety guards are on machines and that the inmates are performing their jobs, and are "not smoking in prohibited areas."

### **DISCUSSION**

The issue to be resolved by the Arbitrator was stipulated by the parties follows:

"Did Management violate Section 1.03 of the contract when Gerald Schenk, Penal Workshop Superintendent I, was assigned direct supervision of the grinding area and powder paint area of the Sheet metal Shop on May 15, 1989? If so, what shall the remedy be?"

## SECTION 1.03

Section 1.03 provides as follows:

### "§1.03 Bargaining Unit Work

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisor shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

Further, it is the intent of the employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units. \* \*\*

## EVENTS AFTER MAY, 1989

It is undisputed that instead of three (3) bargaining Unit Supervisors being employed in the Sheet Metal Shop, after Eilerman's extended sick leave in May, 1989, which was followed by his resignation and then the elimination of his job by the State, Schenk assumed direct responsibility for the powder paint area and the grinding area. Furthermore, there was one (1) less bargaining unit employee in the Sheet Metal Shop. The areas over which Schenk assumed responsibility were formerly under the supervision of Eilerman. As a result of his added responsibilities, Schenk admitted to having, direct responsibility over additional inmates who are assigned to the paint and grinding areas. Indeed, after May, 1989, Schenk became directly responsible for the inmates who were formerly under Eilerman's supervision. In light of the evidentiary record, Schenk's direct supervisory responsibilities extend to thirty-five (35) inmates, or at least more than twice the number of inmates that he supervised prior to May, 1989. Along with his direct supervisory responsibilities over the substantially increased group of inmates is the training of the inmates, the additional intense scrutiny of the work of additional inmates, addressing problems at work and increased security over those inmates who previously were under the supervisory responsibility of Eilerman.

In light of Schenk's increased duties and responsibilities his capacity to provide the oversight and ability to check on the security of the two (2) Supervisors on the shop floor diminished to a substantial extent. Since there are inmates performing work on machinery and equipment, the Supervisors must be constantly vigilant concerning their own safety and security and the safety and security of the inmates. Sorrell referred to finding four (4) "shanks" or knives which have been pulled out of equipment, finding two (2) pairs of shearers, and handles which were manufactured by inmate for the "shanks." These findings of contraband may not be due to direct result of the reduction of bargaining unit employees, but it indicates the importance of being constantly vigilant concerning the conduct of inmates. The contraband underscores that the safety and

security of the Supervisors and the inmates themselves are matters which cannot be compromised.

Before May, 1989, there was more effective security in the shop. There were three (3) bargaining unit employees who were Supervisors. They were directly responsible for thirty (30) to thirty-five (35) inmates within their particular areas of responsibility. Schenk had exclusive supervisory responsibility over Supervisors. He was a "walk through Superintendent" who checked on the security and safety of Supervisors. Schenk closely monitored the supervisors and inmates. However, after May, 1989, the bargaining unit was reduced by one-third (1/3) when Eilerman's position was not filled after which it was abolished. Schenk took over Eilerman, responsibilities in connection with the paint and grinding area. Although Schenk estimated that he spent an hour daily in the paint room, he could not estimate how much of seventy percent (70%) of the day he spent in supervising the grinding area. Although he said that from his desk he can observe the grinding area of the shop, he is nonetheless responsible for the direct supervision of the grinding employees. Furthermore, Schenk admitted that for security purposes he checks on the paint room staff one (1) hour a day. It should be underscored that Sorrell and Walsh said that after May, 1989, Schenk checked on the security and safety of the Supervisor and inmates but it is not as frequent. It should be noted that the perceptions concerning the lessening of security is based upon undisputed facts. Three (3) Supervisors and a Superintendent are more effective and provide greater security than two (2) Supervisors and a Superintendent over approximately the same number of inmates. When the added job responsibilities for Schenk are considered, the Supervisors' safety and security are at greater risk, not to mention the safety and security of the inmates. I find it of great weight that when Schenk is on vacation, both Walsh and Davis are responsible for the supervision of those inmates and areas of the shop which were the responsibility of Eilerman, before May, 1989.

### **SECTION 1.03**

The parties have agreed to specific language in Section 1.03 which specifically address the instant dispute. Contrary to the initial sentence of Section 1.03 Schenk did not merely perform bargaining unit work to the extent that he had previously performed such work. The extension of his responsibility to the paint and grinding areas and the direct supervisory responsibility over approximately thirty-five (35) inmates constitute a substantial increase in the bargaining unit work that he performed prior to May, 1989. Before Eilerman ceased working, Schenk performed some direct supervision over inmates. However, such supervisory responsibility and direction increased to a material event after Eilerman went on extended sick leave in May, 1989.

The additional bargaining unit work which Schenk was assigned to perform after May, 1989 was not incidental or of a *di minimus* nature. Schenk assumed an integral part of the bargaining unit work that had been performed by Eilerman.

The second sentence of Section 1.03, in part, prohibits the increase of bargaining work done by supervisors during the life of the Agreement. The State's action in assigning Schenk the bargaining unit work previously performed by Eilerman, is in clear violation of this unequivocal contractual prohibition. Contrary to the second sentence of Section 1.03 the State failed to heed its obligation whereby it is required to "make every reasonable effort to decrease the amount of bargaining unit work done by supervisors."

There was no showing by the State concerning the occasions when it is permitted to perform bargaining unit work under Section 1.03. Thus, for example, there was no "emergency" which required Schenk to perform bargaining unit work. Nor was such work performed "to provide break and/or lunch relief," to avoid mandatory overtime or "to allow the release of employees for union or other approved activities." It is true that there were occasions when Schenk instructed or trained employees and demonstrated the proper method of accomplishing the tasks assigned. Schenk's bargaining unit work went beyond these allowable bargaining unit duties under Section 1.03. He performed the day to day essential elements of bargaining unit work in carrying out direct supervisory responsibilities over inmates in addition to his assumption of responsibility for the grinding and powder paint areas.

The terms of Section 1.03 referring to overtime are not applicable. As Schenk testified, in the past, there was very little overtime, and recently there had been no overtime.



In March, 1990, the "Mod Classification" went into effect. The "Series Purpose" in the State's "Classification Specification", on paper maintained faith with the terms of Section 1.03 which provide:

"\* \* Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work \* \*."

In practice, however, the State disregarded the "Mod Classification" of March, 1990 and failed to differentiate between Schenk's responsibilities and the job duties of Walsh and Davis doing bargaining unit work. Schenk continued to perform extensive bargaining unit work after the "Mod Classifications" went into effect in March, 1990.

The State also violated the last paragraph of Section 1.03 by abolishing a bargaining unit position and assigning Schenk to perform a substantial portion of those duties. By doing so, the State eroded the bargaining unit. In this connection, the Arbitrator in *New Britain Machine Company*, 8 LA 721 (Wallen, 1947) set forth the basis for concluding that removing work from the bargaining unit constitutes a clear violation of the Labor Agreement. He said:

"The basic purposes of collective labor agreements are well known. One is fix wages, hours and working conditions for employees whom they cover. Another is to provide the employees with a measure of job security through rules governing layoffs, rehiring and transfers. Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security; may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. In the case at hand the Article governing recognition clearly sets forth that the contract applies to watchmen but not to guards, and Article I. D. with equal clarity limits the benefits of the agreement to 'Employees covered by this agreement as defined by this Article.'

The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.\*\*" At page 722.

The Arbitrator in *New Britain* disposed of the Company's claim, based upon the management clause, as follows:

"The Company urged that the clause governing right of management justified its action in transferring work customarily performed by watchmen to other workers outside the unit. The management clause is designated to give management the freedom to conduct its affairs in the interest of efficient production but this right may be exercised only within the framework of the limitations imposed by the contract. That clause cannot be utilized as carte blanche to defeat one of the basic aims of the Contract.

If one of the purposes of the contract as a whole, and of the seniority provisions in particular, is to assure the bargaining unit employees a measure of job security then such security would be meaningless if the Company's view in this case were to prevail. For it would mean that without regard to prior custom or practice as to the assignment of work, the Company could continuously narrow the area of available job opportunities within which the seniority clause functions by transferring duties performed by bargaining unit employees to employees not covered by the agreement. Not only the seniority clause but the entire agreement could thus be vitiated." At pages 722-723.

The simple eloquence of the Arbitrator in setting forth the fundamental considerations for prohibiting an Employer from removing work from the bargaining unit in the *New Britain* case applies to the State's action in this case.

## OHIO CLASSIFICATION SPECIFICATIONS

Section 1.03 must be in conjunction with the Ohio "Classification Specifications" for the positions of Supervisor or Specialist, and Superintendent 1. The Superintendent's "Function" as set forth in the "Classification Specification" issued by the State is as follows:

"Under general supervision from penal workshop superintendent 2 or other administrative supervisor, directs production of processed or manufactured goods, supervises penal workshop employees & instructs in operation & maintenance of penal workshop machinery & equipment; \* \*."

The 1990 "Classification Specification" contains a "Series Purpose" for the "Penal Workshop" which provides:

"\* \* The purpose of the penal workshop occupation is to direct work of inmates for Rehabilitation & Correction penal industries.

At the lower levels, incumbents oversee work of inmates or quality control of finished products. At the higher levels, incumbents supervise or manage penal industry operations \* \*."

The "function" of the Supervisor or Specialist in the "Classification Specification" provides as follows:

"\* \* Under general supervision from higher level penal workshop supervisor, supervises shop operations & security of residents; inspects work done by residents; trains residents \* \*."

There is an emphasis on direct supervisory responsibilities of the residents or inmates in the "Classification Specification" of Supervisor. The largest portion of their time, which is 26% to 46%, under the "Classification Specification," is required to be spent in supervising and assisting residents assigned to the shop "in making" various items. The 1990 Classification Specification for Supervisors or Specialists sets forth that they are required to oversee the work of inmates. To reinforce the direct supervisory job duties over inmates of the Specialist their job duties in the 1990 Classification Specification are set forth as follows:

"Oversees work of inmates assigned to penal workshop (e.g, printing, furniture, clothing, sheet metal, paint), provides security & custody of inmates, trains inmates in proper work methods, equipment operation &/or safety practices, assigns & reviews work, ensures quality control of products, evaluates work of & assigns specific job functions to inmates & prepares & maintains records & reports of workshop activities.

Orders &/or maintains stock, materials & tools; oversees equipment maintenance & workshop cleaning; escorts &/or transports inmates; oversees shipping, receiving, storage &/or inventory of products & materials \* \*."

There is nothing either in the "Function" or "job duties" contained in the Classification Specification for Superintendent which indicates the kind of direct supervisory responsibilities over inmates that Supervisors are required to assume, as provided in their Classification Specification. In addition to the "function" of directing production of processed or manufactured goods under job duties, the Superintendent is required to spend 26% to 46% of his time engaged in instructing "in operation & maintenance of machinery or equipment."

It is significant that the emphasis of the Supervisor's "Function" and "job duties" are on the direct oversight and supervisory responsibilities of inmates; nothing comparable to this "Function" and "job duties" are set forth in the "function" and job duties for the Superintendent's position. Indeed, the Superintendent's Classification Specification, among other things, indicates that as part of his function, he "supervises penal workshop employees" and among his primary job duties, he is required to assign "penal workshop specialists" as well as instruct in operation and maintenance of penal workshop machinery and equipment. Moreover, under the 1990 "Series Purpose" contained in Classification Specification . . . the Supervisor is

required to operate "at the lower levels" in supervising the work of inmates. The Superintendent acts at the "higher levels" in supervising or managing industry operations.

The evidence warrants the conclusion that the State acted contrary to its Classification Specifications for Superintendent and Supervisors or Specialists. The Supervisors are at the "lower levels" and are required to oversee the work of inmates or quality control of finished products. However, in the instant case, Schenk as a Superintendent took over the responsibilities of oversight of the work of inmates in the paint and grinding areas. The emphasis in the Classification Specifications for Supervisor or Specialist is to supervise shop operations, the security of residents, the inspection of their work and to train them. However, to a material extent Schenk performed these duties after May, 1989. It is clear that after May, 1989, the State assigned Schenk to perform job duties and responsibilities of a Supervisor which greatly exceeded the limited Supervisors' duties that he had performed before May, 1989. The supervisors' duties that he assumed were of a different order and dimension than the duties that he performed when Eilerman was a supervisor. Accordingly, the State's actions constitute a material deviation for its own Classification Specifications for Supervisor or Specialist, and the position of Superintendent.

### **ARBITRAL AUTHORITY**

In a case strikingly similar to the instant case, *Stanray Corp.*, 63 LA 333 (Kelliher, 1974), the Arbitrator sustained the grievance while finding that the Employer improperly assigned to a non-bargaining unit Supervisor the duties of a retired employee who held the bargaining unit job of accountant in light of the recognition and seniority clauses of the Agreement. The Arbitrator went on to state that the work that was improperly assigned to the non-bargaining unit Supervisor "should have continued to be performed by a Bargaining Unit Employee in order for the recognition and the seniority provisions of this contract to have meaning."

There is also Elkouri and Elkouri, in *How Arbitration Works*, Fourth Edition, (BNA, 1985), who stated:

"Other arbitrators have ruled against the right of management to assign work out of the bargaining unit, even in some cases in which there might have been justification, on the basis that it is not included within the various types of general management rights clauses. Similarly, arbitrators have so ruled on the basis that the recognition, seniority, or job security clause is violated by such action or that the job, being listed in the contract, is a part of the contract, the action thus violating the contract.\* \* ." At page 545.

It should be pointed out that in the instant case, the basic authority supporting the conclusion for the violation by the State is Section 1.03 of the Agreement. By itself, Section 1.03 of the Agreement constitutes the only basis that is required to sustain the grievance.

### **CONCLUSION**

The evidence in the record established that OPI is financed solely by monies generated from the shops located in the various Correctional Institutions within the State of Ohio. The OPI was described as self supportive with the monies generated by the shops going into a "rotary fund" which is used, for example, to purchase materials, to provide for electricity and to pay salaries.

OPI has suffered losses from fiscal year 1989 to the present time. The reasons for the losses were explained by a State's witness to be due to the increase in prison facilities within the State which in turn meant that more inmates were hired by ORI.

In any event, the State claimed that a lack of funds caused the Supervisor position to be abolished and to have caused the reduction from three (3) to two (2) bargaining unit Supervisor positions in the Sheet Metal Shop. The lack of funds is not an adequate contractual justification for the State's violation of Section 1.03 of the Agreement. The State is prohibited from unilaterally abrogating the clear terms of the Agreement. Section 1.03 refers to several circumstances when supervisory employees may perform bargaining unit work but lack of funds is not a circumstance that is mentioned.

Furthermore, the State's claim of lack of funds is open to serious question. During the "restructuring" of the job classifications within OPI in late 1989 or early 1990 the average monthly wages for inmates were

increased. They also received longevity increases, and sick and vacation leave. There was also an upgrading in the rank of Superintendent. In any event, the State's claim of lack of funds to justify the elimination of the position vacated by Eilerman constitutes a violation of Section 1.03 of the Agreement.

### **AWARD**

In light of the aforementioned considerations, Schenk is to cease performing the bargaining unit work duties which he began performing, in May, 1989 when Eilerman went on extended sick leave after which he resigned from the position of Supervisor.

The State is required to post a vacancy for Penal Workshop Specialist in the Sheet Metal Shop, consistent with the applicable terms of the Agreement.

The grievance is sustained.

Dated: December 11, 1991

Cuyahoga County

Cleveland, Ohio

### **HYMAN COHEN, ESQ.**

Impartial Arbitrator

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