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In the Matter of Arbitration

Between

Fraternal Order of Police-  
Ohio Labor Council

and

The State of Ohio, Department  
of Mental Health

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Case No.:  
23-08-900516-0422-05-02

Before: Harry Graham

*#534*

Appearances: For Fraternal Order of Police-Ohio Labor Council

Ellen Davies  
Fraternal Order of Police-Ohio Labor Council  
222 East Town St.  
Columbus, OH. 43215

For Department of Mental Health

John Rauch  
Department of Mental Health  
30 East Broad St.  
Columbus, OH. 43266

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on December 12, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

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

Did the Employer violate the Collective Bargaining Agreement when it failed to fill police officer positions at Athens Mental Health Center? If so, what shall the remedy be?

Background: The events that give rise to this controversy are not disputed and may be simply stated. The Employer operates a facility in Athens, OH. known as the Athens Mental Health Center. Among the employees at that facility have historically been people classified as police officers. With the advent of collective bargaining some years ago the police at the Athens facility were included among employees in Bargaining Unit 2. Employees of that Bargaining Unit are represented by the Fraternal Order of Police-Ohio Labor Council. The number of police employed at Athens Mental Health Center has fluctuated. At times there have been as many as six people classified as police officers. As few as two people have been employed as police officers at Athens at other times. In addition to the members of the bargaining unit, there are normally two sergeants and a Chief. These latter people are not members of the bargaining unit. On occasion the Police Department at Athens Mental Health Center employes intermittent employees who perform the functions of a police officer. The intermittent employees are not in the bargaining unit.

In late Spring or early Summer 1989, sometime about June or July, two police officers at the Athens facility retired. This left the Athens Mental Health Center with no police officers who were members of the bargaining unit. In due course the Union filed a grievance protesting the absence of people in the bargaining unit. It was the opinion of the

Union that the failure of the State to employ bargaining unit members represented an impermissible erosion of the bargaining unit that was forbidden by the Labor Agreement. The grievance was not resolved in the grievance procedure of the parties and was advanced to arbitration by the Union. Position of the Union: The Union indicates that when it first became aware of the fact that there were no members of the bargaining unit employed at Athens it grieved. No delay attended upon its action. A grievance was speedily filed protesting the failure of the State to employ bargaining unit members at Athens. The time limits of the Agreement with respect to grievance filing were strictly complied with in the Union's view.

With respect to the substance of the grievance, the Union points to Section 7.03 of the Agreement and insists it was violated by the State. In relevant part the language of Section 7.03 provides that the State "shall not attempt to erode the bargaining unit." Such prohibited erosion is precisely what has occurred in this situation according to the Union. There were once six members of the bargaining unit employed at Athens. Over time that fell to two. Now there is not a single bargaining unit member working at Athens. Those developments meet the test of erosion of the bargaining unit in the opinion of the Union. Such erosion is prohibited by the clear language of the Agreement.

While there are no members of the bargaining unit

employed at Athens nonmembers continue to be employed in the Police Department. Specifically, there are two sergeants. They are supervisors who supervise nobody. According to the Classification Specifications for Police Sergeant (Employer Exhibit 2) the most important aspect of the Sergeant's position is to supervise police officers. The people they are to supervise are not employed at the Athens facility. The sergeants perform work formerly done by police officers. At the hearing they testified to that fact. Furthermore, a member of the management team at Athens testified to that as well. It is incontrovertible that supervisory personnel are performing work that should properly be performed by members of the bargaining unit. That cannot be permitted to occur the Union insists.

The Mental Health facility at Athens presently employes two intermittent police officers. They are not members of the bargaining unit and are limited to 1,000 hours of work per year. Like the sergeants, they are doing bargaining unit work. In this situation the evidence clearly points to the fact that the Agreement has been eroded. Consequently the Union seeks a determination that has occurred and an order directing the State to hire some number of police officer to work at the Athens Mental Health Center.

Position of the Employer: The State asserts the grievance was not filed in timely fashion under the grievance procedure of the parties. In the Fall of 1989 conversation was had between

management officials at Athens Mental Health Center and the Union Staff Representative who represented police at that time, Joel Barden. Barden became aware of the fact that no police were employed at Athens. He did nothing. No grievance was filed until the Spring of 1990. The time limits for filing a grievance had lapsed. The grievance is untimely and should be dismissed according to the State.

If the grievance is deemed to be arbitrable the State asserts that no violation of the Agreement has occurred. Section 7.03 of the Agreement prohibits the State from attempting to erode the bargaining unit. No such attempt has occurred. The State did not go out and deliberately determine to eliminate the bargaining unit at Athens. The bargaining unit disappeared as a byproduct of retirements. The State does not control retirements. They occur as a function of age and length of service. No attempt was made to erode the bargaining unit.

The State also points out that fiscal concerns have prevented the Department from replacing those officers who have retired. In fact, the Athens Mental Health facility has repeatedly requested permission to hire replacements. Those requests have been rejected by the Central Administration in Columbus.

The State asserts that the central feature of the Union argument in this case is misplaced. That bargaining unit work is being performed by nonbargaining unit personnel was not

raised in the grievance. It is not germane and should not be considered by the Arbitrator in determining the outcome of this dispute according to the State.

Article 31.01 of the Agreement refers to vacancies "which the Employer has determined to fill." The State decides whether or not to fill vacancies. It decided not to fill vacancies in the police department at Athens Mental Health Center. The language at Article 31.01 permits it to make that decision. Furthermore, the Management Rights article of the Agreement explicitly reserves to the employer the authority to "hire" employees. It may also direct the workforce, determine its adequacy and effectively manage it. That is what has taken place in this situation. Accordingly, the State urges the grievance be denied.

Discussion: Even if it is accepted that a management official at the Athens Mental Health Center mentioned the absence of police officers to Joel Barden, Union Staff Representative, in the Fall of 1989 that does not serve to render the grievance untimely. This dispute is of a continuing nature. That is, the alleged violation of the Agreement occurs each day. Furthermore, there is no pending liability to the State should the Union prevail in this case. Any remedy to be directed would be prospective in nature.

In this situation when the appropriate Union official, Jack Holycross, learned of the situation, he moved promptly to secure the filing of a grievance. It cannot be said that

the Union was dilatory in any way. The continuing nature of the occurrence plus the speedy action of Mr. Holycross compel a conclusion that the grievance is properly before the Arbitrator for determination on its merits.

The State is correct when it points out that management at the Athens facility did not engage in an "attempt" to erode the bargaining unit. To the contrary, they acted with dispatch to ensure that the bargaining unit was not eroded and that protection was provided to residents and staff. They did not violate the Agreement. However, their requests for police officers fell upon deaf ears at the higher reaches of officialdom. Their requests were repeatedly denied. It was not local management who violated the Agreement, it was their superiors in the hierarchy of the Department. By refusing repeated requests for police officers it was they who engaged in the attempted erosion of the bargaining unit that is prohibited by the Agreement. In this situation local management has scrupulously clean hands.

When the Union sought to indicate at the arbitration hearing that supervisory officials were performing bargaining unit work it was proceeding correctly. Evidence to that effect, if bona fide, would serve to prove the Union's case in this situation. In fact, the conclusion is inescapable that supervisors are performing work that is properly within the province of the bargaining unit. That work is not being performed by bargaining unit members. There are no bargaining

unit members. Tasks are being performed. No one other than supervisory personnel is available to perform those tasks. Those people cannot be performing the central element of their job description, supervision, as they have no one to supervise. Those that they supervise are not part of the workforce at Athens Mental Health Center.

To the extent that intermittent employees are at work, they too are performing work properly within the province of bargaining unit personnel. If the State can employ intermittent employees in lieu of bargaining unit members it calls for no stretch of the imagination to conceive of a situation where the bargaining unit might well disappear. If the State seeks to layoff people it may do so, provided that the proper procedures specified in the Agreement are followed. It may not have duties that are properly performed by bargaining unit members performed by people who do not belong to the bargaining unit.

Section 31.01 of the Agreement, cited by the State in its defense, is inapplicable to this dispute. It refers to "promotions." Promotions are not at issue in this case. Nothing is on the record indicating that the State would fill police officer positions at Athens with other than entry level positions.

Similarly, Article 6 of the Agreement, dealing with Management Rights, does not apply to this dispute. Language in that Article provides that "except to the extent modified



by this Agreement" the Employer retains certain rights. But Section 7.03 of the Agreement does modify Article 6 by providing that "Management may not attempt to erode the bargaining unit...." That is precisely what has occurred in this situation.

Award: The grievance is SUSTAINED. Testimony from at the hearing from Sergeant Bobo indicated that the number of people resident at Athens is substantially the same as when the two police officers retired in the middle of 1989. The figure two (2) provides a guide for remedy in this situation. If the Employer believed that two (2) police officers were sufficient at that time and local management has requested that two (2) be hired, nothing exists to indicate that some other number would be more appropriate. The Employer is directed to hire two (2) police officers for the Athens Mental Health Center forthwith.

Signed and dated this 21<sup>st</sup> day of December, 1990 at South Russell, OH.

Harry Graham  
Harry Graham  
Arbitrator