In the Matter of Arbitration		
Between		Case Nos.:
OCSEA/AFSCME Local 11		11-09-(891026)-0119-01-06 11-09-(891023)-0120-01-06
and		
The State of Ohio, Bureau of Employment Services		Before: Harry Graham

Appearances: For OCSEA/AFSCME Local 11:

John Porter
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Rachel Livengood
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on October 31, 1990 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on November 25, 1900 and the record was closed on that date.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Did Management violate Article 18 of the Collective Bargaining Agreement between OCSEA and The State of Ohio in abolishing the positions of the Grievants? If so,

what shall the remedy be?

Background: The events that prompt this proceeding are not a matter of controversy. The State operates an office of the Bureau of Employment Services in Cincinnati. At that office it employed two people, Jimmy Williams and Edward Hammer, as Parking Facility Attendants. On October 16, 1989 both Mr. Williams and Mr. Hammer were informed that their positions as Parking Facility Attendants were abolished effective at the close of business on November 3, 1989. Both were to be permanently laid off at that time.

Grievances protesting the layoffs were filed. They were not resolved and the parties agree they are properly before the Arbitrator for determination on their merits.

Position of the Union: The Union acknowledges that there are three intertwined issues in this proceeding. These are: 1, questions involving the burden of proof, 2, the scope of an arbitrator's authority in cases involving job abolishment and 3, whether or not the State violated the Agreement when it abolished the positions of the Grievants?

With respect to the first issue the Union insists that it is the State that bears the burden of showing that the job abolishments are proper. The Agreement at Article 18 governs such actions. It makes reference to layoffs being made according to the Ohio Revised Code, Sections 124.321-.327 and the Ohio Administrative Code, Sections 123:1-41-01 through

22.

Section 123:1-41-23 of the Administrative Code specifies that appeals from layoff shall be made in accordance with the rules set forth by the Ohio State Personnel Board of Review. That Section 123:1-41-23 of the Administrative Code is not specifically mentioned in the Agreement is not an oversight according to the Union. No need for that to occur is the result of language found elsewhere in the Agreement. Section 43.02 of the Agreement establishes that where state statutes and rules provide benefits not specifically enumerated in the Agreement, those benefits shall continue. Section 123:1-41-23 does not conflict with the Agreement and provides a benefit to employees in that appeals from layoff will be made in accordance with the rules set forth by the State Personnel Board of Review.

Section 124-7-01(A)(1) of the Revised Code, utilized by the Personnel Board of Review in disputes of this nature, places the burden of proof upon the employer. It indicates that:

> appointing authorities shall demonstrate by a preponderance of the evidence that a job abolishment was undertaken due to ... a reorganization for the efficient operation of the appointing authority or for reasons of economy.

The Union anticipates an argument from the State that Section 123:1-41-23 was deliberately omitted from the Agreement in order that Section 124-7-01(A)(1) would not come

into operation. That characterization of events is hotly disputed by the Union. No need to specify 123:1-41-23 in the Agreement exists in its view. Appeals from layoff are not made to the State Personnel Board of Review. They are made to Arbitration. That does not relieve the State from proving its case according to the standards set forth in 124-7-01(A)(1) in the opinion of the Union. An argument that the parties deliberately omitted 123:1-41-23 from the Agreement in order to relieve the State from its burden of proving its case is absurd according to the Union. Section 124-7-01(A)(1) remains vital even though the forum for review has changed. The State must bear the burden of proving its case by the standard of preponderance of the evidence. That view was accepted by another arbitrator, Jonathan Dworkin, when he concluded that the Agreement at Article 18.01 placed the burden of proof to support a layoff remained with the State. That holding should remain unaltered according to the Union.

An arbitrator has authority review termination decisions on their merits the Union insists. Article 43.02 of the Agreement establishes that benefits conferred by the Ohio Revised Code will remain in effect. Nothing exists in the Code to limit the authority of an arbitrator to examine layoff decisions on their merits. The Union points out that in a previous decision I found as much. Nothing is different in this situation from the one that existed in that dispute

which involved the Department of Mental Health. The same result should occur in the opinion of the Union.

Turning to the action on its merits, the Union insists that the State has provided insufficient rationale to support it. The proper standard to apply in this situation has been enunciated by the Ohio Supreme Court in Bispeck v. Board of Commissioners of Trumbull County, 37 Ohio St. 3d 26, (1988). In Bispeck the State Personnel Board of Review opined that "Evidence of not having to pay the salaries on its own is not sufficient to prove increased efficiency and economy as required." (Quoted by the Court). That view is precisely the case in this situation according to the Union. There must be some rationale provided in order to support a layoff beyond an itemization of dollars to be saved. That has not been provided in this case. The internal documentation generated by the Employment Service that prompted the layoff decision at issue in this case itemized the salaries of the Grievants. It made no attempt to inquire whether or not the positions were needed. In fact, incident reports filed by the Grievants in the course of their duties indicate that the parking lot at the Cincinnati facility is a hotbed of vandalism and theft. Those reports are not self-serving documents. They were completed by the Grievants in the course of their duties before there was any inkling they would be subject to discharge. The parking facility attendants protect employees,

clients and automobiles. There is a demonstrable need for their services. It is insufficient to justify a layoff merely to assert that funds may be saved if employees are severed from the payroll. The Employer must show why positions are no longer needed to support a decision to layoff. When, on July 5, 1989, the Bureau informed the Department of Administrative Services of its intention to layoff it merely informed the Department that it was "reorganizing its security force and parking facility structure in order to achieve greater efficiency and economy. (Joint Exhibit 4). That amorphous rationale is insufficient in the light of the Supreme Court holding in Bispeck the Union insists. Invocation of the concepts of economy and efficiency without support do not meet the test set forth in Bispeck. As a result, the Union urges the Grievants be restored to employment with a make whole remedy.

Position of the Employer: The State claims that an arbitrator has no authority under the Agreement to examine layoffs on their merits. Article 25.03 of the Agreement provides the customary restrictions upon the authority of an arbitrator. No arbitrator may impose upon either party an obligation not required by the terms of the Agreement. At Article 18.01 the Agreement establishes that layoffs shall be made according to the Ohio Revised Code, Sections 124.321-.327 and Administrative Rule 123:1-41-02. As the State would have the

Arbitrator read those provisions of the Code and Rules respectively, they establish that the appointing authority may determine to abolish a position. Neither Article 18 nor 25 of the Collective Bargaining Agreement place any burden whatsoever upon the State to support a layoff decision on its merits before an arbitrator. The contents of the Administrative Code at Section 124-7 specify the fashion in which the State Personnel Board of Review is to examine layoff decisions. They do not pertain to arbitral review according to the State.

This dispute is different from the dispute presented to me in the Oakwood layoff arbitration in the State's opinion. (Case No. 23-12-(900208)-0179-01-09-06-13). In Oakwood it was the responsibility of the Director of the Department of Administrative Services who was to determine if a lack of work existed. In this case, the appointing authority is vested with authority to determine whether or not positions may be abolished. Under the Revised Code and the Administrative Rules it is the appointing authority which determines when a reduction in force is necessary. By incorporating the Code and the Rules into the Agreement the Union agreed to limit any review of layoff decisions to examination of procedural propriety. No review of their substantive validity may be made by an arbitrator the State asserts.

The State has labor agreements with unions other than OCSEA/AFSCME. Specifically, the State points to its Agreement with OEA/SCOPE which contains language that makes specific reference to the Employer proving the need for layoff. The OEA/SCOPE agreement specifically addresses the question of review of the merits of layoff decisions. That language is absent from the language of the OCSEA/AFSCME agreement. The difference between the two agreements is indicative of the fact that the State successfully secured different standards of review in the two Agreements it asserts. The Union did not place upon the State any burden to justify layoff decisions under this Agreement in its opinion.

The State is well aware of the decisions in Bispeck and Esselburne and urges they be discounted. By specifically referencing the Ohio Revised Code, Sections 124.321-327 and Administrative Rules 123:1-41-01 to 22 the Agreement excludes any reference to the State Personnel Board of Review according to the State. Article 25 of the Labor Agreement makes the Grievance Procedure the exclusive method of adjusting complaints arising under its terms. No reference is made to disputes that may have arisen in other forums, specifically the State Personnel Board of Review. Equating the Personnel Board of Review and arbitration is erroneous according to the State. In fact, Chapter 4117 of the Revised Code at 4117.10(A) indicates that the labor agreement and its

grievance procedure, including arbitration in essence supersede determinations of the State Personnel Board of Review. As that is the case, the State urges that the Bispeck and Esselburne holdings be disregarded.

In arbitration decisions involving the State and this Union Arbitrator John Drotning pointed out that when a Collective Bargaining Agreement exists it takes precedence over state law with respect to the employment relationship. By excluding sections of the Revised Code and Administrative Rules from the Agreement the parties determined they were to be given no consideration in disputes of this nature according to the State. Further, as Bispeck involves an interpretation of an action of the State Personnel Board of Review and the Agreement specifies arbitration as the proper forum for procedural review of layoff decisions, the State urges it be disregarded.

Should the merits of the layoffs at OBES be reached the State asserts they stand scrutiny. The Bureau of Employment Services is approximately 90% funded by the Federal Government. In order to cope with change in Federal funding the Agency places great emphasis upon efficient delivery of its services. It periodically reviews its operations. In the course of such a review it identified savings that would occur by terminating the Grievants. No benefits resulted for the Employment Service by continuing the positions. No work

has been redistributed to other people. The incident reporting forms completed by the Grievants were filed sporadically. They are insufficient to show a need for the positions.

The State indicates that the appointing authority, the Department of Administrative Services, determines upon layoffs. That OBES sought them in its request on July 5, 1989 is only part of the story. Employer Exhibit 1 is a compilation of documents that reflect Bureau discussions regarding the fashion in which efficiencies in operations might be made. It sets forth alternative scenarios for economies, among them the layoff of the Grievants. The State undertook a thorough review of various alternatives before determining on the layoffs. That the Bureau sent only one option to the Department of Administrative Services does not mean that all options were not considered. The options presented in Employer Exhibit 1 should be examined by the Arbitrator, not just those sent to the Director of DAS should be reviewed, if review is found appropriate according to the State.

The State points out that one of the Grievants, Edward Hammer, did not appear at the arbitration hearing. No plausible reason for his absence was proffered by the Union. The State urges that if consideration is given to the arguments of the Union and if they prevail, that Grievant

Hammer has forfeited any rights to pay and recall due to his failure to appear at the hearing.

Discussion: At Article 18 the Agreement specifically indicates that layoffs are to be made pursuant to the Ohio Revised Code, Section 124.321-327 and Administrative Rules 123:1-41-01 through 22. Conspicuous by the omission from the Agreement is Rule 124-7-01 of the State Personnel Board of Review. Omitted as well is Chapter 123:1-41-23 of the Administrative Code. In spite of these omissions the Union urges that the contents of those Rules and Chapters should be given consideration when determining the outcome of this dispute. If that contention stood in isolation, without reference to other language found elsewhere in the Agreement or decisions of other arbitrators, the position of the State might well prevail on this question. The absence of the language relied upon by the Union is not absolute. At Section 43.02 of the Agreement the parties have considered the situation that might arise when state statutes and regulations confer benefits upon employees in areas where the Agreement is silent. Any such benefits shall continue according to the Agreement. Obviously it was a benefit to employees prior to the institution of collective bargaining that the State Personnel Board of Review hear appeals from layoff. At Article 25, Section 25.01 the parties have agreed that the grievance procedure will be the "exclusive method"

of resolving grievances. Employees covered by the Agreement no longer have access to the State Personnel Board of Review in order to contest layoffs. They must grieve under the plain language of the Agreement. The parties altered the forum into which appeals would be taken. No longer do employees bring disputes to the State Personnel Board of Review. The Grievance Procedure, including arbitration, now serves as the avenue of appeal.

When appeals from layoff were taken to the State Personnel Board of Review they were made pursuant to its Rules. Among its Rules was 124-701(A)(1) which placed a burden upon the employer to demonstrate by "a preponderance of the evidence that a job abolishment was undertaken due to the lack of the continuing need for the position, a reorganization, for the efficient operation of the appointing authority, for reasons of economy or for a lack of work expected to last more than twelve months." There is nothing on the record in this proceeding to indicate that the State ever proposed or that the parties agreed in negotiations that that standard should not continue to be utilized in layoff disputes. Obviously that Rule represents a benefit to employees as contemplated by the Agreement at Article 43, Section 43.02. No testimony came before this Arbitrator to suggest that the State had on its agenda negotiation of a sweeping change in the way layoffs are reviewed in Ohio. The

parties readily agreed to alter the forum for review from the State Personnel Board of Review to arbitration. Nothing suggests that the fundamental basis of review was to be altered.

One of the most respected arbitrators in the United States has placed the burden for supporting layoff decisions squarely upon the State. In case No.G86-0020 Arbitrator Jonathan Dworkin opined that "Article 18, Section 18.01 of the Agreement incorporates certain Civil Service statutes and rules placing a burden upon the Employer to demonstrate rationale for the layoff decisions." Arbitrator Dworkin's opinion is as valid today as it was when it was first enunciated.

That the employer must prove the necessity of layoff by a preponderance of the evidence is well known in Ohio. The Supreme Court of the State reiterated that view in its holding in Bispeck. It is upon the employer that the burden falls to convince the reviewing authority that the necessity for layoff exists.

The criteria for evaluating layoff were cogently expressed by the Court of Appeals for Franklin County in Esselburne v. Ohio Department or Agriculture (1988) 49 Ohio App. 3d 37. The Court indicated that an employer may carry its burden if it compares current work levels to a period when a lack of work did not exist. That did not occur in this

situation. There is not a shred of evidence on the record in this case to demonstrate that a lack of work existed for the Grievants. Nothing indicates that the number of people visiting the OBES office in Cincinnati at the time of the layoff was fewer than at some prior time. There is nothing on the record demonstrating that there are fewer cars owned by employees in the OBES parking lot. Evidence in the form of incident reports shows that there are a continuing number of acts of vandalism and theft perpetrated upon vehicles of clients and employees alike. There is no evidence that the number of incidents has declined which might serve to support a decision to layoff these employees.

The State made reference to the amount of funds that could be saved by laying off the Grievants. It did not show it needed to save money. It did not indicate there existed a lack of funds. Only subsequently, at the arbitration hearing itself, did the State assert that funding for OBES was inadequate. That conclusion was not presented to the Director of the Department of Administrative Services when the layoffs were proposed to him. There does not exist before this Arbitrator any evidence whatsoever that the Bureau was experiencing a shortfall of funds. In fact, evidence exists to the contrary. Joint Exhibit 8 are the minutes of the Statewide Labor Management Meeting held on June 30, 1989. Officials of OBES indicated that the Bureau "did well in the

budget process." Elsewhere George Sheehan of the Bureau discussed the funds available to the Bureau and took the view that there "was more money than he thought OBES would receive." The Bureau has failed to demonstrate that the economies resulting from the layoff of the Grievants were necessary.

When the Administrator of OBES recommended abolishment of the Grievants positions on July 5, 1989 she made no reference to the number of people visiting the office where Messrs. Williams and Hammer work. No reference was made to there being any need whatsoever for the economies that would result from their discharges. As the State Personnel Board of Review noted (quoted in Bispeck) "Evidence of not having to pay the salaries on its own is not sufficient to prove increased efficiency and economy as required." That salaries would not have to be paid to the Grievants is the only supporting evidence before the Arbitrator to justify the layoffs in question. (Joint Ex. 4). As the Board noted, standing alone absent supporting rationale that is insufficient evidence to generate a finding that "increased efficiency and economy" of operations will result from the layoff of these Grievants.

This decision should not be read as prohibiting the State from laying off employees. If it demonstrates there exists a lack of funds or that a lack of work exists a layoff

might well stand neutral review. The State did not demonstrate either a lack of funds or a lack of work in this situation. Had it done so, a result different from the one in this case might have occurred.

That Grievant Hammer did not appear at the arbitration hearing does not require a finding that he should not be reemployed. He is a party to these grievances. He grieved in timely fashion under the Agreement. His testimony was not necessary in order to arrive at a determination of this dispute.

Award: The grievances of Jimmy Williams and Edward Hammer are SUSTAINED. The State is to recall them to employment forthwith. It is to pay them all wages they would have received but for this action. They are to receive all other benefits they would have received including accrual of seniority, holidays, vacations and leaves. Any health expenditures that would have been paid by the health insurance provided by the State are to be paid by the State.

Signed and dated this 16th day of December, 1990 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator