STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF
MENTAL RETARDATION AND DEVELOPMENTAL
DISABILITIES, BROADVIEW DEVELOPMENTAL CENTER

-and-

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

GRIEVANCE: Paul Caldwell (Abolishments)

OCB Case No.: 24-03-(88-10-25)-0079-01-04

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date:

APPEARANCES

For the Employer

Greg Darling	Superintendent and Expert Witness
Susan Arnoczky	Chief of Quality Assurance
Carol Kirsh	Programming Director
Marilyn Reiner	Labor Relations Officer
Michael P. Duco	Advocate
Rachael Livingood	Assistant Advocate

For the Union

Paul Caldwell	Grievant
John Delaney	Expert Witness
John Feldmeier	Arbitration Clerk
Edith Bargar	Arbitration Clerk
Gladys Evans	Therapeutic Program Worker
Dorothy Schmidt	Machine Operator II (Retired)
Hattie Sanders	Food Service Coordinator II
Rufus Sharpe	Food Service Worker

Judith Machino	Therapeutic Program Worker
Carol Ann Kuhar	Custodial Worker
Homer J. Michaud	Corrections Officer
Gary C. Bowling	Safety and Health Coordinator
Lucy A. Cornett	Therapeutic Program Worker
Linda K. Fiely	General Counsel
Bruce A. Wyngaard	Director of Arbitration Services

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Mental Retardation and Developmental Disabilities, Broadview Developmental Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986-July 1, 1989. (Joint Exhibit 1).

The arbitration hearing was held on January 7-8, 1991 at the Broadview Developmental Center, Broadview Heights, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUES

Does the Collective Bargaining Agreement (Joint Exhibit.) provide the Arbitrator with authority to review the Employer's justification for abolishing the contested positions?

Does the Employer have the burden of proof in establishing by the preponderance of the evidence that it was justified in abolishing the contested positions?

Did the Employer violate the Collective Bargaining Agreement (Joint Exhibit.) when it abolished the bargaining unit positions? If a violation is established, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION

...

Section 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 supervisors 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.

...

The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units.
(Joint Exhibit 1, Pg. 2)

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, al the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9.
(Joint Exhibit 1, Pg. 7)

ARTICLE 18 - LAYOFFS

Section 18.01 - Layoffs

Layoffs of employees covered by this Agreement shall be made pursuant to ORC 124.321-.327 and Administrative Rule 123:1-41-01 through 22, except for the modifications enumerated in this Article.

Section 18.02 - Guidelines

Retention points shall not be considered or utilized in layoffs. Performance evaluations shall not be a factor in layoffs. Layoffs shall not be a factor in layoffs. Layoffs shall be on the basis of inverse order of state seniority.

Section 18.03 - Bumping in the Same Office, Institution or County

The affected employee may bump any less senior employee in an equal or lower position in the same, similar or related class series within the same office, institution or county (see Appendix I) provided that the affected employee is qualified to perform the duties.

Section 18.04 - Bumping in the Agency Geographic Jurisdiction

If the affected employee is unable to bump within the office, institution or county, then the affected employee shall have the option to bump a less senior employee in accordance with Section 18.03 within the appropriate jurisdiction of their Agency (see Appendix J).

Section 18.05 - Limits

There shall be no bumping in Unit 3. There shall be no inter-agency bumping. There shall be no inter-unit bumping except in those cases allowed by current administrative rule or where a class series overlaps more than one unit.

Section 18.06 - Geographic Divisions

The jurisdictional layoff areas shall not be utilized. Instead, the geographic divisions of each agency shall be used (see Appendix J).

...

(Joint Exhibit 1, Pgs. 27-28)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the Arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the Arbitrator does not have authority to modify the termination of an employee committing such abuse.

...

(Joint Exhibit 1, Pgs. 34-35)

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

...

(Joint Exhibit 1, Pgs. 37-38)

Section 25.03 - Arbitration Procedures.

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the Arbitrator.

...

Questions of arbitrability shall be decided by the Arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the Arbitrator

shall then proceed to determine the merits of the dispute.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The Arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

...

(Joint Exhibit 1, Pg. 40)

ARTICLE 43 - DURATION

Section 43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

Section 43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

...

(Joint Exhibit 1, Pg. 62)

JOINT STIPULATIONS

1. The bumping procedure as outlined in Article 18 were (sic) properly followed.

2. The case is properly before the Arbitrator.

3. Joint Exhibit 3 is the only document provided to DAS as the Department's rationale supporting the abolishments.

4. DAS did not provide (a) response to the rationale submitted by the

Department.

5. The institution has not been recertified for the purposes (sic) of receiving Medicaid recertification.

6. There is nothing in the personnel records of Paul Bledsoe, Bill Edwards, Roman Karis, (and) Gary Kosich that indicates certification for training in providing fire and/or safety training to others. Homer (Joe) Michaud's file reflects his participation in such training.

Linda Fiely Michael P. Duco

(Joint Exhibit 23)

CASE HISTORY

Greg D. Darling, served as Superintendent at Broadview Developmental Center from April 16, 1988 until September of 1989. Upon arriving at the institution, he was purportedly faced with the initial task of regaining certification for Medicaid funding purposes. It appears that certification was lost as a consequence of a prior Federal survey (Joint Exhibit 9) conducted during January of 1987. This survey identified a number of deficiencies; some of which included the following general deficiency categories: Inappropriate staffing levels; failure to provide clients with acceptable training and habilitation services; inappropriate supervision by Qualified Mental Retardation Professionals (QMRP) of the resident's individual plan of care; failure to implement staffing in-service programs in enhancing habilitation skills; direct care staff not providing acceptable standards of care regarding habilitation planning and delivery; lack of structured resident activities; and lack of knowledge of how to successfully

implement, monitor and record measurable and behavioral data. Based upon the previously identified survey (Joint Exhibit 9), observations and additional survey results (Joint Exhibits 12 and 15), Darling concluded that a major reorganization was necessary. This reorganization was primarily based upon a determination that formal resident programming had to be dramatically increased to accomplish the goal of "normalizing" the residents' daily programming activities. He determined that human resources had to be added to increase coverage; but he did not have the financial resources to supplement his existing staffing levels.

An abolishment plan (Employee Exhibit 1) was developed as a consequence of these perceived needs. The Employer planned to abolish twenty (20) full-time positions which would, in turn, allow the creation of an additional forty (40) part-time positions. Darling submitted this document as well as his abolishment proposal to the Assistant Director of the Department.

On August 22, 1988, Robert E. Brown, the Director of the Ohio Department of Mental Retardation and Developmental Disabilities, notified the Department of Administrative Services that it was considering the abolishment of several positions at the Broadview Developmental Center. The notification contained the following relevant particulars:

"...

The Department of Mental Retardation and Developmental Disabilities is filing the justification in order to comply with various sections of the Ohio Revised Code and Administrative Rules. We are abolishing these

positions as a result of a reorganization for the efficient operation and/or reasons of economy at Broadview Developmental Center.

..."

(Joint Exhibit 3, Pg. 1)

It should be noted that Brown sought the approval of thirty-four (34) abolishments and provided justifications for each job classification. Not all of the abolished positions were represented by the present bargaining unit; only twenty-five (25) positions possessed such standing.

The contested abolishments were implemented during the period September 26-October 14, 1988. This managerial decision engendered a series of bumps and some layoffs.

On October 14, 1988, Paul D. Caldwell, a Union Representative filed a grievance on behalf of all affected employees. The Statement of Facts contained the following contentions:

"...

The Superintendent abolished approximately 25-30 jobs at Broadview without justification pursuant to 124-7-01 of the Ohio Civil Laws on September 26, 1988 and notified 9/28/29/30 of 1988.

..."

(Joint Exhibit 2)

On February 14, 1889, the Employer issued a 3rd Step Grievance Hearing Response. The grievance was denied. As justification, the Employer asserted that the abolishments were consistent with the provisions of Article 18 and paragraph (D) of the Ohio Revised Code Section 124.321.

The Parties were unable to settle the grievance during subsequent

stages of the grievance procedure. It should be noted, however, that the Parties were able to settle their differences concerning a number of abolishments during the course of the two-day hearing. The remaining abolishments and related justifications will be discussed in a subsequent portion of this Award.

THE PARTIES' SUBSTANTIVE ARBITRABILITY POSITIONS

The Position of the Employer

It is the position of the Employer that the abolishment decisions are not arbitrable because of certain substantive bars. This position was based upon a series of contract interpretation arguments, application of recent court decisions and pertinent sections of the Ohio Revised Code and Ohio Administrative Code.

A reserved management rights argument was proposed by the Employer in support of its claim that the present matter was outside the scope of the Arbitrator's authority. Article 5 references Ohio Revised Code Section 4117.08(C) which allows a public employer to determine matters of inherent managerial policy in areas of discretion, organizational structure, and/or layoff decisions. In this instance, the Parties negotiated unambiguous language covering layoffs and abolishments as codified in Article 18 Section 18.01, moreover, specifically incorporates Ohio Revised Code Sections 124.321-327 and Administrative Rule 123:1-41-01 through 22. By enumerating these specific provisions, and excluding others, the Parties never intended to incorporate Ohio

Revised Code Section 124.03(A) and Ohio Administrative Code Section 123:1-41-23. Both of these sections deal with layoff or displacement appeals to the State Personnel Board of Review (SPBR).

The Employer asserted that the Arbitrator's authority is not supplemented by the review powers provided the State Personnel Board of Review. Such a supplement would specifically conflict with the Arbitrator's authority as enumerated in Section 25.03 of the Agreement. This provision expressly provides that:

"...

The Arbitrator shall have no power to add to, subtract from or modify the terms of the Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of the Agreement.

..."

The Employer maintained that in this instance Bispeck[1] is not governing case law. Bispeck was distinguished because the recent matter involves a collective bargaining relationship which expressly incorporates Ohio Revised Code Section 4117.08(C) and the layoff and abolishment references in Article 18.01. In Bispeck, moreover, the court relied upon Ohio Revised Code Section 124.03(A) when it determined that the State Personnel Board of Review was empowered with the authority "to determine whether the layoff was necessary and whether proper layoff procedures were followed." Since Article 18 never specifically incorporated this section of the Code, the Bispeck ruling

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[1]Bispeck v. Bd. of Commrs. of Trumbull County. (1988), 37 Ohio St. 3d 26.

does not serve as a supplement to the Parties' Agreement. Unlike the State Personnel Board of Review, this Arbitrator does not have the authority to review the substantive propriety of any abolishment decision.

The Employer proffered that the principles enumerated in State, Ex Rel. Clark, vs. Cleveland Transit[1] support its arbitrability argument. In Clark, the court found that when a conflict exists between a portion of the Code and the provisions of a collective bargaining agreement, Ohio Revised Code Section 4117. 0(A) requires that the parties be subject to all laws pertaining to wages, hours and terms and conditions of employment when no specification as to such a matter is made. The Employer alleged that here a conflict does exist with the Code because the Parties incorporated certain pertinent portions of the Code and omitted others. As such, Clark was not viewed as controlling.

Instead of Clark, the Employer placed a great deal of emphasis on Rollins v. Cleveland Hts.-University Hts. Bd. of Edn.[2] In Rollins, the court held that collective bargaining agreement requirements must prevail because of the clear conflict between the contract and the statutory provisions.

The Parties specifically incorporated Ohio Revised Code Section 124.321(D) and Ohio Administrative Code Section 123:1-41-04(B). Both

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[1]State, Ex Rel. Clark, vs. Greater Cleveland Regional Transit Auth. (1990), 48 Ohio St. 3d 19.

[2]Rollins v. Cleveland Hts.-University Hts. Bd. of Edn. (1988), 40 Ohio St. 3d 123.

statutory provisions discuss the role of the appointing authority in determining whether a position should be abolished. When the Union agreed to this language, as well as the reserved management rights contained in Article 5, it should have understood that the Employer retained all rights not expressly abridged by other terms contained in the Collective Bargaining Agreement (Joint Exhibit 1).

The Employer also argued that Section 43.02, entitled Preservation of Benefits, does not authorize arbitral review of an abolishment decision's rationale. The Agreement (Joint Exhibit 1) is not silent because Article 18 and Section 25.03 deal with the subject; both fail to provide an Arbitrator with this authority. Also, Section 43.02 discusses the continuance of benefits. The State Personnel Board of Review's authority to review the substantive rationale of an abolishment is not a benefit as envisioned by this provision. Further, a benefit is limited to economic conditions and other supplements.

Further clarification of the Employer's "benefit" theory is suggested in the inter-relationship of Sections 43.01 and 43.02. Both sections can only be given meaning if one distinguishes a "benefit" from a "beneficial interest."

Finally, the Employer urged the Arbitrator to discount prior arbitration awards rendered by other panel Arbitrators. These decisions are not precedent setting because the doctrine of stare decises does not apply.

The Position of the Union

In the opinion of the Union, the present matter is arbitrable

because the Arbitrator has been empowered by the Parties to review the substantive bases for the abolishments.

The Union asserted that the Parties intended to transfer the majority of the Civil Service system, and its related statutory obligations, into the Agreement (Joint Exhibit 1). Some of the particulars, however, were modified. Most importantly, the authority of an arbitrator to review layoff decisions other than the State Personnel Board of Review. Review authorization was codified in Section 25.01(A) of the Agreement (Joint Exhibit 1) which provides broad authorization in terms of scope, and identifies the grievance procedure as the exclusive method of resolving grievances. These clearly articulated requirements justified the exclusion of Ohio Administrative Code Rule 123:41-23 from the Parties' Collective Bargaining Agreement (Joint Exhibit 1). There was no need to reference this provision in light of an arbitrator's responsibilities concerning layoff and abolishment appeals.

Further support for its arbitrability thesis is purportedly found in the requirements contained in Section 25.03. This provision precludes and arbitrator from imposing a limitation on the Parties not specifically required by the expressed language of the Agreement (Joint Exhibit 1). Since Article 18 fails to specify any limitation on an arbitrator's authority to substantively review an abolishment decision, Section 25.03 prohibits such a requirement.

A number of awards authored by other panel arbitrators were presented by the Union. All of these prior awards substantiated the Union's arguments regarding the propriety of an arbitrator's review

powers.

In a similar fashion, case law precedent was referenced in support of third party review of abolishment decisions. Bispeck, Esselburne v. Ohio Department of Agriculture[4], and State, ex rel Ogan v. Teater[5] found that the State Personnel Board of Review is empowered not only to review procedural compliance but substantive compliance with Code requirements.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE ARBITRABILITY CLAIM

From the evidence and testimony introduced at the hearing, a thorough review of relevant contract provisions, and pertinent statutory requirements, this Arbitrator concludes that the grievance is arbitrable. In this particular instance, this Arbitrator finds that he does not have to go outside the four corners of the Agreement (Joint Exhibit 1) to establish that he has the authority to review whether the Employer has complied with procedural and substantive abolishment requirements. The grievance is properly before this Arbitrator.

Arbitrability seeks to answer the question: Is the subject matter of the grievance or dispute comprised within the agreement to arbitrate made by the parties? As such, this question typically involves matters

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[4]Esselburne v. Ohio Department of Agriculture. (1988), 49 Ohio App. 3d 37.

[5]State, ex rel Ogan v. Teater. (1978), 54 Ohio St. 2d 235.

dealing with an arbitrator's jurisdiction to hear the dispute and his/her authority in deciding the dispute on its merits.

Such matters are of extreme import because an arbitrator is the agent of both parties. An agent jointly appointed by both parties to decide their differences and to make a "contract settlement" for them. The jurisdiction, therefore, of the arbitrator, as a mutual agent, extends only to those matters which the parties by their submission agreement or contract empower the arbitrator. If the parties have not empowered their agent to make a "contract of settlement" of their dispute, the arbitrator is without jurisdiction to fashion a settlement. As a consequence, the matter in dispute is not arbitrable. Even though an arbitrator has jurisdiction because he/she has been properly empowered, in exercising his/her jurisdictional prerogative an arbitrator may fashion a "contract settlement" which exceeds his/her delegated authority. When this takes place, the "contract settlement" becomes potentially voidable as a function of court review.

Even though Article 5 and its addendum, Ohio Revised Code Section 4117.08(C), Numbers 1-9 allow the Employer to determine organizational structure and layoffs, these rights are not totally unfettered and are subject to review. Article 5 contains a proviso which underscores the Parties acknowledgement of this requirement. It states in pertinent part:

"...

Such rights shall be exercised in a manner which is not inconsistent with this Agreement.

..."

The Employer's substantive arbitrability claim would conflict with other relevant portions of the Agreement (Joint Exhibit 1) because the Parties have empowered this Arbitrator, their agent, to make a "contract of settlement" of their dispute.

Article 25 contains provisions dealing with the grievance procedure which serve to define the scope of an Arbitrator's authority. The Parties, in Section 25.01, have defined a grievance in extremely broad terms. The definition encompasses any (Arbitrator's emphasis) difference, complaint or dispute affecting terms and/or conditions of employment regarding the application, meaning or interpretation of the Agreement (Joint Exhibit 1). Obviously, the procedural and/or substantive underpinings of an abolishment decision dramatically impact employees' terms and conditions of employment. Also, the application and meaning of Article 18 requirements fall well-within this proviso. Noting in Section 25.01 precludes the filing of a grievance contesting the propriety of an abolishment decision. As a consequence, this section not only provides these types of grievances with proper standing, it also serves as an empowerment vehicle because it fails to clearly articulate any limitation on an Arbitrator's authority.

Section 25.03, Arbitration Procedures, contains language which supports the Union's arbitrability argument. A ruling in the Employer's favor would result in a direct violation of the express terms negotiated by the Parties. This provision prohibits an Arbitrator's imposition "...on either party a limitation or an obligation not specifically

required by the expressed language of the Agreement." Nothing in the Collective Bargaining Agreement (Joint Exhibit 1) expressly prohibits an Arbitrator from engaging in a review of procedural and substantive abolishment layoff decisions. Article 18, Section 25.03, Article 5, and Section 25.01 do not contain a prohibition dealing with an Arbitrator's authority in this area. Such a limitation needs to be clearly and unequivocally articulated; a reserved rights reference does not serve as an adequate bar. As such, a ruling in the Employer's favor would impose a limitation on the Union which it has not specifically agreed to by the express language negotiated by the Parties. Interestingly, the Parties have agreed to a specific restriction on an Arbitrator's authority when dealing with the termination of an employee found to have abused a patient or another in the care and custody of the State of Ohio. Section 24.01 may prevent an Arbitrator from modifying a termination decision. The Agreement (Joint Exhibit 1) would have to contain similar language to limit an Arbitrator's authority in the abolishment/layoff area.

The Employer's argument is further rebutted by language contained in Section 43.02 which deals with the preservation of employee benefits. This provision provides for the continuance of benefits conferred upon employees by statutes, regulations or rules where the Agreement (Joint Exhibit 1) is silent. The Parties never specifically limited the "benefits" in question to pecuniary or economic gains. Such intent should have been supported by bargaining history or specific limitations contained in this section of the Agreement (Joint Exhibit 1). In fact,

the provision references Ohio Revised Code Chapter 119 which discusses, in pertinent part, administrative procedures, and does not deal with "economic" considerations.

It is abundantly clear that prior to the onset of statute-based collective bargaining in the State of Ohio, civil service employees were granted the benefit of abolishment and layoff appeals. This appeals process now rests within the grievance and arbitration sections negotiated by the Parties. The grievance, therefore, is properly before the Arbitrator.

THE PARTIES' BURDEN OF PROOF POSITIONS

The arguments proposed by the Parties regarding this issue are virtually identical to those proposed in the section discussed above which dealt with the arbitrability issue. As such, there is no need to re-visit these arguments.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE BURDEN OF PROOF ISSUE

The focus of the present dispute deals with Ohio Administrative Code Rule 124-7-01(A)(1) which states in pertinent part:

"...

124-7-01 Job Abolishments and Layoffs. (A) Job abolishments and layoffs shall be disaffirmed if the action is taken in bad faith. The employee must prove the appointing authority's bad faith by a

preponderance of the evidence. (1) Appointing authorities shall 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.

..."

Both Parties offered arguments dealing with the application of this provision. On the basis of recent court decisions and relevant contract language, the Employer is required to demonstrate by a preponderance of the evidence that the job abolishments were properly implemented.

In Rollins, the Supreme Court of Ohio held that Ohio Revised Code Section 4117.10 (A) requires that collective bargaining agreement requirements must prevail when there is a clear conflict between a collective bargaining agreement and a statutory provision. The present matter is not controlled by the principles articulated in Rollins because a conflict does not exist. Further, the fact situation falls well-within the principles enunciated in the more recent Clark decision.

In Clark, the court concluded that no conflict existed between a statutory provision and the provisions of a collective bargaining agreement since:

"...

The Agreements at issue did not specifically address the matter of prior service credit for the purposes of computing vacation leave. R.C. 4117.10(A) clearly requires that the parties be subject to all laws pertaining to wages, hours and terms and conditions of employment when no specification as to such a matter is made.

..."[1]

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[1] Supra note 2, at 23.

The present fact situation is virtually analogous to the one discussed in Clark.

Here, Article 18, and specifically Section 18.01, do not specifically address whether an appointing authority must substantiate the abolishment decision by a preponderance of the evidence or any other standard of proof. The Parties more specifically, did not specifically address this matter. As such, Ohio Revised Code Section 4117.01(A) requires that the Parties be subject to the evidentiary standard enunciated in Ohio Administrative Code Rule 124-7-01(A)(1).

Once again, Section 43.02 provides additional credence to this interpretation. Ohio Administrative Code Rule 124-7-01(A)(1) was employed in appeals taken to the State Personnel Board of Review. Neither the record of the present proceeding nor any contractual term or provision negotiated by the Parties indicate that the above-mentioned burden requirement was somehow discontinued by the Parties. This requirement is, indeed, a benefit because it enhances the value of the property or rights of those covered by the Collective Bargaining Agreement;, and particularly Article 18 provisos.[7] As such, the benefits contained in Ohio Administrative Code Rule 124-7-01(A)(1) shall continue and shall govern the propriety of any abolishment decision.

THE MERITS OF THE FILING DEFECT CLAIM AND THE RATIONALE UNDERLYING

[7]Hooper v. Merchants' Bank and Trust Co., 130 S.E. 49.

THE ABOLISHMENT DECISIONS[1]

The Position of the Employer

The Employer posited that by a preponderance of the evidence the abolishment of positions was done in accordance with Ohio Revised Code Section 124.321(D). Arguments were offered dealing with the suitability of certain evidence and the justifications surrounding the abolishment decisions.

The Employer claimed that it was not barred from presenting into evidence anything outside the rationale submitted to DAS (Joint Exhibit 3). Nothing in Article 18, nor the Ohio Revised Code and the Ohio Administrative Code provisions contained therein, bar the introduction of such evidence and testimony. Also, a similar bar is unsupported on the basis of equity considerations and the arbitration process's standing as a "De Novo" hearing. The Employer maintained that it merely presented documents developed prior to the formal submission to DAS. As such, this evidence and testimony were viewed as more credible and relevant than the documents and testimony introduced by the Union which dealt with post-abolishment data.

The Employer asserted that the reorganization which engendered the abolishments was accomplished for efficiency purposes. Superintendent Darling was faced with an allocation of resources dilemma. He had to

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[1]This section will deal with arguments posited by the Parties regarding the underlying rationale for the abolishments. Subsequent portions of the Award will deal with the merits of the individual grievances.

reorganize the facility to eliminate one key impediment to Medicaid recertification; the day programming and direct care function of the institution. This requirement necessitated a redeployment of manpower needs during certain times of the day; with more focused and increased staffing requirements. With additional attempts to "normalize" daily activities, direct care responsibilities would be reduced because programming requirements would be accomplished in more structured classroom settings.

To accomplish this desirous outcome, Darling decided to transfer existing man hours to other areas by abolishing certain positions and establishing a series of part-time positions. This reorganization, moreover, strengthened "day programming" requirements which resulted in a more efficient organization. The resident population was provided with more focused and purposeful "day programming."

In addition to Darling's testimony, Susan Arnoczky, Chief of Quality Assurance, provided testimony which supported Darling's rationale. Arnoczky alleged that the abolishments did not negatively impact the Employer's certification attempts. She, moreover, refuted several allegations raised by the Union's expert witness. Part-time employees did provide flexibility in terms of staffing. The "normalization" process engenders a great deal of "dead time" during the day when the residents are in classrooms. This programming effort requires extensive staffing during the beginning and end of the day. Part-time scheduling allows the institution to accomplish these staffing and programming goals.

The Employer emphasized that the Union failed to properly rebut the rationale employed to justify the abolishments. The Union never challenged the Employer's purported need to reorganize as a consequence of Medicaid certification problems. Also, the Union failed to suggest an alternative staffing strategy.

The Position of the Union

The Union maintained that the appointing authority's rationale and supporting documentation (Joint Exhibit 3) were defective which should result in the overturning of all abolishments. This defect, more specifically, served as a violation of Ohio Revised Code Section 124.321(D). The Union asserted that the documentation provided facts but did not articulate how the reorganization would result in economy and/or efficiency of operations. The rationale (Joint Exhibit 3) merely discussed various employee transfer proposals.

For a number of reasons, the Union asserted that the Employer failed to establish that the abolishments were appropriate by a preponderance of the evidence. These deficiencies dealt with various aspects of the Employer's rationale.

First, the Employer's reliance in I.C.F.R. regulations was not totally supported. Although Darling maintained that he relied on these regulations, he never testified that he relied on the regulations in effect after the implementation of the abolishment decision. As such, his decision to reorganize based upon both sets of regulations seemed to be misplaced. This conclusion tends to minimize Arnoczky's testimony regarding the import of the most recent guidelines vis-a-vis their

justification for the abolishments. Arnoczky stated that the new regulations were never discussed as a basis for the abolishments but for recertification considerations.

In a related fashion, the Employer's certification theory as a basis for the abolishments was found to be lacking. Darling admitted that the institution never obtained certification after the abolishments were implemented. In fact, at the present time, the facility is being monitored by a court appointed Special Master. He has mandated no additional layoffs until the facility has achieved substantial certification. Recently, the District Court has adopted the layoff mandate and other conditions specified by the Special Master (Union Exhibit G). These court-directed requirements indicate that maintenance of current staffing levels are necessary for certification. As such, by abolishing positions rather than maintaining staffing levels, the Employer jeopardized the facility's certification goal.

Second, the reorganization relied considerably on the use of part-time employees for the purpose of efficient manpower utilization. And yet, the Employer failed to provide any data or cost/benefit analyses which documented potential or actual savings. Daring, moreover, did not analyze the potential costs associated with the reorganization. Costs which were not properly analyzed include: Overtime usage; sick leave and lost time; increased supervision costs; and other general layoff costs.

Third, prior surveys identified hospital aide proficiency concerns and programming difficulties. Various recommended corrections never

specifically identified reorganization as a plausible solution. Other less severe measures could have resulted in equally efficient outcomes. Operational alternatives such as the quality of supervision and program goal assessment should have been addressed prior to the reorganization attempt.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE FILING DEFECT CLAIM AND THE RATIONALE UNDERLYING THE ABOLISHMENT DECISIONS

In the opinion of this Arbitrator, the Employer did not violate Ohio Revised Code Section 124.321(D) because of documentation filing deficiencies evidenced in the rationale (Joint Exhibit 3) submitted to the Department of Administrative Services. The abolishments, therefore, cannot be overturned on the basis of this theory.

Ohio Revised Code 124.321(D), as pertinent, provides as follows:

"...

The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority. Appointing authorities shall themselves determine any position should be abolished and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of abolishment.

..."

It should be noted that this portion of the statute allows appointing authorities, themselves (Arbitrator's Emphasis), to abolish jobs. As such, the Appointing Authority rather than the Director of Administrative Services retains the power to abolish jobs without the

need for prior approval.[9] The requirements placed on an appointing authority concerning the propriety of a statement of rationale seem to be quite broad. The Supreme Court of Ohio has articulated the following procedural standard:

"In order for a layoff to be effective the appointing authority must substantially comply with the procedural requirements promulgated by the Director of Administrative Services pursuant to R.C. 124.32. The State, ex rel. Brittain, v. Board of Agriculture (1917), 95 Ohio St. 276; State, ex rel. Bay, v. Witter (1924), 110 Ohio St. 216, 221. Whether an agency substantially complies must be decided on a case-by-case basis."[10]

A more recent Court of Appeals decision[11] has more clearly detailed the statement of rationale's requirements.[12] The rationale must contain a conclusive statement of the reasons provided for abolishments in Ohio Revised Code Section 124.321(D). These reasons for abolishment of positions are: Reorganization for the efficient operation of the appointing Authority; reasons of economy; or lack of work. Once an appointing authority specifies one or more of the above-mentioned reasons further documentation is required. He/she must document, in writing, the factual basis for the statutory basis for the abolishment. It appears that at this stage of the abolishment process statistical data and additional supporting material are unnecessary.

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[9] Berndsen v. Westerville Personnel Review Board, 14 OBR 396 (1984).

[10] State, ex rel. Potten, v. Kuth (1980), 61 Ohio St. 2d 321, 325-326.

[11] Supra note 9.

[12] Id. at Pgs. 397-398.

These documents and comparative analyses may play a critical role in subsequent appeals to the State Personnel Board of Review or an arbitration process.

A review of the statement of rationale (Joint Exhibit 3) indicates that the Appointing Authority complied with the previously reviewed standards. The positions were abolished as a result of a reorganization for efficiency and/or reasons of economy. Also, the Employer identified the positions to be abolished and pertinent facts supporting the statutory basis for the abolishment.

The analysis dealing with the statement of rationale indicates that an Arbitrator is not necessarily limited to the information contained in this document. With the latitude granted the Appointing Authority in formulating the rationale, a review restricted to these matters would result in a potential injustice to both Parties' presentations.

The broad powers granted the State Personnel Board of Review adds additional justification to the conclusion just described. The General Assembly by enacting Ohio Revised Code 124.03(A) empowered the Board to determine from the evidence presented whether the layoff of employees was arbitrary or unreasonable, and whether proper layoff procedures were followed."[11] As such, the review of an appointing authority's decision is the equivalent of a trial de novo regarding the appointing authority's actions, with the appointing authority having the burden of proving by the preponderance of the evidence that its actions were

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[11] State Ex Rel. Ogan v. Teater, 375 N.E. 2d 1233, 1240.

appropriate."

Unless somehow restricted by terms and conditions negotiated by the Parties, an arbitrator reviewing the propriety of an abolishment decision serves in a capacity similar to the one held by the Personnel Board of Review. The arbitration stage serves as a quasi trial de novo situation while the prior grievance steps approximate local courts of very limited jurisdiction. As Arbitrator W. Willard Wirtz indicated:

"...unless some deliberate attempt to mislead the other party is disclosed, and particularly if the 'new' evidence or argument appears substantially material, most arbitrators will be disinclined to rule the matter out of the proceedings."[11]

Here, the Union never proposed that the Employer deliberately withheld its abolishment rationale which was partially based on the facility's certification efforts. Further, the Union urged that this evidence be discounted because it was never fully articulated in the statement of rationale (Joint Exhibit 3). Paul D. Caldwell, the Chief Steward, stated that the rationale (Joint Exhibit 3) was presented to the Union and that some form of notification was delivered to all impacted employees. These various notification attempts and the facility's long term certification difficulties should have led to expectations concerning certification arguments.

Throughout the hearing, the Employer objected to any evidence or

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[10]Blin et al., v. Ohio Bur. of Employment Services, 29 OBR 88 (1985); Supra note 10, at 325; Supra note 1, at 29; Indiana Bell Telephone v. Communication Workers of America, Local 4900, LA 981. (Goldstein, 1989).

[11]Wirtz, "Due Process of Arbitration," Proceedings of the Annual Meeting of NAA, 1, 15 (BNA Books, 1958).

testimony introduced by the Union regarding post abolishment data and other informational sources. This objection seems unsupported in light of the standards of review articulated by the judicial system. In Esselburne, the Court of Appeals declared that an appointing authority may meet its burden by providing comparison data between two differing time frames: Current work levels versus work levels where the work did not exist. Data, moreover, may (Arbitrator's Emphasis) include statistical data and additional supporting materials."[16] A similar standard was articulated by the Supreme Court of Ohio in Bispeck:

"In order to determine whether any efficiency gains were accomplished by the abolishment, the Board must consider the county's operations before and after the abolition."[17]

These decisions underscore the need to address comparative data rather than the steady-state analysis proposed by the Employer. Pre and post abolishment evidence and testimony, not necessarily limited to statistical data and other supporting material, have to be presented as justifications.

From the evidence and testimony introduced at the hearing, I am convinced that the reorganization was motivated by a sincere desire to recertify the facility for Medicaid purposes. With this goal in mind, Darling's reorganization format was driven by identified weaknesses in the programming area (Joint Exhibits 9, 12 and 15) in terms of quantity and quality of services. The reorganization, moreover, was shaped by

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[16] Supra note 4, at 41.

[17] Supra note 1, at 30.

the anticipated revision of new Medicaid guidelines. Even though these guidelines were issued, during the abolishment period of September 26-October 14, 1988, Arnoczky discussed the new requirements with Darling while he was formulating his reorganization plan. The new regulations emphasized programming during the "natural flow of the day" which re-focused programming and servicing efforts away from the living areas and to the classroom setting. As a consequence, then requirements engendered changes in managerial, organizational and staffing functions.

These various considerations resulted in a reorganization plan which re-directed resources. Every effort was made to staff direct care employees during critical periods during the day. This normally required heightened staffing levels at the beginning and end of the day. Darling's analysis concluded that these staffing requirements could only be accomplished with a greater quantity of part-time workers because their employment enhanced staffing flexibility. This rationale resulted in the abolishment of several full-time positions and the creation of part-time positions for coverage purposes. Darling, moreover, claimed that even though the Department supplemented his budget after Medicaid funding was withdrawn, the Department indicated that recertification was of the utmost importance because the supplement would not be continued indefinitely.

Although this Arbitrator recognizes the underlying rationale supporting the abolishment, this conclusion does not necessarily fulfill the conditions negotiated by the Parties as codified in Section 18.01. This provision incorporates Ohio Revised Code 124.321(D) which provides,

in pertinent part:

"...

(D) Employees may be laid off as a result of abolishment of positions. Abolishment means the permanent deletion of a position or positions from the organization or structure of an appointing authority due to lack of continued need for the position. An appointing authority may abolish positions as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or lack of work. The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority. Appointing authorities shall themselves determine whether any position should be abolished and shall file a statement of rationale and supporting documentation with the Director of Administrative Services prior to sending the notice of abolishment. If an abolishment results in a reduction in the work force the appointing authority shall follow the procedures for laying off employees

..."

The language contained in Ohio Revised Code 124.321(D) suggests a sequential analysis of any abolishment decision; the reasoning is articulated below.

A reading of the statute indicates that the language defining abolishment must be initially confronted because it serves as the threshold issue. The statute defines this critical condition as meaning "...the permanent deletion of a position or positions...due to lack of continued need for the position..." This definition, therefore, contemplates the permanent elimination of a position because the work performed or services provided are no longer required by the appointing authority."[1] It does not contemplate the laying off of a person "...while leaving that position intact for another person to fill,

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[1] "In re Appeal of Moreo (1983), 13 Ohio Ap. 3d 22; Griffith et al., v. Department of Youth Services (1985), 28 Ohio App. 3d 76.

whether that person is another public employee or an employee of a private concern."[11] A permanent deletion, more specifically, does not exist when substantially the same work previously performed by the ousted employee is presently performed, as a function of a mere transfer, by others in a similar capacity.[12] Nothing in the abolishment statutes and regulations, however, prohibits an appointing authority from consolidating or redistributing some of the employee's duties to other employees.[13] As such, if the specific work in question needs to be performed, and it is not accomplished by consolidation or redistributing, the position cannot legitimately be abolished as a consequence of statutory definition. Consolidations take place when job elements are assigned to others within the organization but the consolidated job elements do not represent a substantial percentage of the "new" position. In a similar fashion, a valid redistribution takes place when various aspects of the abolished position are distributed amongst other existing positions, to the extent that the abolished position becomes permanently deleted or eliminated.

If the record establishes that the appointing authority has complied with the statutory definition of an abolishment, certain circumstances may allow the abolition of positions. These circumstances

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[11] Carter, et al., v. Ohio Department of Health (1986), No. 85 AP-752 (10th Dist. Ct. App, 1-9-86), 122.

[12] In re Appeal of Woods (1982), 7 Ohio App 3d 226.

[13] Keyerleber v. Cuyahoga County Mental Health Board, State Personnel Board of Review; 84-LAY-01-0048 (1985).

are specified in Ohio Revised Code 124.321(D) and include: Reorganization for purposes of efficiency, reasons of economy, or lack of work. Therefore, if an appointing authority's reorganization can operate more efficiently or economically by either not performing a given service or by legitimately consolidating the services of the abolished position with another position in the organization, then the appointing authority may abolish the position. Obviously, if an abolishment is approved, these appropriate circumstances must be justified by a preponderance of the evidence as specified in Ohio Administrative Code 124-7-01(A)(1).

The Parties' positions regarding the abolishments in dispute will be analyzed in the following sections. The principles discussed above regarding Ohio Revised Code 124.321(D) requirements will be considered. Each abolishment claim will be addressed in a separate opinion.

HATTIE SANDERS AND RUFUS SHARPE

Background Facts

Hattie Sanders served as a full-time Food Service Coordinator I (FSCI) for approximately ten (10) years prior to the abolishment of her position on September 26, 1988. As a consequence of the abolishment, Sanders bumped into a Cook I position which was occupied at the time by Rufus Sharpe. This sequence of events caused Sharpe to bump into a vacant Food Service Worker (FSW) position. The original rationale for this abolishment stated that:

"...

Food Service Coordinator 1 (PCN 21034.0)

Abolishment of this position is a part of some reorganization within the Dietary Department, reducing the amount of need for lead workers. The duties of this position will be absorbed by supervisors and other line workers in the department.

..."

(Joint Exhibit 3, Pg. 4)

It should be noted that Sanders was eventually promoted to a Food Service Coordinator II (FSC II) position.

The Position of the Employer

The Employer argued that the abolishment was justified and based on a reorganization of the food service operation. When the Employer moved to a two kitchen operation, no need existed for the Food Service Coordinator I position because each kitchen was supervised by a Food Service Coordinator II. As such, the abolished responsibilities were covered by existing supervisory personnel and other line workers. The supervisors, more specifically, could provide call-off coverage in accordance with Section 1.03, while the line workers could absorb Sanders' food preparation responsibilities.

As a result of this analysis, Sharpe's claim must be denied. He was properly bumped from the Cook I position because Sanders' abolishment was properly implemented.

The Union's Position

In the opinion of the Union, the abolishment was improper because the evidence introduced by the Employer failed to support the efficiency justification. Darling testified that the abolishment was implemented

because two kitchens were merged into one food service facility. Yet, the food service operation continued to operate in the same manner for a considerable period of time after the abolishment. This circumstance indicated that the abolishment was actually based on anticipated lack of work rather than actual work responsibilities. The Esselburne ruling precludes an abolishment based on a proposed lack of work.[11]

Survey data collected prior to the abolishment indicated that severe deficiencies existed in the food service department. As such, recertification efforts could only be enhanced if the contested position was retained rather than abolished. Efficiency concerns could not be accomplished via this reorganization format.

The abolishment resulted in a job transfer in direct violation of several statutory mandates and a Collective Bargaining Agreement requirement. Ohio Revised Code 124.321(D) was violated because the duties performed by Sanders were required before and after the abolishment. Several Union witnesses testified that Sanders' duties were assumed by a supervisor. The supervisor, moreover, was assigned to Sanders' shift even though he never worked on the shift prior to the abolishment.

Ohio Administrative Code 123:1-17-16 requires that employees be assigned duties that properly belong to the position to which the employee has been legally appointed. The supervisor in question was performing most assigned duties outside of his classification.

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[11] Supra note 4, at 41.

The abolishment and the associated supervisory assignment violated Section 1.03. Testimony adequately supported the motion that he performed bargaining unit work after the abolishment, and that he had never previously performed such work.

THE ARBITRATOR'S OPINION

From the evidence and testimony introduced at the hearing Hattie Sanders' position was improperly abolished. The Employer failed to comply with the statutory definition of a valid and proper abolishment and the proposed justification was not supported by a preponderance of the evidence.

The position in question was not permanently eliminated because a mere job transfer took place. The same work and associated duties were required by the Appointing Authority after the abolishment, and a redistribution and/or consolidation of positions did not take place. James Vinton, the Supervisor in question, continued to perform substantially the same work while working on Sanders' shift.

Testimony provided by Sanders and Sharpe supported the Union's theory; none of which was properly refuted by the Employer. Sanders remarked that she provided work direction, scheduling and training to food service workers, cooks and delivery workers. She was also involved in food preparation and quality assurance of residence dietary plans. ON occasion she also ordered and received food and other food service material. Her testimony was supported by a job specification (Joint

Exhibit 21F) introduced by the Union. Sanders maintained that Vinton engaged in all of these activities after the abolishment but that he had no knowledge of food preparation and dietary requirements. In fact, Vinton asked her to continue with her prior duties after she bumped into her cook job classification; she refused to comply with his wishes. Sharpe's testimony supported Sanders' testimony and associated conclusions. His review was viewed as highly credible because his shift overlapped with Vinton's shift assignment. Sharpe stated that Vinton performed all of Sanders' duties after the abolishment and never left the kitchen during the course of his shift. These statements further support the notion that a mere job transfer took place.

The Employer would have been better served if it differentiated the duties performed by Sanders prior to the abolishment from the duties performed by Vinton after the abolishment. Job duty and major work characteristic distinctions might have substantiated work distribution or consolidation conditions. Vinton's testimony and job analytic data would have supported the Employer's abolishment decision.

The abolishment also engendered a contract violation. Section 1.03 was violated because the abolishment and the resultant work performed by Vinton caused the performance of bargaining unit work by an individual serving in a supervisory capacity. Nothing in the record indicates that Vinton or any other similarly situated supervisor had previously performed such work. As such, Vinton's assignment and related duties resulted in the erosion of bargaining unit work.

Efficiency and economy justifications were not supported by the

record reviewed by the Arbitrator."[11] The record fails to support the Employer's rationale concerning the merger of the two kitchens. Darling and Sanders basically agreed on the series of events surrounding the abolishment. It appears that prior to the abolishment the food was prepared in cottages, and eventually food services were provided via a two (2) kitchen arrangement. During the two (2) kitchen arrangement, moreover, the abolishment of Sanders' position and the subsequent bump by Sanders of Sharpe took place. The centralized arrangement, more specifically, did not take place for approximately seven to eight months beyond the date of the abolishment. One can hardly support an efficiency justification under these circumstances.

In further support of the abolishment, the Employer offered a number of conditional justifications. The Employer alleged that the supervisors "could be used for coverage" and line workers "could absorb her preparation duties." Nothing in the record, however, indicates that these conditional expectations were indeed fulfilled by these individuals.

Consequently, the Employer did not lawfully abolish Sanders' position; the abolishment is overruled. As a consequence of this illegal abolishment, Sharpe was wrongfully bumped by Sanders.

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[11]Normally, a finding that an abolishment does not comply with the statutory definition enumerated in Ohio Revised Code 124.321(D) would serve to nullify an abolishment. The efficiency and economy analyses should provide the Parties with some additional guidance concerning the propriety of the submitted rationale. Similar analyses will be provided in subsequent portions of this Opinion even if the Employer fails to support statutory definition requirements.

CAROL KUHAR AND OTIS TERRELL

Background Facts

Carol Kuhar has been employed by Broadview Developmental Center since August 14, 1987. Prior to the abolishment of her position, she served as a full-time Custodial Worker. Her position was abolished on September 26, 1988 which forced her to bump into a part-time custodial position. The statement of rationale specified the following reasons for the abolishment:

"...

Custodial Worker (PCN 24244.0

There is currently a full-time custodial worker assigned to the administrative office in the Thorin Building Monday through Friday. With the current reorganization of housekeepers in this area, the duties will be absorbed by the evening shift staff, following the normal working day of the administrative staff.

..."

(Joint Exhibit 3, Pg. 3)

It should be noted that Kuhar displaced Otis Terrell which resulted in his layoff. He was removed on October 14, 1988.

The Position of the Employer

The Employer asserted that efficiencies required the abolishment of this position. Darling testified that the closing of an administration building in 1986, and the move to a smaller building, necessitated a reduction in housekeeping staff. A condition which was further exacerbated by the previous Superintendent's refusal to cut staff even though the number of employed custodial workers increased as a

consequence of the closing of the Cleveland Developmental Center.

Kuhar's first shift duties were no longer necessary because they could be absorbed by the housekeeping staff on the evening shift. It also appeared to be extremely inefficient to have Kuhar clean the Thorin Building during the day while the offices were occupied by Administrative personnel. These circumstances appeared ripe for abolishment because associated man hours could be used to bolster the number of direct care positions.

The Union's assertion that Kuhar's duties as a part-time employee truly reflected full-time status was unsupported by the evidence and testimony. The Employer admitted that Kuhar worked between thirty to thirty-nine hours per week after the abolishment. Such a condition, however, does not afford Kuhar with full-time status. Kuhar maintained that she substituted for various employees because of sick leaves, vacations and other call-off related reasons. Circumstances of this sort do not justify full-time status. If anything, they support the Employer's efficiency arguments because they evidence the flexibility attained by part-time assignments.

The Position of the Union

The Union alleged that the abolishment was improper because the Employer failed to support its efficiency justification. Kuhar testified that after the abolishment of her position she discussed her work schedule with her supervisor. He purportedly told her to continue to perform her work, but to only work thirty-nine rather than forty hours per week. Scheduling of this sort should not allow the Employer to

reallocate resources. By working hours virtually equivalent to those of a full-time employee, efficiency gains never materialized. The Employer merely recovered the full-time benefits Kuhar would have received but for the abolishment decision.

THE ARBITRATOR'S OPINION

The evidence and testimony clearly indicate that Kuhar's position was improperly abolished by the Employer. Section 124.321(D) requirements were not established by a preponderance of the evidence.

The statute defines an abolishment as the permanent deletion of a position due to a lack of continuing need for the position. Here, the Employer failed to establish that there was a lack of work, and that the lack of work was no longer required.

The Court of Appeals in Metzgar[11] was confronted with a very similar issue. The appellants worked as house-parents until the appointing authority decided to abolish these positions. The population of children in the various homes had decreased substantially over a period of time. As a consequence of the layoffs, the appellants agreed to accept "intermittent" positions. The Court of Appeals ruled that the propriety of the layoff was not of primary importance. Rather, the issue was whether appellants were properly laid off even though they remained full-time employees performing the same duties. The evidence

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[11] Metzgar et a., v. Summit County Children's Services Board, 456 N.E. 2d 820 (Ohio App. 1982).

indicated the appellants continued to be employed within the same classification and performed the same duties at various locations and at various shifts. The Court of Appeals held that:

"...

There is nothing in the statutes which precludes a full-time regular employee from performing duties at various locations and various shifts.

..."[11]

The general nature of the work performed and the regularity of employment were critical factors considered by the Court of Appeals. The layoff decision was disaffirmed.

Here, Kuhar was forced to bump into a part-time position even though the work she regularly performed in this new position was virtually identical to the work she performed as a full-time employee. She still performed general housekeeping work. The Employer merely reduced her hours to thirty-nine hours per week. Even though she might presently work at different locations on occasion, the regularity of her assignments and the nature of the work performed satisfy full-time employee status. A one hour reduction in weekly hours worked, and the fact that she was assigned to other locations for coverage purposes, do not minimize this conclusion. The original position was still intact after the abolishment and the work was not consolidated or redistributed. The Employer merely changed the label attached to the position rather than actually changing the requirements and amount of work performed.

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[11] Id. at 822.

The Employer's efficiency arguments were also unsupported. The Employer asserted that the part-time position provided a great deal of scheduling flexibility. Kuhar, however, noted that she was only assigned to other locations for coverage purposes approximately twice per month. Such infrequent assignments hardly support the primary goal of scheduling flexibility. Also, the Employer failed to document the economic savings associated with this abolishment. Obviously, Kuhar's benefits were reduced as a consequence of the abolishment. And yet, by regularly scheduling Kuhar for thirty-nine hours per week, the Employer never realized a substantial economic benefit.

The Employer did not lawfully abolish Kuhar's position. As a consequence of this illegal abolishment, Otis Terrell was illegally bumped out of his position.

HOMER J. MICHAUD

Background Facts

Homer J. Michaud has been working for the State of Ohio for approximately seventeen years. He was employed as a Security Officer I on October 3, 1971, held a few positions as a Police Officer, and became the facility's Safety and Health Inspector I in October of 1978. In this capacity, Michaud had a number of duties which were nested within three major job categories. First, he inspected institutional living conditions and related equipment for safety hazards and recommended corrective actions. These inspections, moreover, were engaged in to

ensure compliance with OSHA regulations and other state and federal laws. Second, Michaud conducted safety training meetings on new laws and existing regulations. Within this job domain, Michaud trained fire brigade personnel and conducted fire drills and practices. Third, he conducted investigations and completed reports dealing with accidents, injury claims and workers' compensation forms.

On September 26, 1988, Michaud's position was abolished by the Employer. The statement of rationale submitted to the Department of Administrative Services contained the following pertinent particulars in support of the removal:

"...

Safety Health Inspector I (PCN 22032.0)

The police sergeant will serve as fire marshal for the facility. The duties of fire drills will be delegated to the police force to perform on all shifts. Since most of our Worker's Compensation accidents occur as a result of the erratic behavior of the clients, the Police Office is engaged in the investigations most of the time. Safety inspections and health practices can be handled by the main tenance superintendent, housekeeping manager, and infection control nurse as a team in the inspection of buildings, premises, and equipment for compliance. Job specifications indicate that these positions be involved in fire, safety, infection control, and serve on appropriate committees. The processing of the Worker's Compensation claims can be hand led by the Personnel Office, inasmuch as they are closely related to the Disability claims and the Occupational Injury claims which are handled through the Personnel Office.

..."

(Joint Exhibit 3, Pgs. 3-4)

The Position of the Employer

The Employer asserted that the abolishment was lawful because it resulted in an efficient distribution of Michaud's duties. Various individuals assumed portions of the duties discussed above.

A committee was established to conduct safety inspections. The committee, more specifically, consisted of the following individuals: maintenance superintendent, housekeeping manager and the inspection control nurse. This arrangement was thought to be quite efficient because it eliminated the duplication of efforts and responsibilities. Each of the appointed staff members possessed expertise in the areas covered by the inspections.

Another arrangement was established to deal with Michaud's fire drill responsibilities. The Employer had the police officers assume the management of fire drills. Unlike Michaud, they were available throughout the work day on all shifts. Such a rudimentary task as evacuating individuals by prescribed routes required no exceptional expertise. Also, the inspection of fire extinguishers for pressure check purposes was thought to be a rudimentary endeavor. This could be accomplished by police officers while conducting their rounds.

Other staff members were assigned Workers' Compensation Claims duties. Since the police officers were already involved with other investigations, these new duties would merely be assigned to them. The claims processing function was to be accomplished by the personnel department. These duties merely involved the filling out of forms and the processing of paperwork.

The Employer asserted that the Union's efficiency arguments did not properly refute the abolishment decision. Testimony provided by Gary Bowling, a Department of Industrial Relations employee, indicated that he had conducted two wall-to-wall investigations. One took place in

1979 and the other in April of 1990. The investigation conducted in 1990 resulted in a citation for failure to properly report accidents to the Department of Industrial Relations. This circumstance was viewed as a de minimus occurrence; an oversight which did not evidence that the abolishment was inefficient. The Employer, moreover, questioned the propriety of Bowling's testimony. Various incidents discussed by Bowling dealt with the pre and post abolishment situations. As such, they were irrelevant to the abolishment which took place in 1988.

Other aspects of Bowling's testimony seemed to support the Employer's abolishment decision. Bowling noted that working titles in the State system sometimes differ from formal classification titles. He also stated that each facility which he surveyed did not have a Safety and Health Inspection job classification.

Michaud's unique job history caused the Employer to suggest certain remedy considerations if in fact the Arbitrator rules in the Union's favor. First, since Michaud has a duty to mitigate damages, he should be required to submit records of all his earnings after the abolishment. This information should be factored into any back-pay calculation. Second, any back-pay liability should cease as a consequence of Michaud's selection of alternative work with the Department of Rehabilitation and Corrections. Third, Michaud should not be allowed to retain his position with the Department of Rehabilitation and Corrections, and be paid at an hourly rate equivalent to the rate he would earn as a Safety Health Inspector I. An alternative remedy would tend to "redline" Michaud's present position which would create a

potential liability for the State of Ohio. Last, Michaud voluntarily withdrew his retirement monies from the PERS system. As such, the Employer should not be required to replenish the sum withdrawn by Michaud. This withdrawal resulted as a consequence of Michaud's independent decision rather than the abolishment of his position. A remedy which would grant a back-pay and a PERS supplement would violate the Ohio Revised Code 4117 because the Parties are prohibited from negotiating over the Retirement System. The PERS claim is a matter to be decided by Michaud and PERS.

The Position of the Union

The Union alleged that the various justifications offered by the Employer were defective. The distribution of Michaud's duties were thought to be inefficient; and in some instances, in violation of Ohio law, and OSHA regulations.

Michaud's fire marshal duties were improperly transferred to the police sergeant. These duties were outside the classification specifications of this individual. Unlike Michaud, the police sergeant does not possess the minimum class requirements of 100 hours of training in providing fire and/or safety training to others or in fire and occupational safety education. A review of all the police sergeants' personnel files indicated that none of these individuals possessed these certification requirements.

The Union maintained that Darling was misinformed with respect to the fire drill procedures employed at the facility. Darling testified that police sergeants could readily conduct fire drills because these

drills took place at night. Since Michaud did not work at night, the police sergeant's assignment was far more efficient. Darling's assumptions, however, were inaccurate. Michaud testified that the drills were conducted throughout the day and that he was present even if the drills were held during the night shift.

The team concept proposed by the Employer was viewed as a direct violation of OSHA requirements. The classification specifications of the various team members are deficient in terms of several OSHA related duties performed by Michaud. None of these specifications require knowledge of OSHA regulations or OSHA inspection practices. These responsibilities are critical aspects of the Safety Health Inspector I job classification.

Bowling's testimony was referenced in an attempt to rebut the Employer's efficiency claims. Bowling asserted that since the abolishment the Employer had been cited for violation of Ohio Revised Code 4101.10(B)(1) (Union Exhibit 2). This statute requires State agencies to report injuries to the Industrial Relations Department within five days after the injury is reported to the agency by an employee. Bowling claimed that the Employer had never been cited for such a violation while the position in question existed at the facility. Bowling's most recent inspection also raised efficiency concerns. He noted that his inspection uncovered several serious safety and health violations (Union Exhibit 2). Bowling also alleged that he has inspected a number of similar institutions throughout the State of Ohio, and that they have Safety and Health Inspectors.

The processing of Workers' Compensation Claims by the personnel office was thought to be unlawful, which further raised suspicion concerning the Employer's efficiency claim. Instructions specified on the Safety and Health Officers Investigation of Serious Injury or Illness report (Union Exhibit 3) prohibit the completion of this report by staff performing record keeping; and requires completion of this report by safety and health personnel. As such, these matters could not be legally undertaken by the personnel department.

THE ARBITRATOR'S OPINION

The Employer complied with the statutory definition contained in Ohio Revised Code 124.321(D) in terms of process. As this Arbitrator has previously noted, an appointing authority can properly abolish a position as long as the eliminated work is somehow consolidated or redistributed to other employees.[11] Here, the Employer properly redistributed Michaud's duties. Various aspects of the abolished position were distributed amongst other existing positions, to the extent that the abolished position became permanently deleted.

Compliance with this segment of Ohio Revised Code 124.321(D), however, does not complete an analysis of any abolishment decision. Justifications proposed by the Employer must still be established by a preponderance of the evidence. Here, the Employer failed to properly

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[11] Supra note 20.

support is various efficiency arguments. In other words, the Employer failed to show that the abolishment would result in increased efficiency of the facility's operations.

The committee arrangement discussed by the Employer seems inefficient. Michaud testified that this approach had been attempted on two occasions prior to the abolishment. The first attempt took place while the facility was part of the Northeast Ohio Developmental Center; the second took place approximately one year prior to the abolishment, and lasted two to three months. Michaud asserted that these attempts did not prove to be effective. He asserted that various committee members often excused themselves from rounds because their committee responsibilities conflicted with prior commitments. When the committee finally met as a group, the reports submitted by the participants were often inaccurate and riddled with inconsistencies. The Employer failed to refute this testimony. It, moreover, failed to present any evidence which suggested that the committee was functioning properly after the abolishment.

Nothing in the record suggests that committee participants had expertise in several critical major work characteristics. The characteristics are specified in the Safety and Health Inspector I job specification (Joint Exhibit 21(C)) and include: Knowledge of (1) OSHA regulations, and (2) OSHA inspection practices and procedures. Obviously, committee members could have acquired expertise in these areas. Potential expertise, however, does not serve as an adequate substitute for actual expertise when one attempts to support an

efficiency argument. The Employer could have submitted classification specifications in support of its expertise argument. By failing to submit documentation, one can only conclude that these specifications did not contain OSHA related duties.

Bowling offered testimony which further discounted the Employer's efficiency argument. He remarked that throughout his professional involvement with the facility, he always dealt with Michaud prior to the abolishment. Bowling, moreover, stated that the majority of facilities under his geographic jurisdiction had individuals holding the position of Safety and Health Inspector I.

Procedural and related legal considerations were also raised by Bowling which raised some doubt concerning the Employer's efficiency claim. He asserted that Ohio Revised Code 4101.10(B) requires that a facility notify his office within five days of an accident occurrence. A survey conducted by Bowling in April, 1990 resulted in a citation (Union Exhibit 2) involving the facility's reporting problems. Over a two year period, the Employer failed to properly report approximately one hundred accident occurrences. Bowling also rebutted the Employer's claim that some of Michaud's duties could be fulfilled by the personnel department. He reviewed instructions contained in a Safety and Health Officer's Investigation report (Union Exhibit 3). These instructions stated that the form was not to be completed by personnel performing injury or illness record keeping. As such, personnel department employees could not legitimately complete this form. It appears that no one was performing this reporting function; a responsibility which

should have been fulfilled by someone on the committee established by the Employer.

This Arbitrator disagrees with the Employer's de minimis assertion. In Bispeck, the court indicated that post abolishment data could be considered when determining whether efficiency gains were accomplished."[11] Here, the citation (Union Exhibit 2) and the excessive number of reporting violations adequately support the Union's inefficiency claims.

The Employer's fire drill arguments proved to be unsupported by a preponderance of the evidence. In my opinion, these duties are not rudimentary and must be properly conducted if one hopes to ensure the safety and health of the resident population. Fire brigade training and evacuation procedures do not merely involve "escorting" responsibilities. These duties, moreover, cannot solely be conducted during the evening shift. One cannot assume that difficulties will only occur during this time period. Fire extinguisher monitoring responsibilities are not duties which should be engaged in by untrained personnel. Different fire extinguishers are used in various situations.

Once again the Employer failed to establish that police department personnel possessed the ability to perform these various duties. Documentation regarding formal training in these areas was not introduced by the Employer. In fact, the police sergeant job specification (Joint Exhibit 21(C)) does not contain any job duties or

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[11] Supra note 1, at 30.

major work characteristics which would indicate that they possess these skills and abilities. One should not conclude from this analysis that these individuals could not be trained to perform these various functions. In order to support these assertions, however, the Employer needed to introduce training and certification documentation. Also, submission of actual fire drill schedules would have improved the Employer's argument.

Based upon the evidence and testimony introduced at the hearing, the Employer improperly abolished Michaud's position. The Employer failed to support its proposed justification by a preponderance of the evidence.

CARL ESHELMAN

Background Facts

Carl Eshelman served as a Medical Lab Technician II prior to the abolishment position. The Employer submitted the following rationale to the Department of Administrative Services in support of its decision:

"...

Medical Lab Technician 2 (PCN 12122.0)

Services provided by this position will be obtained from providers who will bill insurance companies directly for such services at no cost to Broadview Developmental Center.

..."

(Joint Exhibit 3, Pg. 3)

The Position of the Employer

The Employer maintained that the abolishment of this position was efficient. Darling testified that outside providers performed these services without any cost to the State of Ohio. Once services were rendered, various insurance plans were billed directly by these outside providers. As such, residents received comparable care while the Appointing Authority and the State did not incur any cost for these services.

The Employer also asserted that Eshelman's claim lacked standing. By failing to appear at the arbitration hearing, Eshelman waived his right to pursue his claim.

The Position of the Union

The Union challenged this abolishment on the basis that the Employer failed to prove by a preponderance of the evidence that the abolishment was proper.

Although the Employer offered some economic justification for the abolishment, it failed to produce proof of the savings associated with this decision. Even if the deletion of this position resulted in associated salary savings, such a condition does not necessarily establish increased efficiency and economy in operations.

The Union asserted that this grievance had standing and was not procedurally defective. Eshelman's non-appearance at the hearing in no way jeopardized the legitimacy of his claim. In these types of matters, the Employer has the burden of showing by a preponderance of the evidence that the abolishment decision was justified.

THE ARBITRATOR'S OPINION

In my opinion, the abolishment of this position was improper. Ohio Revised Code 124.321(D) does not authorize the replacement of an employee with persons employed by a private institution. As a consequence there was no abolishment of the position in question as contemplated by Ohio Revised Code 124.321(D). The position in question was not deleted due to lack of continued need for the position. Obviously, if the Appointing Authority decided to "subcontract" the work previously performed by Eshelman, there was work to be done, and needed to be done. Under these circumstances, it becomes virtually impossible for the Appointing Authority to establish a permanent elimination of a particular position. The Employer's decision merely served as an external job transfer. The position in question was left intact to be eventually filled by an employee working for a private concern. Any job transfer involving the performance of substantially the same work by others in a similar capacity does not result in a permanent legal deletion."[11] This conclusion holds true whether the circumstances concern job transfers internal or external to any organization.

Without proper and complete compliance with the statutory definition of an abolishment as contained in Ohio Revised Code 124.321(D), the Employer's efficiency claims, regardless of their merit, fail to support the abolishment decision. The justifications supplied

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[11] Supra note 20.

in support of the present abolishment, moreover, further frustrate the legitimacy of the Employer's decision. Evidence and testimony concerning the duties performed by Eshelman as compared against the duties performed by the outside providers were not submitted by the Employer. It was alleged that the outside providers provided "substantially" the same services. General statements, without proper support, do not establish the level of proof necessary to substantiate an abolishment decision. Also, evidence concerning mere salary savings do not, by themselves, necessarily establish increased economy and efficiency.

The non-appearance of the Grievant and his failure to testify do not, in this instance, jeopardize the Union's abolishment claim. The Grievant did not waive his right to have his claim adjudicated. The arbitration step and the grievance mechanism are voluntary processes. As such, the majority of arbitrators permit the parties with significant latitude in the selection, examination and cross-examination of witnesses. Although questions of inference are sometimes drawn when a grievant refuses to testify in a disciplinary case, similar inferences do not normally arise where the challenged action does not involve discipline or discharge matters. Unless, evidence is omitted that only the grievant can supply, which raises certain skepticism regarding the merits of the grievance."

"Problems of Proof in Arbitration, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (BNA Books, 1967).

JUDY MACHINO, MARY GREEN, LUCY CORNETT SHAWNEE McWAIN, GWENDOLYN HARVEY, DEANNA DANIELS AND LAUREN LUNDER

Background Facts

On September 26, 1988, Judy Machino, Mary Green and Lucy Cornett had their Hospital Aide Coordinator I positions abolished. Their job classification specification (Joint Exhibit 21(E)) indicates that they were required to act as team leaders for one assigned module or residential building. In this capacity, they were asked to perform a number of duties, which include in pertinent part: training and direction of other direct care staff; assessing the needs of clients, maintaining the therapeutic environment; and providing basic unskilled nursing care to and habilitative training for clients.

These three abolishments resulted in a series of bumps which impacted other bargaining unit members. Machino bumped into a full-time Therapeutic Program Worker (TPW) position which prior to the abolishment was occupied by Deanna Daniels. Daniels, in turn, bumped into a part-time Therapeutic Program Worker (TPW) position, which was held by Lauren Lunder. Lunder's displacement caused her to bump into a part-time Hospital Aide (HA) position. These various displacements were triggered by Machino's original abolishment. As such, her circumstances will be analyzed because a ruling in either Parties' favor will effect the job status of the other bargaining unit members.

Green's abolishment also resulted in a number of personnel moves. She bumped Shawnee McWain out of a full-time TPW position. McWain, in

turn, filled a part-time Hosital Aide position.

In a similar fashion, Lucy Cornett bumped into a full-time Therapeutic Program Worker (TPW) position formerly occupied by Gwendolyn Harvey. Harvey, as a consequence filled a part-time Hospital Aide (HA) position.

As justification for the Hospital Aide Coordinator I abolishments, the Employer submitted a rationale to the Department of Administrative Services. It contained the following particulars:

"...

Hospital Aide Coordinator I (PCN 16032.0) (PCN 58046.0) (PCN 64039.0)

Duties as stipulated in the position descriptions are not being performed. These positions are located in the Infirmary/Clinic area and since there are only a total of ten (10) hospital aides assigned to this area, the need for lead workers does not exist. To further substantiate this justification, one of the hospital aide coordinator's is currently lending limited assistance to the part-time dentist and part-time podiatrist, which is due in part to the fact that the Infirmary is not staffed to the level that would require lead workers.

..."

(Joint Exhibit 3, Pg. 4)

It should also be noted that not all of the individuals specified above appeared at the hearing. Green, McWain, Harvey, Daniels and Lunder did not testify. As a consequence, the Employer claimed that these individuals waived their right to pursue their claims. The Arbitrator ruled on this matter when he dealt with Eshelman's claim; there is no need to reiterate that ruling. These individuals did not waive their rights to pursue their respective claims.

<u>The Position of the Employer</u>

The Employer used efficiency justification to support the three

abolishments. Darling testified that the three Hospital Aide Coordinator I positions were deleted as a consequence of a treatment practice change. Much of the activity in the infirmary/clinic was reduced when the Employer adopted a "normalization" strategy. Prior to the abolishments, the majority of illnesses, and related treatments, were exclusively cared for in the infirmary/clinic. After the abolishments, however, most medical care took place in the residents' living areas. As a consequence, the number of Hospital Aides was reduced which eliminated the need for lead workers.

The Union's attempt to counter the efficiency justifications was viewed as unpersuasive. Cornett's testimony had to be discounted by the Arbitrator. Her claim that the "normalization" process resulted in inefficient delivery of medical services was not supported by documented medical protocols, and based on limited medical training. Also, Cornett's assertion that she continued to function as a lead worker after her assignment as a Therapeutic Program Worker was contradicted under cross-examination.

Machino's position was abolished for similar efficiency purposes. Prior to the abolishment, Machino assisted the podiatrist and dentist in the clinic. Her duties involved scheduling appointments and escorting residents to and from the clinic from their living areas. The Employer admitted that it might have mismanaged this assignment in the past; but that it had the authority to correct this mistake. The previously discussed "normalization" program provided additional support for the abolishment. Her position was no longer required. With the majority of

medical care taking place in the living units, Machino's escorting duties were also superfluous. If necessary, the direct care staff could escort the residents to the clinic/infirmary area.

The Position of the Union

In the opinion of the Union, the abolishment of the three positions was illegal because it did not increase the economy and efficiency of the facility. The Union recognized that these individuals might have been working outside of their classification specifications. Such a condition, however, was not the fault of the employees, but rather, the result of mismanagement. This condition also constituted a direct violation of the Collective Bargaining Agreement (Joint Exhibit 1).

The abolishment, moreover, conflicted with the rationale provided by Darling. He asserted that the reorganization was initiated to increase the quantity in facility programming. This would be accomplished by additional Hospital Aide positions. It would, therefore, be inefficient to add these positions and abolish associated team leader positions. As such, the abolished positions were essential because there was a continued need for the positions.

Survey date also evidenced that there was a continuing need for these positions. Several surveys of the facility indicated that staff orientations were deficient because there was lack of training. On-going resident care, moreover, seemed to be lacking because the staff was not using proper techniques when interacting with residents. The Hospital Aide Coordinator I job specification (Joint Exhibit 21 (F)) indicates that these duties fall within the job domain of the abolished

positions. These survey results indicated that the quality of services provided rather than the quality of service providers engendered the inefficiencies referred to by Darling.

THE ARBITRATOR'S OPINION

In my judgment, the three Hospital Aide Coordinator I positions were properly abolished by the Employer. As a consequence, the four related collateral claims are also disaffirmed.

There was a permanent deletion of these positions due to a lack of continued need. It appears that some of their responsibilities were distributed to other employees holding different positions. A practice not specifically prohibited by Ohio Revised Code 124.321 (D). Machino's duties were distributed to direct care providers who assisted the podiatrist and the dentist after the abolishment. Machino's working out of classification would not alter this conclusion. By performing these duties, as opposed to traditional Hospital Aide Coordinator I responsibilities, Machino reinforced the Employer's argument that this position was no longer required.

Hospital Aide Coordinator I supervisory responsibilities were also properly distributed. After the abolishment, nurses working in the infirmary/clinic area supervised Hospital Aide personnel. Cornett's testimony supported the notion that her former team leader position was no longer required. Under direct examination Cornett asserted that she was still providing direction to other employees even though she was

classified as a Therapeutic Program Worker. Under cross-examination, however, her testimony changed as the following dialogue indicates:

E: As a Hospital Aide Coordinator, isn't it true that the distinguishing factor between a Hospital Aide Coordinator and a Hospital Aide is providing direction to the work force?

W: Yes.

E: And isn't it true that since you came back as a TPW you no longer provide direction but you relay messages between the supervisor and the work force in that --

W: Yes.

It should be noted that Machine basically concurred with the testimony provided by Cornett under cross-examination.

This analysis clearly indicates that the Employer complied with the statutory definition of an abolishment. The evidence supports the conclusion that after the ouster of these individuals, other employees did not perform substantially the same work in a like capacity. The Employer did not merely transfer their job duties to a new employee to perform."

The reorganization, and related deletions, were supported by legitimate efficiency considerations. Probably the most prevalent and pervasive problem confronted by the Employer has been in the area of direct care programming. This concern was underscored by new Medicaid guidelines which Darling knew about while he developed the

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"State, ex rel. Stine, v. McCaw (1940), 127 Ohio St. 13.

reorganization plan. The "normalization" of the facility engendered a greater amount of classroom activities and lessened the need for resident care in the living areas. Most of these activities took place during the day and required a decreased amount of concentrated direct care assistance and supervision. Concentrated involvement of direct care providers was, therefore, required at the beginning and conclusion of any given shift. At all other times, the residents were involved in activities outside of their immediate living area.

This Arbitrator believes that this programming goal was efficiently accomplished by the reallocation of human resources. Coverage at the beginning and end of the shift could more readily be accomplished by the additional use of part-time employees. The abolishment of unnecessary Hospital Aide Coordinator I positions allowed the Employer to shift its organizational resources toward the desired outcome. "Normalization" also required a shift in the process used to provide medical services. It would have been less efficient and counter productive to retain the existing delivery system process within the new "normalization" paradigm. "Normalization" resulted in a decreased number of Hospital Aide positions at the infirmary/clinic because more medical services were being delivered at the living areas.

Although alternative means to accomplish the "normalization" goals of the facility may be available, I am unwilling to substitute my judgment for that of the Appointing Authority in this instance. The Union, moreover, neither provided a plausible alternative nor was it able to tilt the preponderance of evidence in its favor. Testimony

provided by Machino and Cornett did not support the notion that the reorganization resulted in inefficiencies.

BARBARA SUTTEN, CYNTHIA WOOLFOLK, HAZEL MONTELESE, CATHERINE PRUITT AND GLADYS EVANS

Background Facts

As part of the institution's reorganization, the Employer abolished these General Activity Therapist I positions held by Barbara Sutten, Cynthia Woolfolk and Hazel Montelese. Two Activity Therapy Specialists positions were also eliminated. These positions were held by Catherine Pruitt and Gladys Evans.

The abolishments caused these individuals to initiate a number of personnel moves. Cynthia Woolfolk filled a part-time Activity Aide position at Warrensville Developmental Center. Gladys Evans filled a vacant part-time Activity Aide position at the Broadview Developmental Center. Catherine Pruitt was on disability leave at the time of the abolishment and did not displace another employee. Barbara Sutten was laid off after the abolishment because she had no other position to bump. The record does not disclose the outcome of Hazel Montelese's abolishment (Joint Exhibit 22).

As justification for these abolishments, the Appointing Authority submitted the following rationale to the Department of Administrative Services:

"...

General Activity Therapist I (PCN 48482.0) (PCN 64422.0) (PCN 64426.0)
Activity Therapy Specialist I (PCN 58421.0) (PCN 42428.0)

Reorganization of formal program services has resulted in a lack of need for these positions. The remaining General Activity Therapist I's and therapeutic program workers will provide sufficient lead staff for the client groupings.

..." (Joint Exhibit 3 Pg. 2)

Once again, the Employer argued that certain individuals waived their rights to pursue their respective claims because they failed to attend the hearing. These individuals included Barbara Sutten, Cynthia Woolfolk, Hazel Montelese and Catherine Pruitt. They did not waive their rights to pursue their respective claims. The ruling involving other employees in prior sections of this opinion also apply with respect to this group of Grievants.

The Position of the Employer

The Employer asserted that these abolishments were proper based on the need to reorganize the facility in an attempt to upgrade program services in an efficient manner. As a consequence, these positions were no longer needed because comparable services could be provided by the remaining General Activity Therapist I's and Therapeutic Program Workers.

Testimony provided by Gladys Evans was thought to be unpersuasive. She testified that after the abolishment she continued to perform some of her pre-abolishment duties. After the abolishment, however, Evans stated that she provided services by referring to "scenarios" developed

by individuals in other classifications. The apparent overlap of pre and post abolishment duties did not establish that Evans was actually functioning in her prior capacity even though she was reclassified after the abolishment. Her new position did not contain certain distinguishing characteristics which would have placed her in the higher job classification.

John Delaney, the Union's expert witness, was also thought to be unpersuasive in his attempt to refute the Employer's efficiency justification. Delaney's qualifications were viewed as suspect because he had withdrawn from the field for approximately three years. He was also unfamiliar with the new Federal regulations which caused him to provide opinions based upon stale information.

The Position of the Union

The Union argued that the abolishment of Evans' position was illegal for a number of reasons. First, Evans maintained that she essentially performed the same duties before and after the layoff. Much of her therapeutic programming activities, however, diminished after the abolishment because of reduced resources.

Second, Evans alleged that her role in the preparation of Individual Habilitation Programs remained the same after the abolishment. She actively participated in the program development process and continued to monitor the residents' progress once programs were developed.

Third, her part-time status was viewed as a pretext because she virtually worked a full-time schedule after the abolishment. On a

regular basis, she was assigned seventy-eight to seventy-nine hours per pay period. This schedule was relatively consistent and met expectations announced by her supervisor after she obtained this part-time position. Evans moreover, often worked overtime to cover for a variety of employee call-offs; and when activities exceeded the programming schedule. These periodic overtime occurrences negatively impacted her ability to provide the proper quantity and quality of program activities.

Last, Delaney identified many program deficiencies related to the programming efforts referred to by Evans. As such, the abolishment was not viewed as efficient because Evans performed less program activities after the abolishment. Many of the reasons previously articulated led to this result.

THE ARBITRATOR'S OPINION

From the evidence and testimony introduced at the hearing, the positions in question were properly abolished. Both the statutory definition of an abolishment and the justifications provided by the Employer support this conclusion.

Nothing in the record indicates that the services these individuals provided prior to the abolishment were presently required. These positions, more specifically, were eliminated due to lack of continued need for the positions in question. Substantially the same work was not being performed by these employees after the abolishment; and others in

the organization were not performing work in a similar capacity.

Although Evans attempted to equate the duties she performed prior the abolishment with those performed after the abolishment, a review of submitted job specifications and her own testimony refute these perceptions. Under direct examination, Evans asserted that prior to the abolishment she "handled" recreational activities. This involved the independent development of "outside" activities, performing necessary paperwork and soliciting the cooperation of direct care staff. She admitted that post-abolishment duties did not involve an inordinate amount of "outings" because classroom activities became more prevalent.

This review indicates that the duties were not substantially similar. Her excuse that duties after the abolishment were curtailed because of staff shortages and overtime requirements seems contrived. The variance in duty requirements was a function of altered job responsibilities; her previous position was eliminated by the Employer.

This conclusion is further bolstered by a comparison between the classification specification for an Activity Therapy Specialist I (Joint Exhibit 21(B)) as opposed to the classification specification for a Therapeutic Program Worker (Joint Exhibit 21(I)). As an Activity Therapy Specialist I, she organized or assisted in the planning and conducting of "activity therapy program(s) of specialty area(s) for specific therapeutic and goal reaching rehabilitative purposes other than entertainment..." As a Therapeutic Program Worker, however, she "planned leisure time activity (e.g. games, crafts, walks) to fill free time when none was scheduled by (the) activity therapy department (and)

assists with related scheduled activities (e.g., recreational educational, occupational)." Obviously, these two job specifications differ in terms of program content responsibilities. One cannot equate the planning of leisure activities to fill free time with programming efforts specifically designed to accomplish therapeutic and rehabilitative purposes.

There is also a major difference in terms of program development content. A Therapeutic Program Worker trains residents to function independently in self-help and/or conducts training and/or classes in activity therapy programs with specific therapeutic and rehabilitative purposes. Again, one cannot logically equate daily living skills with activity therapy domains dealing with occupational, structured therapeutic, vocational or social needs.

It should also be noted that similar content, process and planning differences exist between the two previously mentioned job specifications and the General Activities Therapist job specification (Joint Exhibit 21(A)). Consequently, these specifications fail to support the theory of an illegal abolishment based on a mere job transfer.

The Employer, moreover, was able to justify its efficiency justifications. Once again, there was a need to reorganize the institution so that the quantity of direct care personnel could be scheduled in a manner which increased staffing flexibility.

Darling provided additional support when he discussed the efficiency rationale which caused the reorganization of the recreation

department. He noted that for a considerable period of time Broadview Developmental Center had positions on the organizational chart for General Activity Therapist I's and Activity Therapy Specialist I's, but not all of the positions had been filled. The closing of the Cleveland Developmental Center resulted in a series of bumps with a number of individuals bumping into the previously mentioned positions.

The addition of these new employees exacerbated an already inefficient delivery of recreation services. Under the old table of organization the recreation services department was staffed completely by General Activity Therapist I's and Activity Therapy Specialist I's. This was viewed as an inefficiency because services were provided by employees in relatively high classifications.

Not only were the services being delivered by the wrong individuals, the programming efforts proved to be inefficient as evidenced by prior survey results. This situation resulted in the policy of "normalization" of recreation services by moving toward a classroom oriented paradigm. Some General Activity Therapist I's were moved into the classroom to function as leader workers. Traditional living area recreational services were conducted by part-time Activity Aides.

The "normalization" process resulted in an excess number of General Activity Therapist I's and Activity Therapy Specialist I's. This condition led to the contested abolishments.

The Union failed to properly counter the Employer's efficiency justifications. Delaney, the Union's expert witness, never truly

addressed several critical aspects of the Employer's efficiency argument. He could never sufficiently address the benefits and detriments associated with the "normalization" process; he was unaware of the new Federal regulations. Also, his thoughts concerning part-time employee problems were purely anecdotal and failed to relate his views to actual difficulties at the facility in question.

This Arbitrator has previously remarked that a Grievant does not waive his/her right to pursue a matter merely because he/she does not appear at an arbitration hearing. It is also axiomatic that a class of grievants may have its interests represented by a member of the class. It is highly unusual, however, to have a member of one job classification representing the interests of another job classification. Here, the Union proposed that Gladys Evans, an Activity Therapy Specialist I, was representative of the Activity Therapy positions in the activity therapy department. This suggestion seems to be a reach on the part of the Union. As this Arbitrator previously ruled, there are major differences in the various job specifications within the activity therapy department. As such, the Union's representation claim minimized its attempt to counter the abolishment of the General Activity Therapy Specialist I positions.

Although an employer is bound by statute to establish the propriety of any abolishment by a preponderance of the evidence, this requirement does not entirely remove certain obligations on the part of the Union. Black's Law Dictionary (4th Edition, Pgs. 1344-1345) defines preponderance of evidence in the following manner:

> "It rests with the evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto."

Obviously, a union can win any particular abolishment claim without presenting any direct evidence countering an employer's efficiency justification. In doing so, however, the Union faces the possibility of failing to introduce sufficient opposing testimony to dissuade a positive impression created by the employer's testimony. This Arbitrator's ruling on the abolishment of the General Activity Therapist I positions was partially based on these considerations.

THE ARBITRATOR'S AWARD

The following abolishments and collateral claims were determined to be proper. As such, the associated grievances are denied:

Hospital Aide Coordinator I

Judy Machino
Mary Green
Lucy Cornett

Therapeutic Program Work (Full-time and Part-time)

Deanna Daniels
Laureen Lunder
Shawnee McWain
Gwendolyn Harvey

General Activity Therapist I

Barbara Sutten
Cynthia Woolfolk
Hazel Montelese

Activity Therapy Specialist I

Catherine Pruitt
Gladys Evans

The following abolishments were found to be improper because they violated conditions contained in Ohio Revised Code 124.321(D). As such, the associated grievances are upheld because the Employer failed to meet the guidelines dealing with the statutory definition of an abolishment and/or failed to support by a preponderance of the evidence that the abolishments were supported by special circumstances (i.e. reorganization, economy, and efficiency).

Custodial Worker (Full-time and Part-time)

Carol Kuhar
Otis Terrell

Safety and Health Inspector

Homer Michaud

Medical Lab Technician II

Carl Eshelman

Food Service Coordinator I

Hattie Sanders

Cook I

Rufus Sharpe

This Arbitrator directs the Parties to meet and negotiate regarding the appropriate remedies for those grievances which were upheld by the Arbitrator. The unique circumstances surrounding these grievances support a negotiated settlement attempt. The circumstances considered by the Arbitrator include, but are not limited to, the following: the

period of time which has elapsed since the abolishments, the potential closure of the facility, the Special Masters' concern about staffing and layoff policies, and the employment status of some Grievants. If the Parties are unable to reach agreement within sixty calendar days after receipt of this Award, the following Award shall be implemented at the end of said sixty day period.

For all the foregoing reasons, the Employer is directed to reinstate all successful Grievants to their former positions, until such time as they were able to assume other positions through promotions. All Grievants who were bumped out of their positions as a result of the improper abolishments shall be reinstated to their former position, until such time as they were able to assume other positions through promotions.

The Grievants are entitled to back pay from the date of the abolishment through the date of reinstatement or until such time they were able to assume other positions through promotions. This amount shall be reduced by unemployment compensation received and <u>established</u> (Arbitrator's Emphasis) interim earnings. Also, the Grievants shall receive all lost benefits which include: holiday pay, all leave accruals which would have been credited during the period of layoff, and reinstatement of full seniority and service credits.

Grievants are entitled to lost Employer contributions to the Public Employee Retirement System (PERS) for all dates from the date of abolishment through the date of reinstatement or until such time they were able to assume other positions through promotions.

Homer Michaud's situation requires some additional analysis. He is presently employed with the Department of Rehabilitation and Corrections. The Employer's back-pay liability, therefore, ceased upon his acceptance of this position on March 26, 1990. Michaud's rate of pay with the Department of Rehabilitation and Corrections shall reflect the existing classification plan and shall not reflect the rate of pay previously received as a Safety Health Inspector I. The Employer, moreover, does not have to reimburse Michaud for the PERS monies withdrawn after the abolishment. Even though this Arbitrator has ruled that the abolishment is improper, the withdrawal of funds was a voluntary decision initiated by Michaud. This does not mean, however, that the Employer is not obligated to reimburse Michaud for lost Employer contributions to the Public Employee Retirement System.

The record is unclear concerning the present employment status of Carl Eshelman. If he is presently employed by someone other than the Department of Mental Retardation and Developmental Disabilities, the rationale devised for Michaud's special circumstances shall also be applied to Eshelman's case.

The Arbitrator will retain jurisdiction for thirty days beyond the sixty day settlement period previously discussed to resolve any issues regarding the remedy portion of this Award.

5/6/91
Date

Mr. David M. Pincus
Arbitrator