

STATE OF MICHIGAN  
FEDERAL MEDIATION & CONCILIATION SERVICE

Employer

-AND-

**Case: GIROLAMO #1**

Union

**ARBITRATOR 'S OPINION AND AWARD**

**BACKGROUND**

This dispute concerns a demand for Out-of-Class Pay. The Union maintains the Grievant has been performing the work of a higher classification and therefore he is entitled to the higher level of pay associated with the higher class. The Department responds that the Civil Service Department has jurisdiction over the matter in controversy and it determined the Grievant was performing the duties of the classification he holds and therefore an increase in pay for work out of class is unwarranted.

The Grievance before the Undersigned is displayed as follows:

"There are Equipment Technician 11's throughout the State that were hired doing the same duties and having the responsibilities that I do as a Equipment Tech, E10 and who are equally qualified. I have been performing a majority of duties and responsibilities of a Equipment Tech. 11 working as a Equipment Tech. E10. I feel that I have been working out of class as a Equipment E10 doing Equipment Tech 11 duties and responsibilities since my employment date as stated in Article 24 Section 7 of the contract between the Employer and Union."

The requested Remedy is the following:

"To be compensated the difference in pay between the Equipment Technician E10 and Tech 11 levels and made retroactive back 180 days from date of this grievance, and to be made whole in every way."

The Parties were unable to resolve their differences and Hearings were held before the Undersigned on December 6, 1994, and April 5, 1995. At the conclusion of the Hearings, the respective Advocates elected to file Post-Hearing Briefs, which have been received and considered.

The Parties Stipulated to the following items:

- (1) The Issue - Whether The Grievant Worked Out Of Classification In Accordance With The Provisions of Article 24, Section 7 Of The Collective Bargaining Agreement Between the Employer and Union.
- (2) The Grievant is an Equipment Technician 10.
- (3) The Grievant claims to be performing the work of an Equipment Technician 11.
- (4) The relevant time frame for this dispute is March 17, 1992 to the present.
- (5) The Grievant claims to be working as a Senior worker.
- (6) If the UNION prevails, the Grievant will be paid the difference between the rate of pay he was paid and the rate of pay he would have received had he been promoted from March 17, 1992 until such time as he is directed to cease performing the Equipment Tech. 11 duties.
- (7) A V Level is equivalent to an 11 Level.
- (8) The Grievant was assigned to and performed the work in question with the knowledge of his Supervisor.
- (9) With reference to the examples of work contained in the Class Specification for the Equipment Tech. 8-12, it is undisputed that the Grievant performs all of them except items 2, 3, 4, 6 and 8.

P.F., Grievant, began his employment with the Department in March, 1988. On March 17, 1991, P.F. accepted a position of Equipment Technician 10 at the Department's Gus Harrison Facility in Adrian. At the time he became an Equipment Technician, the Department had three (3) other Equipment Technicians - all were at the 11 Level - who were assigned to separate facilities. P.F. related that he had prior related experience and education with reference to his Equipment Technician position - Associate Degree, experience with medical equipment, etc. Insofar as the referenced examples of work for the Class of Equipment Technician are concerned, the Witness said he does the following:

(4) "Makes design sketches from which equipment is fabricated;"

(6) "Establishes specifications and makes computations for the manufacturing process;"

(8) "Designs and builds equipment for the measurement of physical and chemical changes."

He acknowledged he and none of the other Equipment Technicians do items (2) and (3):

(2) "Constructs specialized equipment designed by engineers, scientists, and equipment technicians;"

(3) "Assists engineers and scientists in designing equipment."

In support of his assertion relative to the above items he does perform, P.F. related that he has installed a camera system and fire alarm detection devices as well as the ongoing troubleshooting and general maintenance activities 'required at the facility. The Union submitted into evidence the Position Description of the other Equipment Technician 11's employed at the other Department facilities. P.F. said he performs the same basic tasks at the facility to which he is assigned. The Union supplied the Grievant's Position Description, which the Personnel Officer at Gus Harrison had indicated was an 11 Level job. The Department explained that Civil Service reviewed the matter and concluded the Grievant's position was properly classified at the 10 Level. The Grievant conceded that he was appointed to his position on March 17, 1991, and he did not dispute the 10 Level until March 17, 1992. He explained that in his first year all the equipment was under warranty - it was a new facility -and therefore his main function was to identify the appropriate Contractor to be called for any required repairs. After the first year, the facility was "on its own," which meant he had to perform the required repairs.

W.H., Manager Classification Division, Department of Civil Service, is responsible for Classification matters in the Department of Corrections. The Witness related that when a Department determines they need a particular position, they submit a description of duties and a suggested Classification Level which is then reviewed by Civil Service, which has ultimate authority to set the Class Title and Level. With reference to the Equipment Technicians, the Witness noted the Class Series encompasses five (5) Levels of difficulty - (8 through 12). The Equipment Technician 11 is a Lead or Senior worker. W.H. said that the fact an individual performs tasks listed on examples of work is not dispositive on the issue of Class Level because Civil Service also considers the degree of difficulty of the work performed.

The most directly relevant provision of the Collective Bargaining Agreement is the following:

"ARTICLE 24 - COMPENSATION

\* \* \*

Section 7. Working Out of Class.

A. Temporary Assignment. The Employer may temporarily assign an employee to perform duties and responsibilities of another classification title and/or level. Payment for time spent in such assignment shall be as provided in Subsections C, and D.

To be eligible for pay adjustment under such circumstances the employee must be directed to perform and must actually perform a majority of the duties and responsibilities which differentiates the higher classification from the employee's current classification.

No employee shall be worked out of class for nine (9) days, then replaced by another employee, who also works out of class. 'Temporary assignment' is intended to be temporary. It is not the intent to have a permanent assignment filled temporarily by one person several times or by a number of different persons; nor to work anyone out of class for several less-than-ten (10) -day periods solely for the purpose of avoiding payment at the higher level.

It is the express intent of the parties to incorporate by reference the Department of Civil Service, Bureau of Classification's policy memos (1), (13), and (17) and the policies as they pertain to compensation for working out of class as they existed on the date of approval of this Agreement by the Civil Service Commission.

\* \* \*

F. Appeals.

(1) Grievance relating to working out of class shall be appealable exclusively through the grievance procedure contained in this Agreement.

(2) Disputes relating to reallocation shall be appealable exclusively through procedures established by the Civil Service Commission."

\* \* \*

## DISCUSSION AND FINDINGS

The Union notes that the issue relative to the above provision of the Agreement is rather narrow:

"There was no dispute between the parties at the hearing regarding conditions one and two. The parties stipulated that the grievant was assigned to and performed the work in question with the knowledge of his supervisors. This leaves us with one question; Did the duties and responsibilities in question constitute a majority of the duties which differentiate the Equipment Technician 11 from the Equipment Technician 10?"

The Union accepts that the distinguishing fact of an Equipment Technician 11 is that the individual resolves the most complex technical problems - the standards set forth in the Class Specification. Beyond the Grievant's testimony relative to the tasks he performs, it is noted:

"There also was testimony that all other Equipment Technicians working in the Department of Corrections are classified at the 11 Level."

Insofar as the examples of work contained in the Class Description are concerned, the Union concludes that only twelve (12) of the seventeen (17) items are relevant in this case and argues:

"This leaves us with twelve elements to be considered under the Equipment Technician 11 concept. The parties agreed that the grievant performed all the relevant elements in question with the exception of #'s 4, 6 and 8. No evidence or testimony was presented by the Department that the grievant did not perform the elements in question at the most complex level, and the grievant presented substantial evidence illustrating that he performed the elements in question at the same level as all other Equipment Technician's 11. This means that at a minimum the grievant performed nine of the twelve elements that distinguish the Equipment Technician 11 from lower level Equipment Technicians. Since Article 24 Section 7 of the State of Michigan requires an employee to perform a majority (Emphasis Added) of the duties and responsibilities which differentiate the higher classification from the employee's current classification, in order to be working out of class, (See Joint Exhibit #1, Pg. 103) the grievant in this case clearly meets the final requirement for working out of class."

The Union says the Grievance should be granted.

The Department admonishes the Undersigned that he is without authority to make a determination of whether the Grievant is performing the duties of a higher classification "on the basis of his own review of the class specifications and other comparable positions." It is the Department's view that:

"Only the Civil Service Commission and its staff can determine the correct classification of a particular set of duties. Once Civil Service has classified a set of duties, the Arbitrator's role is to determine whether or not the employee has been temporarily assigned to perform those duties which differentiate he higher class from the employee's current class. Even if the Arbitrator determines that he has the authority to determine whether the grievant's duties were those of a higher level position, it is the Department's position that the Arbitrator should give great weight to the classification determinations assigned by (sic) the provisions of Article 11, Section 5 of the Michigan Constitution to make those determination in state classified civil service.

Secondly, the comparable higher level positions raised by the UNION are lead workers, not senior workers. It was admitted in the examination of the grievant regarding Union Exhibit 1 that Duty 4 was 'supervisory' and was not a claim being made by the grievant. Likewise in Union Exhibit 2, the fourth duty listed as 20% indicates: 'General Maintenance A. Supervisory Foreman for Maintenance Repair.' A concept for the Equipment Technician 11 is the lead worker, which includes responsibility for assigning and coordinating the work assignments of lower level equipment technicians. The grievant's position does not compare favorably with these two positions in that it does not have any supervisory or 'lead worker' duties. Clearly, the two positions claimed as comparable by UNION are functioning as lead workers, not senior workers and therefore are not performing the same job duties as the grievant. Without these positions as comparisons, the UNION is without any evidence that the grievant's position is performing duties outside of his current class and level.

The UNION has failed to present, any, specific job duties that the grievant is performing that have been recognized by Civil Service as the most complex. They were unable to identify any specific job duty that if removed would revert the responsibilities to those of an experienced worker or that specifically make the grievant eligible for working out of class. It is very telling that the grievant is making a claim for working out of class but has not requested a more permanent solution so that he does not continue to be worked beyond his classification. It is also very telling that the facility initially requested the position to be classified as an Equipment

Technician 11 and Civil Service determined the duties warranted only the E 10 level. The UNION was unable to indicate how the position has changed since that Civil Service determination.

Finally, working out of class claims are considered to be temporary assignments. The grievant has made no request to have the assignment cease. If this is an inappropriate assignment it is incumbent on the arbitrator to identify the job duties that should be removed from the grievant's position in order to restore him to his appropriate job duties. Again, it is the Department's contention that UNION could not, nor will the Arbitrator be able to identify such duties. Civil Service did not identify any such higher level duties when they classified the position as an E-10 based on Union Exhibit 3.

With reference to the Union's submission of other Arbitration Awards, the Department notes that the better reasoned Decisions recognized that Out of Class refers to temporary situations. The Department argues the Grievance should be denied.

By way of background, it should be noted that this dispute was the subject of a prior Arbitral Decision. Arbitrator Glazer, in denying the Grievance, said:

"I can understand and appreciate that P.F. feels that he is being unfairly treated insofar as Equipment Techs at other facilities are compensated at a higher level than he; however, I can't rewrite the contract to help him. By filing for reallocation and losing, P.F. left himself in the position where his grievance can only be regarded as an appeal, or as his second attempt for reallocation, as opposed to an independent attempt to obtain out of class pay based upon independent facts. Therefore, the grievance must be denied."

The Award by Arbitrator Glazer was challenged in Court and it was, in part, held:

"IT IS FURTHER ORDERED that the matter be remanded to a new arbitrator to consider, consistent with the grievance procedures and Article 24, section 7 of the collective bargaining agreement between the State of Michigan and the United Technical Employees Association, whether or not P.F. was working out of class as asserted in his grievance dated September 16, 1992."

The above Order was entered on April 13, 1994.

Arbitrator Daniel issued an Opinion and Award on June 27, 1994, wherein he stated the following:

"The contract, Article 24, Section 7, F, certainly has established and recognized a clear division of jurisdiction and authority - disputes relating to working out of classification are exclusively in the jurisdiction of the arbitrator, under the grievance procedures of the contract, while disputes relating to reallocation are exclusively to be reviewed through procedures established by the Civil Service Commission. In no respect, then, can a decision by an arbitrator be of any relevance or considered in the process of reallocation and, conversely, determinations and findings in the process of reallocation are not properly to be brought before the arbitrator as evidence in a particular case. Proofs such as analysis, fact finding, conclusions and final determinations are inappropriate in this matter because it is the obligation of the arbitrator to make his own analysis, fact finding and determination independently and based upon the record in the case."

Arbitrator Daniel further held that the fact that no vacancy existed and that the assignment was not temporary were not dispositive considerations to the issue - "The heart of this case still evolves around the question of whether the grievant was assigned a majority of the duties and responsibilities which differentiate the higher classification from the lower classification." The Arbitrator concluded the Grievant was performing the higher level of duties and found the Grievant was entitled to Out of Class Pay. He distinguished the case before him from other proceedings:

"Attempts by the grievant's supervisors, and himself to obtain reallocation, or requisition for a new position cannot be regarded as detrimental to his claim nor can statements or positions taken in other proceedings, even if inconsistent with this claim, deprive the grievant of his contractual right to have his claim determined by an arbitrator."

The point of the above is that it appears to the Undersigned that Arbitrator Daniel's Opinion and Award is in conformity with the Court Ruling relative to this case. That is to say, the issue of Out of Class Pay is within the Arbitrator's jurisdiction and the findings of Civil Service are not controlling.

P.F.'s un rebutted testimony revealed that when he began his tour as an Equipment Technician, the facility was new and the equipment was under warranty. The equipment in the facility after the time this Grievance was filed, was no longer under warranty. P.F. did delineate various tasks which are assigned to him - he is the only Equipment Technician working at the site. The Grievant's Position Description indicates the following:

" . . . function of the position. Maintains, installs, troubleshoots, and repairs all electronic and some electro-mechanic systems at these

facilities such as; fire alarm systems, communications systems, telephonic systems, and security alarm systems.

\* \* \*

. . . supervision or guidance given this employee. This employee needs minimum supervision to perform his work. General direction only.

\* \* \*

. . . special knowledges, skills and abilities an employee must have to function in this position. This employee must be able to perform a full range of equipment technician assignments and must be able to use considerable independent judgment (sic) in making decisions related to his work assignments."

The Department in reference to other Equipment Technicians at other facilities notes the individuals have supervisory duties. In one instance the supervision amounts to six (6%) percent of the assigned duties. In the other it is twenty (20%) percent, but the supervision apparently involves inmates. When all is said and done, the central duty of the Equipment Technicians relates to repair and maintenance and that corresponds with the duties assigned to P.F.. Finally, the Description of Duties provided by the P.F. was not rebutted except that a Civil Service Department witness said the duties were those of a 10, not an 11. The latter opinion is belied by the fact that the Equipment Technicians at the other facilities are Classified at the 11 Level.

To the extent that the Department encourages the Undersigned to give weight to Arbitrator Glazer's earlier Award, the Undersigned notes that his Decision, to a large extent, appears to be dictated by the fact that he felt his hands were tied:

"By filing for reallocation and losing, P.F. left himself in the position where his grievance can only be regarded as an appeal, or as his second attempt for reallocation, as opposed to an independent attempt to obtain out of class pay based upon independent facts. Therefore, the grievance must be denied."

It is interesting to note that the above is preceded by an expressed understanding and appreciation of the Grievant's feeling of being unfairly treated. At this juncture, this Arbitrator has the benefit of a Court directive, wherein he is authorized to make a determination on the basis of the provisions set forth in Article 24, Section 7.

Based on the above considerations, the Arbitrator concludes the Grievance has merit.

AWARD

The Grievance of P.F. is GRANTED as follows:

P.F. is to be compensated at the Equipment Technician 11 Level from March 17, 1992 until such time as he is directed to cease performing the Equipment Technician 11 duties.

JOSEPH P. GIROLAMO  
ARBITRATOR

DATED: June 29, 1995