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In the Matter of Arbitration

Between

State Council of Professional  
Educators, OEA/NEA

and

The State of Ohio, Ohio  
Veterans Children's Home

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Case Numbers:

\* 32-00-911017-0276-06-10

\* 32-00-911025-0278-06-10

Before: Harry Graham

Appearances: For State Council of Professional Educators:

Robert W. Sauter  
Cloppert, Portman, Sauter, Latanick & Foley  
225 East Broad St.  
Columbus, OH. 43215-3709

For Ohio Veteran's Children's Home:

Lou Kitchen  
Office of Collective Bargaining  
106 North High St., 6th and 7th Floors  
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on April 7, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on May 10, 1992 and the record was closed on that date.

Issue: The parties agree upon the issue in dispute between them. That issue is:

Did the Employer violate Article 18 of the Contract when

it laid off two employees within the OEA/SCOPE bargaining unit? If so, what shall the remedy be?

The issue incorporates two questions. These concern questions of procedural regularity and whether or not the Employer had a lack of funds sufficient to justify the lay off of two members of the bargaining unit. The two issues which comprise the issue stated above may be stated as:

Did the Employer meet the procedural requirements of Article 18 in effecting the Reduction in Force (RIF), and if not, what shall the remedy be?

and

Has the Employer established that there is substantive validity to support the RIF due to a lack of funds to sustain the positions of two teachers at OVCH, and if not, what should the remedy be?

Background: The events that prompt this proceeding are not a matter of dispute and may be succinctly stated. The State of Ohio operates a facility known as the Ohio Veteran's Children's Home. Originally established to care for children of Civil War veterans the Home continues to exist some 127 years after the close of that conflict. On September 19, 1991 the Interim Superintendent of the Home, Lieutenant Ralph Fussner informed the President of SCOPE, Arthur Lunt, that the Home intended to lay off members of the bargaining unit represented by SCOPE. When the Union was notified of the pending lay off there was included the Employer's rationale for the layoff, a list itemizing the positions to be affected in the SCOPE bargaining unit, a list itemizing affected

positions in other bargaining units and among non-bargaining unit employees. On September 27, 1991 a meeting was held between Union and Management officials to discuss the pending layoff. At that meeting the Union was provided opportunity to question the rationale proffered by the Employer justifying the proposed layoff. As a result of that meeting, the Employer modified its planned layoff. On October 23, 1991 a revised layoff scheme was communicated to the Union. That revision was designated by the Employer as its final plan.

The Union protested the layoff of members of its bargaining unit through the contractual grievance procedure. The grievances were not resolved and the parties agree that they are now properly before the Arbitrator for determination on their merits.

Position of the Union: The Union contends that the Employer has failed to meet the procedural requirements of the Agreement when it laid off the teachers who are party to this grievance. Section 18.01 of the Agreement is a detailed layoff procedure. It must be followed when a layoff is to be effected. The Agreement mandates that "at least forty-five (45) days prior to the anticipated effective date of a RIF, the Association must be afforded an opportunity to meet with the Employer." In addition, the Association must be provided an opportunity to challenge the layoff at the meeting or within ten days afterwards. The Association is permitted to

offer input to the layoff decision and that input is to be "seriously considered" before any "final decision" regarding a layoff is made.

As the Association reads the Agreement, no decision is to be made at the meeting. Rather, the decision is made no later than thirty days prior to the proposed effective date. The layoff decision must be communicated to the Union along with supporting documentation. This is to include a written rationale and a final listing of the classifications to be laid off and other specific bits of information.

The chronology of this dispute indicates that on September 19, 1991 the Interim Superintendent notified the President of the Union that a layoff of SCOPE represented employees could occur as early as November 4, 1991. On September 23, 1991 the President of the Union wrote the Interim Superintendent and scheduled a meeting for September 27, 1991 to discuss the proposed layoffs. A meeting was held on that date and the Union challenged aspects of the proposed layoffs. In particular, it raised the issue that the proposed layoff of the librarian would violate state mandated education standards.

The proposed layoffs were to take effect on November 4, 1991. Consequently, the Employer was required by the terms of the Agreement to notify the Union by October 4, 1991 of its final decision. In fact, this did not occur. The failure of

the Employer to communicate its final layoff decision to the Union was drawn to its attention by the President of the Union on October 9, 1991. On October 15, 1991 the new Superintendent of the facility wrote the Union and confirmed that a final decision regarding the layoff had not been reached. He also opined that he had to October 18, 1991 to notify the Union of the final layoff list or any changes in the list. That was immediately disputed by the Union which reiterated its view that October 4, 1991 was the last possible notice date if the Employer desired to layoff at the beginning of November, 1991. A grievance to this effect was filed.

On October 23, 1991 the Union was notified of the Employer's final decision regarding the layoff. A new layoff list was provided to the Union and two teachers were slated for layoff on December 2, 1991. The Union views this sequence of events to be violative of the Agreement. It asserts that the October 23, 1991 notice did not comply with the Agreement as it was not made no later than thirty (30) days prior to the proposed effective date of the layoff. The only layoff date proposed by the Employer was November 4, 1991. The Employer was required to notify the Union by October 4, 1991. Its notice was dated October 23, 1991. This was nineteen days late in the opinion of the Union. No layoff occurred on November 4, 1991. Hence, the notice requirements of the

Agreement were not met according to the Union. As the Arbitrator is bound by the customary restrictions upon his authority the Union urges that as the Employer is bound to a specific time sequence in layoff situations and did not comply in this case, the layoffs must be voided.

Turning to the merits of the layoffs, the Union notes that the sole reason advanced by the Employer to justify them was lack of funds. It had a \$664,429 deficiency in funding according to its own accounting. In the final analysis, the layoff of the two teachers at issue in this proceeding was expected to save the Home approximately \$32,000. This figure accounts for the associated costs of unemployment compensation.

The Union acknowledges there exists a shortfall in funds available to the Home from General Revenue sources. But the Home has funds from other than General Revenue dollars. These have not been cut. These are as follows:

Table I

<u>Fund</u>	<u>Amount</u>
National School Lunch Program	\$151,946
Federal Education (Title 1)	\$ 57,582
Federal Special Needs	\$ 3,597
State Vocational Education	\$ 55,676
State Tuition Reimbursement	\$ 29,694

There is a shortfall of \$209,286 in General Revenue Funds. This can be offset by the funds above, producing an amount of \$89,209 which is sufficient to cover the \$32,000 that will be saved by the layoffs in question in this proceeding.

In fact, the Union points out that the preceding analysis is conservative. The State Tuition Reimbursement program is likely to yield more dollars to the Home than currently anticipated according to the Union. As that is the case, there exists ample resources to fund the two positions at issue in this proceeding in the Union's view.

According to the explicit language in the Agreement at Section 18.01 it is the Employer that must shoulder the burden of justifying a layoff. Given the resources available, it simply cannot do so according to the Union. Even if no funds were available as asserted by the Union, the two positions at issue in this proceeding account for only .05% of the anticipated deficit in the accounts of the Home. Given that situation, the Union is of the view that the Employer cannot meet the contractually required burden. As that is the case, it urges the Grievances be sustained and the teachers at issue in this proceeding be returned to employment with back pay and benefits as appropriate.

Position of the Employer: As is to be expected, the State disagrees with the Union on all aspects of this dispute save the facts. The Agreement at Section 18.01 provides that at least 45 days prior to the anticipated effective date of a reduction in force the State must offer the Association an opportunity to meet. On September 19, 1991 the Employer notified the Union it was contemplating a layoff. The notice

to the Union included a rationale and the people the Employer proposed to layoff. A meeting was held between the parties on September 27, 1991. The Employer explained its funding difficulties to the Union. The Union set forth its view that the Home would violate State education standards if the librarian were to be laid off. Accordingly, the Employer agreed to retain the librarian. It revised the layoff list to include two teachers, rather than one. On October 23, 1991 the Employer provided what it characterized as a final layoff list to the Union. In the interim period it also provided the Union with a list of available vacancies, a revised seniority list and the expected duration of the layoffs. This material was provided at the direction of the Agreement. No additional rationale beyond what had been initially provided the Union was supplied. The continuing rationale for the layoffs was lack of funds. The Union was provided an opportunity to challenge the layoffs at the September 27, 1991 meeting. The Agreement does not require an additional meeting because the people to be laid off changed subsequent to that meeting the State insists. The underlying rationale for the layoff, well known and understood by the Union was the funding problem being experienced by the Home. That the layoff list was modified as a result of the September 27, 1991 meeting does not start the clock running again in the State's view. The Employer complied with the procedural requirements of Section



18.01 it insists. No harm came to any member of the bargaining unit as a result of the series of meetings held to discuss the pending layoffs. In fact, the delay occasioned by revision of the layoff list inured to the detriment of members of other bargaining units who were laid off as a result in the State's view. Nothing occurred in the meeting sequence in the Fall of 1991 that would warrant the setting aside of the layoffs as requested by the Union the State insists.

In the opinion of the Employer it had ample grounds to layoff the Grievants due to a lack of funds. There is no question but that the Home was experiencing a deficit of \$664,429. Funds provided to the Home had been reduced by the State. The reduction in funding represented 5.1% of the Fiscal Year 1991 amounts. Projected appropriations for Fiscal 1993 are expected to increase 1.6% above the amounts available for FY 1992. No question exists concerning the fact that funds available to the Home have been substantially reduced.

Estimates of funds available to the Employer made by the Union are erroneous or misleading in the opinion of the State. They include the monies itemized in Table I above. The Employer does not have discretion as to how such monies are to be utilized. They cannot be reallocated among various accounts to pay salaries and benefits of those laid off in

the bargaining unit represented by SCOPE. Moreover, the Home laid off members of the bargaining unit represented by another union, OCSEA/AFSCME. Twenty-nine people in the OCSEA/AFSCME bargaining unit were laid off. In addition, management personnel were reduced. Should these grievants be restored to employment, personnel in the other bargaining unit and/or additional management personnel will have to be laid off in order to make up the necessary funding shortfall. In essence, there will be a game of musical chairs being played with people who are to be laid off. Such a development should be avoided according to the State.

Pointing to an arbitration decision of Arbitrator Jonathan Dworkin the State asserts that when arbitrators review layoff decisions they should exercise their authority circumspectly. That is, unless it may be said with positive assurance that a violation of the Agreement has occurred, the action of the Employer should be sustained. Furthermore, in this case, even if it is assumed that the Union is correct in its accounting of funds available to the Home, the Arbitrator should not substitute his judgement for that of responsible management officials. That is, it is they who are responsible for delivery of service to their clientele. On a day to day basis, they allocate funds among the various accounts maintained by the Home. Only the responsible managerial personnel can determine what functions must be performed and

the allocation of funds that should be made to each. As that is the case, the Arbitrator should not substitute his judgement for that of the management personnel who best know how to deploy the scarce resources available to the Home. As a result, the State urges the Grievance be denied in its entirety.

Discussion: In the procedural aspects of this dispute the Union focuses squarely upon the trees and overlooks the forest. On October 23, 1991 the Employer notified the Union of the final layoff decision. Its notice itemized the people to be laid off, Ms. Price and Ms. St. Dennis, together with the appropriate demographic data. Its notice was in compliance with the layoff of procedure set forth in Section 18.01, page 44 of the Agreement which provides that:

... no later than thirty (30) days prior to the proposed effective date of the reduction in force effective date of the reduction in force, the Employer shall make a final decision as to whether it will effect a reduction in force. Such final decision shall be communicated to the Association. If a reduction in force is to be effected, the Employer shall supply to the Association a written rationale, with supporting documentation if any, revised if necessary, setting forth the basis for the final decision.

The required rationale was provided to the Association on September 27, 1991. That was approximately one month before the October 23, 1991 notice. It was unnecessary for the Employer to again set out its rationale for the pending layoff. The rationale did not change. That rationale was well

known to the Union. The Union cannot claim surprise or deceit on the part of the State. It cannot claim ignorance of the reason for the pending layoff.

It is the case that the persons slated for layoff changed between September 27 and October 23, 1991. At the behest of the Union the librarian was deleted from the layoff list and a teacher added in her place. The Agreement provides that:

The Association shall also be provided with a final listing of the classification(s) where reduction in force will occur....

There is no specificity concerning when such a final listing is to be provided. The thirty day notice requirement refers to notice, not when the Employer is obligated to provide to the Union the itemized list of people to be laid off. Nonetheless, the notice of October 23, 1991 itemized Ms. Price and Ms. St. Dennis. Obviously this was shortly prior to the original layoff date communicated to the Union. It was well before the revised date of December 2, 1991 which had also been communicated to the Union. To require the Employer to hold an additional meeting and essentially restart the clock because the layoff list had changed at the behest of the Union is an exercise in futility. The State complied with the procedural aspects of the layoff specified in the Agreement. The Union was provided its opportunity to challenge the State's rationale. It received timely notice of

those who were on the final layoff list. No purpose would be served to require the State to hold a second round of meetings because the people to be laid off had changed or the effective date of the layoff was altered. To the contrary, it is likely that to read the Agreement so as to require another round of meetings and a further tolling of the notice period would be counterproductive. Additional layoffs would be required. A reading of the Agreement to produce such a result is unjustified. It cannot be said that the State has violated the layoff notice provisions of the Agreement in these circumstances.

Concerning the merits of the layoffs it is beyond doubt that the Employer was experiencing a financial situation that it had not anticipated. This was due to the fact that the State, the primary financial support of the Home, had cut the amount of funds available. When the Union cites the amounts received by the Home set forth in Table I as being available to offset cuts in State funding, it is not entirely accurate. Testimony was received from Jay Strayer, Business Manager of the Home, to the effect that the various Federal and State funds itemized in Table I are for specific uses. They cannot be shifted among various accounts maintained by the Home.

Article 18 of the Agreement permits the Employer to lay off for "lack of funds." It may also layoff "for reasons of economy." Admittedly the amount ultimately at issue in this

proceeding is small, some \$32,000 after offsetting expenses associated with Unemployment Compensation. The layoffs offset about one-half of one percent (.5 of 1.0%) of the anticipated budget deficit. That observation must be tempered with the observation that the layoffs and funds at issue in this proceeding do not stand alone. They did not occur in isolation. Rather, they were part of managerial response to the entire problem of the funding shortfall it was experiencing. It is intellectually dishonest to conclude that as the amount in question is small, that the Employer did not meet the test of "lack of funds" set forth in the Agreement. If these layoffs stood alone there would be no question that the Employer would fail the contractually mandated test. The unfortunate fact is that the layoffs under review in this proceeding do not stand alone. They are part of a larger response to the funding difficulties experienced by the Home. Bargaining units represented by other Unions experienced larger numbers of people being laid off. Managerial personnel were laid off as well. The number of students served by the Home dropped by 60. Under these circumstances it must be concluded that the Employer has demonstrated the requisite "lack of funds" and that it indeed had a bona fide "reason(s) for economy" which necessitated the unfortunate action at issue in this proceeding.

Award: The grievance is denied.

Signed and dated this 5<sup>th</sup> day of June, 1992 at South  
Russell, OH.

Harry Graham  
Harry Graham  
Arbitrator