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In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department of Natural Resources

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Mary Douglas Lacy

Case Numbers:

25-20-(8-7-91)-01-01-09
25-17-(8-7-91)-02-01-09
25-20-(8-7-91)-02-01-09
25-20-(8-7-91)-03-01-09
~~25-20-(8-7-91)-03-01-09~~
25-20-(8-7-91)-09-01-09 ?

Before: Harry Graham

#791

Appearances: For OCSEA/AFSCME Local 11:

Maxine Hicks
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Natural Resources:

Jon Weiser
Labor Relations Administrator
Department of Natural Resources
1930 Belcher Dr.
Columbus, OH. 43224

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on May 5, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on June 15, 1992 and the record was closed on that date.

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

Did the abolishment in the Offices of Employee Services,

General Services and Budget and Finance and the subsequent displacement of positions identified in these grievances violate the Labor Agreement? If so, what shall the remedy be?

Background: During the summer of 1991 the Department of Natural Resources undertook a reorganization of its organizational structure. Specifically, three offices of the Department experienced a reduction in their staff complement. These officers were: the Office of Employee Serivces; the Office of General Services and the Office of Budget and Management. The Office of Employee Services combined three sections, Personnel, Labor Relations and Equal Employment into one section. This resulted in abolishment of three postions within the Office of Empolyee Services. One of the abolished positions was exempt. Specifically, two Clerk I positions in the EEO section were abolished. Their work was given to a secretary. The Office of General Services abolished two positions. One was a Radio Operator who was based in Chillicothe, OH. The other was an Inventory Control Specialist 1 stationed in Columbus. The Office of Budget and Finance was created by the combination of three sections within the Department. As a result, four bargaining unit positions were abolished. Three of these were Data Entry Operators. One abolished postiion was a Data Procssor. The tasks performed by the laid off people were taken over by fourteen Account Clerks in the Office of Budget and Management.

In order to protest the lay offs grievances were filed. They were processed through the procedure of the parties without resolution and are now before the Arbitrator. Position of the Union: The Union insists that these grievances are properly before the Arbitrator for determination on their merits. In other words, the Union holds to the view that these layoff disputes are arbitrable. There is a great deal of authority supporting that view. In Broadview Arbitrator David Pincus indicated that there was nothing in the Labor Agreement which prohibited an arbitrator from reviewing the procedural and substantive aspects of a layoff decision. Similarly, in a dispute involving Grievants Hamner and Williams this Arbitrator determined that the contractual grievance procedure was the proper forum for challenge of a layoff decision. On April 28, 1992 the Tenth Appellate District Court of Appeals denied the State's motion to vacate the Hamner and Williams award. (Case No. 91AP-1174) The decsion of this Arbitrator had previously been upheld by the Common Pleas Court as well. In essence, the Union insists that any challenge of the jurisdication of an arbitrator to hear appeals from layoff is frivolous and amounts to nothing more than harassment. It is clear that an arbitrator has the authority to review the layoff decisions made by the Department according to the Union.

In its review of my decision in Hamner and Williams the

Court also upheld the view that it is the Employer that bears the burden of justifying layoff decisions. It observed that the burden of proof in such disputes is placed upon the party that has access to the evidence to support its action. In disputes of this nature, layoffs, that party is the Employer. Without further extensive reference to what is well-settled law, it is the Unions view that the Employer must justify the layoffs under review in this proceeding.

There are several significant court decisions in Ohio concerning the burden of proof in layoff disputes. See Esselburne v. Ohio Department of Agriculture (1988), 49 Ohio App. 3d 37 and Bispeck v. Bd. of Commissioners (1988) 37 Ohio St. 3d 26. Esselburne indicates that an employer may meet its burden of justifying layoff with quantitative data, showing work performed before and after layoff. A similar view was enunciated by Arbitrator Pincus in Broadview. In Bispeck the Employer asserted its layoff was due to enhanced organizational efficiency. Its assertion was rejected by the Court. It found there was insufficient proof of the Employer's assertion. The same situation prevails in this case according to the Union. There is a lack of any documentation of greater efficiency in the Department's operations due to the reorganizations that prompted the layoffs under review in this proceeding. In Oakwood I held the Employer to a high standard of proof regarding supporting

data necessary to justify layoff decsiions. In this situation there is no data whatsoeverfrom the State to support its decision. No evidence is on the record to the effect that consolidation of the sort that prompted the layoff decisions was either necessary or desireable. In theabsence of evidence the action of the Employer may not be sustained according to the Union.

This view is supported by the holding of Arbitrator Pincus in Broadview. The arbitrator in that dispute rejected an argument that salary savings were sufficient justification to establish a bona fide rationale for layoff. That should occur in this case as well. In this situation there is no justification for the layoffs. No data is on the record. No comparison of the tasks performed before and afterthe reorganization exists. In this case, the Employer has asserted that increased efficiency is the reason for the layoffs. If that is so, data supporting that view should be available. None is.

The Union also points out that during the life of the 1989-91 Collective Bargaining Agreement the parties engaged in discussions over various of its Appendices. As the Union relates the history of those discussion change occurred in those Appendeices. That change was not reflected in the layoffs under scrutiny in this proceeding. Had it been so one of the Grievants, Alicia Mackey, would have had enlarged

bumping rights. Ms. Mackey was laid off effective August 16, 1991. The Memorandum of Understanding memorializing the changes in the Appendices was in effect August 9, 1991. That this is the case is reflected in the signaturtes of Union and Management representatives. It was also testified to by an official of the Office of Collective Bargaining, Meril Price.

Position of the Employer: The State points out that layoffs may be justified for reasons of lack of work, lack of funds or for reason of economy and efficiency. Turning to the specifics of the disputes at issue in this proceeding the State asserts that it had justification for the layoffs. When the Office of Employee Services reorganized, it combined three sections into one. Consequently, support staff in the three pre-existing sections was available for use in the one, newly created section. This enabled the work to be done with fewer people. Hence, the abolishment of three positions, one of which was outside of the bargaining unit. The same level of work is being performed today as was the case under the prior administrative structure. This is indicative of greater efficiency in the provision of service. As that is one of the criteria justifying abolishment of positions and has been met in this instance, the State insists the layoffs in the Office of Employee Services were justified. The Union cannot show to the contrary nor did it attempt to do so at the arbitration hearing. Hence, the layoffs in Employee Services must be

found to be proper according to the State.

The Office of General Services abolished two positions. These were a Radio Operator in Chillicothe and an Inventory Control Specialist 1 at the Central Office in Columbus. With respect to the Radio Operator, the Department contends that the structure of its radio stations is such that the traffic previously handled by the person at Chillicothe could be handled by nearby stations. Hence, the need for this position no longer existed. The Inventory Control Specialist did not truly perform tasks associated with that classification. The tasks he previously performed could be given to a Storekeeper as part of the duties of that position. As was the case with the Office of Employee Services, the State contends that the Union has been unable to demonstrate that the reorganization of the Office of General Services was for any reason other than to secure increased economy and efficiency.

With respect to the Office of Budget & Finance, it was created by merger of three pre-existing sections within the Department. The Budget Section, the Internal Audit Section and the Business and Administrative Services Office were combined. This enabled four positions previously held by members of the bargaining unit to be abolished. Three Data Entry Operators and a Data Processor were terminated. The tasks they had been performing were assumed by fourteen Account Clerks within the Office. This change was facilitated

by the fact that the Department made another change in its method of operation. Prior to this event it had utilized two accounting systems. One was internal to the Department. The other was the Central Accounting System used throughout State government. Historically, data from the Departmental system was translated into the Central Accounting System. On July 1, 1991 the Departmental system was merged into the State system. This eliminated work that had been performed in prior years.

During the Arbitration hearing testimony was received indicating that managerial personnel had performed work that conceptually was within the province of bargaining unit personnel. Any such activity was incidental. Management personnel were instructed to not perform bargaining unit work in forthright and unequivocal terms. When such tasks were performed by managerial employees, it was to cover for bargaining unit members who were absent with great frequency. Those people used a great deal of leave time. Work had to be done. In the State's view the high amount of leave time necessitated use of management personnel to do what is arguably bargaining unit work.

The State insists that the layoffs under review in this proceeding were done correctly. A seniority roster had been provided to the Union less than six months prior to the layoffs. A handwritten update was given to the Union

immediately prior to the event. There is no procedural difficulty with this in the State's view.

When the layoffs occurred an employee, Alicia Mackey, was bumped by a managerial employee, Cindy Bowers. This was proper. There were however, ongoing discussions between the Union and State at the time of the layoffs over Appendices to the Agreement, specifically Appendix I. As amended, that Appendix would have given Ms. Mackey expanded bumping rights. The State insists that the parties had not reached agreement on the revised Appendix at the time of the layoffs. A letter from the Office of Collective Bargaining, reflecting the agreement of the parties had been sent over the signature of Meril Price to Marianne Steger of the Union. That letter was not binding according to the State. Ms. Price lacked authority to bind the Employer. Furthermore, the correspondence between the parties has about it an equivocal tone. When the memorandum of understanding that finally came to reflect the parties agreement on the revised appendices came into being it was signed by the principals of both the State agency, the Office of Collective Bargaining, and the Union. Ms. Price did not bind the State in any fashion.

In the opinion of the State it has retained under the Agreement the right to determine which positions to abolish. The affected employees and the Union have the right under the Agreement to contest the implementation of the layoff, not

the rationale behind the layoff.

The State asserts that it is the Union that bears the burden of proof in disputes of this nature. The Union has not done so according to the Employer. The Union has failed to demonstrate that the procedure for layoff was improper nor that the Employer did not have sufficient rationale for the action. The Union and arbitration decisions involving these parties have long recognized the inherent authority of the employer to layoff.

Discussion: Neither in its oral presentation nor in its post hearing statement did the State make extensive arguments concerning the arbitrability of this dispute. Such argument as was made may best be termed as cursory in nature. That this is the case confirms the naive belief in the ability of human beings to learn from experience. That disputes involving lay off of State employees are arbitrable must be considered to be well settled. In Case Numbers 11-09-(89-10-26)-0119-01-06 and 11-090(89-10-23)-0120-01-06 involving the Bureau of Employment Services and Grievants Jimmy Williams and Edward Hamner I was of the view that the Grievances concerning their layoffs were properly before the Arbitrator. In that decision reference was made to the Collective Bargaining Agreement and the Ohio Revised Code and the Administrative Rules. In my view they conferred a benefit upon employees which extended to them neutral review in the

forum of arbitration. That forum is the terminal step of the grievance procedure which the Agreement at Article 25, Section 25.01 makes the "exclusive method of resolving grievances." The clear expression of the parties agreement is to resolve layoff disputes in the grievance procedure, including arbitration if necessary. That this is the case was recently found to be the correct view of the parties understanding by the Tenth Appellate District Court of Ohio. On April 28, 1992 that Court rendered its decision on the State's appeal of my Williams and Hamner decision. (Case No. 91AP-1174). The Court unanimously sustained my decision, holding that "... we can conclude that the arbitrator's award was rationally derived from the terms of the collective bargaining agreement." By so doing, the Court gave effect to the Agreement of the parties at Section 25.03 which in unequivocal, unambiguous and plain English expresses the understanding that "The decision and award of the arbitrator shall be final and binding." On occasion that language is overlooked or disregarded in an attempt to find a sympathetic forum.

In a similar vein Arbitrator David Pincus in Case No. 24-03-(88-10-25)-0079-01-04 involving layoffs at Broadview Developmental Center was of the view that the dispute was properly before him as arbitrator. In a cogent discussion of the arbitrability argument made by the State, Arbitrator

Pincus dismissed it in its entirety. It was his view that "Such a ruling (finding the layoff issue to be non-arbitrable) 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 Agreement." (page 19)

Bearing in mind the holding in Hamner and Williams and Broadview any claim by the State that this dispute is not arbitrable must fall on deaf ears. It is beyond doubt for the reasons set forth in those decisions that this dispute is arbitrable.

Similarly the claim of the State that the Union bears the burden of demonstrating that either the manner of the layoff was improper or that the necessity for them was nonexistant is erroneous. Rule 124-701(A)(1) places squarely upon the Employer the burden of supporting its action by a "preponderance of the evidence." Both Arbitrator Pincus and I have found as much. So too did Arbitrator Jonathan Dworkin in Case No. G86-0020. It was his view that "Article 18, Section 18.01 of the Agreement incorporates certain Civil Service statues and rules placing a burden upon the Employer to demonstrate rationale for layoff decision." The claim by the State that the Union somehow bears the burden to show that the layoffs were done improperly or that need for them was nonexistant flies in the face of well established principles on this issue.

Not only have arbitration decisions on this matter been consistently opposed to the view espoused by the State in this proceeding, the Ohio Supreme Court has spoken as well. In Bispeck v. Board of Commissioners of Trumbull County 37 Ohio St 3d 26 (1988) the Court noted that it had held "that the appointing authority has the burden of proving by a preponderance of the evidence" the need for such an action.

Again in its review of my decision in Hamner and Williams the Court of Appeals in April of this year restated the common sense proposition that as the Employer has access to the data necessary to support it layoff action that "Typically, the burden of proof is placed upon the party that has the access to the evidence. Here, that party is the employer." Case No. 91AP-1174 (1992) Why the State continues to espouse its position concerning the burden of proof in the face of such arbitral and court decisions must be considered to be indeed mysterious. It must be rejected. To the contrary, it is the State that must show that its layoffs are justified.

When the Office of Employee Services was reorganized the staff that had previously worked in various stand alone sections, Personnel, Labor Relations and Equal Employment, were essentially pooled. That is, staff who had previously been limited to work in each of the sections became available to work in a larger office. As part of the reorganization

project a managerial employee was moved from the Equal Employment section to a completely different section, that of the Chief Engineer. The need for clerical support for that position no longer existed. As the tasks performed by the laid off person who supported the Equal Employment officer were no longer being performed it appears that the layoff of this particular employee was reasonable. It comports with the standard set forth in the Revised Code at Section 124.321(D) which permits the appointing authority to abolish positions for "lack of work." If the tasks once performed by the laid off employee are no longer needed by the Employer, it may lay off. That is the case in this situation.

The State justified the layoff of the other Clerk I in the Office of Employee Services by indicating that he or she provided "Support and more importantly break relief to the Secretary of the EEO Section." (Brief, p. 4). If there was no longer a secretary to support, tasks once formerly performed no longer are required. In such circumstances it is not required to employ people to work in a vacuum. As was the case with the other laid off employee in the Office of Employee Services, work previously done is not now being done. In addition, given the reorganization in the Department, the need for the tasks to be performed no longer exists. This is unlike the situation in the Hamner and Williams dispute where the evidence indicated that the need

for the services of those grievants continued without alteration and the Employer did not show a lack of funds to pay for those services. The different circumstances prompt a different result. Given the lack of work standard, this layoff is proper.

No lengthy discussion is required concerning the abolishment of the Radio Operator position in Chillicothe. Employer Exhibit 5 is a map of the radio coverage maintained by the Department throughout the State. It indicates beyond doubt that the necessary coverage is provided by stations adjacent to the Chillicothe office. The statutory criteria of abolishment "due to lack of continued need for the position" is met in this instance.

There was also laid off in the General Services Office an Inventory Control Specialist I. Testimony was received from the Operations Manager of the Office to the effect that that person had devoted approximately twenty percent (20%) of his time to inventory control. That estimate was not disputed by the Union. The remainder of his work time was taken up with truck driving and automobile title tasks. These tasks are beyond the province of the Inventory Control Specialist I's duties. The State indicated that the inventory control duties that had previously been performed by the Inventory Control Specialist I were assumed by other members of the bargaining unit, primarily a Storekeeper. In essence what

occurred in this instance was a redistribution or consolidation of job duties. Arbitrator Pincus in his Broadview decision pointed out that consolidations occur when the duties added to a position do not represent a "substantial percentage" of the "new" position. (p.34) In this instance it is the inescapable conclusion that the additional inventory control duties given to the Storekeeper would constitute a small portion of that person's work time. They constituted a fraction of the Inventory Control Specialist's time. Other employees took over the truck driving and auto title work previously being done by the laid off employee. There is in this situation an element of job enlargement that the Union might well characterize in trade union parlance as a "speedup." Lacking evidence that there has taken place in this instance an inordinate addition to the work load of the continuing employees that conclusion cannot be reached in this instance. Hence, it is determined that the sort of consolidation envisaged by Arbitrator Pincus occurred in this situation. That is permissible.

Reorganization of the Office of Budget and Finance involved the combination of three sections into one. More significantly, it ended a practice of duplicate accounting systems. Prior to the altered Departmental structure there existed a practice involving a translation of data from the internal Departmental accounting system to that maintained by

the State. Coincident with the reorganization the Departmental accounting system was eliminated. Hence, the necessity for entering data from that system to the State's system was also eliminated. Work that was previously performed no longer was needed. When that is the case, there is nothing either in the Collective Bargaining Agreement or the appropriate statutes that requires the State to continue in its employ people whose services are no longer needed. What is required is that the termination of the employees be justified by the appropriate evidentiary standard which in this case is that of preponderance of the evidence as specified in Section 124-7-01(A)(1) of the Administrative Code. I am persuaded that the State has met its burden in this instance. When work is no longer being performed the need for the people who once performed it obviously ceases. That on occasion management personnel performed tasks properly to be considered within the province of bargaining unit members is tangential to this dispute. So too is the leave time used by employees. There is no evidence that such work as was done by Howard Hurst, a Fiscal Officer 3 and not a member of the bargaining unit, contributed to the layoffs in the Office of Budget and Management. Nor is it to be believed that as employees recorded what the Employer regarded as high leave utilization that they were laid of[illegible] in retaliation. What is operative in this situation is a

reorganization of the Department's operations resulting in the elimination of tasks previously performed. In such circumstances the State may act as it did in this instance.

One of the Grievants in this dispute, Alicia R. Mackey, was scheduled for lay off on August 2, 1991. On July 31, 1991 the scheduled lay off date was postponed to August 19, 1991. The Union urges that her position in the layoff chain was affected, to her advantage, by revisions to appendices A - I of the Collective Bargaining Agreement. During the Spring and Summer of 1991 the parties had engaged in discussions over those appendices to the Agreement. The record does not demonstrate that the revisions which would have advantaged Ms. Mackey were in effect at the date of her layoff. A letter was sent from Marianne Steger of the Union to Meril Price of the State dated July 23, 1991. That letter does not serve to represent the final agreement of the parties. Ms. Steger writes "Please find enclosed some language which we believe represents our agreement with regard to Appendices A-I." Elsewhere she writes "Also, let me know of any problems you have with the language." (Management Ex. 7). That language does not reflect final agreement. Rather, it is indicative of the thoughts of one party, the Union, believing that the parties were close to agreement and seeking comment from the State. On August 23, 1991 the revised appendices took effect per Joint Exhibit 10. That exhibit is a memorandum sent to

appropriate officials throughout the State by Frank Flynn, Director of the Office of Collective Bargaining. It indicates that the revised appendices A-I "are effective immediately." The effective date was after the effective date of Ms. Mackey's layoff. Whatever benefit the revised appendices may have conferred upon her arrived after, rather than before, the effective date of her layoff. Hence, the revised appendices are of no relevance to her situation.

Award: The grievances are denied.

Signed and dated this 31st day of July, 1992 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator