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 In the Matter of Arbitration  
     Between  
  
 STATE OF OHIO,  
 DEPARTMENT OF MENTAL  
 RETARDATION AND  
 DEVELOPMENTAL DISABILITIES  
  
     and  
  
 OHIO CIVIL SERVICE EMPLOYEES  
 ASSOCIATION, LOCAL 11,  
 A.F.S.C.M.E., AFL/CIO  
 \* \* \* \* \*

#798

OPINION and AWARD

Anna DuVal Smith, Arbitrator  
  
 Case 24-01-910626-0073-01-14  
  
 Russell Boyce, Alvin Whyte &  
 Thomas LoPresti, Grievants

Layoff

Appearances

For OSCEA Local 11, AFSCME:

Donald W. Conley; Associate General Counsel, OCSEA Local 11,  
     AFSCME; Advocate  
 John Gersper; OCSEA Local 11, AFSCME; Second Chair  
 Russell Boyce; Grievant  
 Alvin Whyte; Grievant

For the State of Ohio:

David S. Norris; Deputy Director, Division of Human  
     Resources, Ohio Department of Mental Retardation &  
     Developmental Disabilities; Advocate & Witness  
 Meril Price; Ohio Office of Collective Bargaining; Second  
     Chair  
 Marilyn Reiner; Personnal Officer, Ohio Department of Mental  
     Retardation & Developmental Disabilities  
 William Sven Lindberg; Chief, Office of Project  
     Approval/Budget Management; Ohio Department of Mental  
     Retardation & Developmental Disabilities; Witness  
 Michael D. French; Residential Development Manager

### Hearing

Pursuant to the procedures of the parties a hearing was held on May 5, 1992, at the offices of the Ohio Civil Service Employees Association, Columbus, Ohio, before Anna DuVal Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded. Briefs were exchanged through the Arbitrator on June 15, 1992, and the record closed on that date. This opinion and award is based solely on the record as described herein.

### Issue

The parties stipulated that the issue to be decided by the Arbitrator is:

Did the Employer meet the contractual obligations of Article 18, Section 18.01 when it abolished [the jobs of] and laid off Russell Boyce, Alvin Whyte and Thomas LoPresti? If not, what shall be the remedy?

### Joint Exhibits and Stipulations

#### Stipulations of Fact

1. Valecia Davis, Word Processing Specialist 2 and Deborah Hoffine, Account/Examiner 2, lost no pay, benefits or seniority, but bumped into the same pay range they held prior to the abolishment, and are not a part of this arbitration.
2. Barbara Spikes, Contract Evaluator/Negotiator requested a voluntary demotion to the Classification of Client Advocate, located at the Warrensville Developmental Center effective July 28, 1991, and is no longer part of this Grievance.
3. The grievance is properly before the Arbitrator.

#### Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Grievance Trail
3. Department Rationale for Abolishment
4. Sections 123.321-327 O.R.C. and Chapter 123:1-41 O.A.C.

5. Position Description of Projects Management Supervisor (Planner 2), held by Russell Boyce prior to abolishment.

Relevant Contract Provision

Article 18 - Layoffs

**§18.01 - Layoffs**

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

Case Background

The Employer in this case is a state agency whose mission involves ensuring that services are available to assist the mentally retarded and developmentally disabled to live successfully in environments of their choice. Over the years, the philosophy guiding the activities of the Department has undergone change, resulting in a greatly diminished large residential institutional population as clients are increasingly served through community-based, locally-administered group and, more recently, independent supported-living arrangements.

In early 1991, a new director assumed his role and undertook to reorganize the Department "to standardize the structure of the organization;" "to eliminate non-essential programs, services and personnel where functions performed are no longer required due to statutory changes, systemic changes, or changes in philosophy and direction of the Department;" and "to standardize the existing structure through the use of appropriate classifications...." (Joint Ex. 3). As a result of this reorganization, a number of positions in the Central Office were abolished, among them three Planner 2 positions held by the Grievants in this case, Thomas

LoPresti, Russell Boyce, and Alvin Whyte. Pursuant to 124.321(D) O.R.C., rationale for the abolishment was provided to the Department of Administrative Services. This paragraph of the Code provides that

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 for lack of work....

The Union was notified of the Department's intentions and pre-abolishment meetings were held. To mitigate the impact on affected employees, various forms of outplacement assistance were provided by the Department. One of the grievants, Russell Boyce, feels that the Department reneged on one form of assistance he heard promised at that meeting. On June 21, employees were notified that their jobs were being eliminated, that they were to be laid off effective July 13, and advised of their layoff rights. Six of these filed a class action grievance on June 26, claiming that the abolishments were not justified and seeking reinstatement to their former positions. While the grievance was being processed, three of the grievants secured other employment and withdrew their claims. The remaining three persisted to arbitration, where the case presently resides, free of procedural defect, for final and binding resolution.

## Arguments of the Parties

### The Union

The Union contends that the Employer has the burden to prove, by a preponderance of the evidence, justification for the abolishment. It further argues that the Employer has not carried its burden. In support of the first, the Union relies on a holding by Arbitrator Graham (OCSEA v. OBES (1990) Case Nos. 11-09-(891026)-0119-01-06 and 11-09-(891023)-0120-01-06) interpreting the same contractual language before this arbitrator and a unanimous Ohio Court of Appeals decision (No. 91AP-1174, 10th Dist Ct App, 4-28-92) affirming Arbitrator Graham's award:

Naturally, the employer would have all of the evidence and information concerning its budget, its current and projected needs, its reasons for the layoff, and so on. Typically, the burden of proof is placed on the party that has the access to the evidence. Here, that party is the employer.

In support of its position that the Employer failed to carry its burden of proof, the Union points out that the Department's rationale was founded on an anticipated reduction of work because of a philosophical shift and legislative change. The Union contends that it is not permissible for an employer to base abolishment on a projected lack of work, citing Esselburne v. Ohio Department of Agriculture (1988) 49 Ohio App. 3d 37. Moreover, Union testimony and documents show that the anticipated drop in work had not occurred by the time of the layoff and did not occur thereafter. Fiscal year 1991 development was occurring at the same or greater rate than in fiscal year 1990, and the Employer failed to consider on-going work on previously approved multi-phase

projects. The Union further states that the Employer relied on an obsolete Table of Organization in targeting Russell Boyce's position for abolishment.

For these reasons, the Union asks that the grievance be granted. As a remedy, it requests disaffirmation of the abolishment of the three Planner 2 positions, reinstatement of the three employees to their former positions, and an award of all back pay and benefits. It specifically requests that as part of a make-whole remedy, the Department be ordered to make the employer PERS contribution it would have made had it not been for the improper abolishment.

#### The Employer

The Employer does not argue that it does not have the burden to justify job abolishment, but asserts that it has carried the burden of proof. It states that the Rationale (Joint Ex. 3) describes a Department structure that evolved as former directors put their structures in place over preceding ones. In 1991, reorganization was necessary, it asserts, to eliminate nonessentials following statutory, systemic and philosophical changes, and to standardize the structure. This action, it claims, is consistent with rights reserved to Management through Article V of the Agreement.

According to the Employer, the testimony of David Norris shows that the Division of Policy and Planning was eliminated since its responsibility was largely completed with the publication of the long-range plan and distribution of video tapes. Other functions

were reassigned to other divisions. The functions performed by Mr. LoPresti were therefore no longer needed, and so his position was abolished. The Union presented no evidence to refute the Employer's testimony. Accordingly, the Employer says its decision to abolish this position should be affirmed and the layoff of Mr. LoPresti upheld.

The need for Planners in the Office of Project Approval and Budget Management was affected by a number of developments testified to by the Chief of the Office. Legislation eliminated the responsibility of the Department for reviewing and approving County Board plans. The focus of the Department shifted from expansion of residential homes to modifications of existing facilities. Documents and testimony show there have been no authorizations to develop major expansion projects since 1986 and 1987. Any expansion since has been in supported living, which is administered locally. Applications for modifications have declined and the procedure for processing these applications has been simplified. The Employer goes on to say that the evidence shows there has been a significant reduction in workload, despite the Grievants' claim to the contrary. It concludes that the abolishment of their positions was the result of the elimination of job duties and functions, reduction in amount of remaining duties and functions, and simplification of job processes. The abolishment was not based on an incorrect Table of Organization, but on a reduction of duties caused by a change in philosophy, direction and governing statute, decreased development, and

simplification of procedures to provide more efficient and economical operation.

The Employer further points out that it complied with all procedural requirements of Article 18, encompassing certain sections of the Code and Regulations. It exceeded its obligation in holding pre-abolishment meetings and providing outplacement assistance. It summarizes that the positions were appropriately eliminated for reasons of economy and efficiency and asks that the grievance be denied in its entirety.

#### Opinion of the Arbitrator

The threshold issue--which party has the burden of proof--appears to need no resolution as the Employer presented no closing argument in opposition to the Union's position that the burden is the Employer's. Additionally, the Union argument and supporting authority are persuasive. That being the case, it need only be stated that the Employer here does have the burden to prove by a preponderance of the evidence that the layoffs through job abolishments were justified. Whether the Employer carried its burden will be addressed in two parts, each covering a different structural unit of the Department.

The Employer made its prima facie case for abolishment of the Planner 2 position in the Division of Policy and Planning. By the testimony of David Norris, the completion of the ten-year plan and distribution of media concluded the principal mission of the Division, warranting absorption of its remaining functions into other divisions. The work of the Planner 2 position relative to

the plan was done. Assumption of policy and procedure development by other Deputy Directors further reduced the functions performed by this Planner 2. The Union presented no evidence to refute the conclusion that there was no further need for this position and that its abolishment was justified on the basis of reorganization for economy and efficiency. Mr. LoPresti's claim must be and is denied.

The situation in the Office of Project Approval and Budget Management is more complex. This Office approves and monitors development of residential projects, monitors the budget impact of each, and provides technical assistance to county boards and contractors. The evidence shows an impact of philosophical and legislative changes on its functions. Mr. Lindberg testified that legislation passed in 1988 eliminated Departmental review of county board plans. Philosophical changes resulted in a decline in population of large institutional settings and development of group homes through the purchase of service. More recently, the emphasis has shifted to supported living. The result for the Office has been a substantial decline in development: county and Department RFPs declined from 63 in FY 1987 and 84 in FY 1988 to 20 in FY 1990 and 4 in FY 1991 (Management Ex. 1). Evidence submitted by the Union (Union Ex. 1 & 2 regarding fiscal years 1990 and 1991 respectively) supports Mr. Lindberg's testimony that new development is small relative to total residential development actions, consisting mostly of one bed additions to existing facilities here and there. Mr. Lindberg also testified that the

large supported living conversions from purchase-of-service have already occurred and that they no longer do any emergency development that requires funding. Modifications to existing facilities continue, but require less technical assistance because of learning. Technological changes affecting the activities of the positions were also described: the Residential Development Committee no longer meets face-to-face, but votes by Electronic Mail; boilerplate has been developed that makes composition of approval letters more efficient. The impact of these changes on the functions performed by the Planners is indicated on Management Exhibit 2. Of the thirty separate functions listed as being performed in 1990 (counting separately each type of approval letter and report), sixteen are no longer done, seven are performed less, two are still performed but in fluctuating volume, and one is executed by request. The duties that still must be performed including those in decreased volume have been transferred to the remaining Residential Project Manager, who Mr. Lindberg testified now handles the entire process, including her former duties, without overtime or weekend work. Further evidence of the reduced need for personnel at the time the abolishment occurred was the impact on the Office of the light staffing created by Mr. Whyte's four month assignment to fund-raising during 1990 and one Residential Project Manager's poor attendance and ultimate resignation early in 1991. Mr. Lindberg testified that during the reduced staffing no backlog was created, nor was overtime or weekend work necessary to keep up.

Against this, the Union submits a number of documents and testimony of the two Grievants to show that there was no reduction of work and that the abolishment was based on an obsolete Table of Organization. The Rosters of Residential Actions for fiscal years 1990 and 1991 (Union Ex. 1 & 2) do indicate that approximately the same number of authorization numbers were assigned each of the two years preceding the abolishment, but since each authorization number may involve one or more sites, one of the supervisors indicated is not a Planner 2, and a variety of actions (relocations, change-of-ownership, etc.) are involved requiring different degrees of Office involvement, the documents are not reliable indicators of work load for the Planners. As far as evidence of new development is concerned, the Department does not claim that new development ceased entirely, but that increases were small in size and number, often involving an addition of a respite or backup bed. Indeed, for FY 1991 (Union Ex. 2), where the Union claims 64 beds were added, 41 were at one site and this project was later rescinded, according to testimony of Mr. Lindberg. Union Exhibit 3 indicates approved ICF-MR projects coming on line after April 30, 1991, but no comparison with previous periods or estimate of the former Planner 2 involvement on an on-going basis was given. "Lots of effort" is too imprecise, particularly since the 39 projected certification dates stretch well into 1992 and even to 1993. Union Exhibit 14 was offered to show that the relative amount of supported living beds compared to purchase-of-service beds in FY 1991 was small, so that considerable work remained in

conversions of purchase-of-service to supported living. It also was offered to show the volume of Department-administered supported living that requires staff effort. This is rebutted by Employer evidence of supported living base allocations to the counties not appearing on the exhibit, and slow growth of the supported living budget. In sum, while the Union offered a fair amount of data, the Arbitrator is unable to conclude that much remains for the Planners to do since new purchase-of-service projects dropped dramatically several years ago, the large supported living conversions occurred already, and technical changes have made remaining work more efficient. Moreover, the weight of the evidence is that this was the case when the abolishment occurred in 1991. This is shown by the reduction in RFPs prior to 1991, the Office operating with reduced staff and without overtime or backlogs in 1990, and testimony about changes in the functions of the Planners (Management Ex. 2, e.g.).

Regarding the Table of Organization, it is true that the Rationale says a Planner 2 can be eliminated since no supervisor is needed for the one remaining Health Facility Standards Representative. The Union correctly points out that the Facility Standards Representatives reported to a position other than the one Planner 2. However, elimination of supervisory duties was not the sole basis for the abolishment of the Planner 2 position. Reduction in responsibilities because of the change in focus, decrease of required Department approvals, technical assistance and tracking during development were also cited (Joint Ex. 3).

Besides, whether any supervisory duties remain for the one Planner 2 depends on whether the second Planner 2 position (which reports to the first) is eliminated. And the Employer has borne its burden of proof that both positions were justifiably abolished when a reduction or elimination of duties and responsibilities caused by statutory, philosophical and operational changes resulted in a lack of continued need for the positions and reorganization of the Department for economy and efficiency. Utilization of an obsolete Table of Organization is a technical deficiency not fatal to the Employer's action. In sum, I find that the Employer met its contractual obligations of Article 18, Section 18.01 when it abolished the positions of and laid off Russell Boyce and Alvin Whyte, as well as Thomas LoPresti.

Given these grievants' qualifications and history of public service, it is with a sense of loss that the Arbitrator must deny their grievance. One can only hope that they will soon again be employed serving the community.

Award

The grievance is denied in its entirety.

  
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Anna DuVal Smith, Ph.D.  
Arbitrator

July 18, 1992  
Shaker Heights, Ohio