In the Matter of the
Arbitration Between

OCSEA, Local 11 AFSCME, AFL-CIO Union and State of Ohio Bureau of Employment Services Employer.	Grievance No. 11-02-911992-01-09 Grievant: B. Northup Hearing Date: August 4, 1992 Briefs Date: September 15, 1992 Award Date: October 19, 1992 Arbitrator: R. Rivera

For the Employer: Elliot Fishman, Esq.
Tim Wagner

For the Union: Linda Fiely, Esq.
Brenda Goheen

Clarification of Award
December 31, 1992

Pursuant to a joint request of the parties, I issue the following statements to clarify the Award of October 19, 1992 (Grievance No. 11-02-911002-01-09). These statements do not modify the Award in any manner; they are solely to clarify the meaning of the Award.

1. When the Arbitrator used the phrase "full-time intermittent (at p. 53)," she did not modify nor intend to modify the contractual definition of "intermittent" employees as defined

in § 7.03 of the Contract. The use of the words "full-time" to modify the word "intermittent" was inappropriate. The purpose of the remedy was to award the Grievant the pay and benefits that an intermittent Claims Examiner 2 (Sandusky OBES Office) earned from 10/5/91 to 11/18/91.

2. Because the seniority provisions of the Contract take precedence, Appointment Categories (types) are irrelevant within the bargaining unit with regard to the order of layoff.

3. When lay-off is proper, bargaining unit employees will first exhaust all bumping rights under the Contract. If no bumps are available, they may bump outside the bargaining unit into a lesser appointment category (type) according to the order of layoff provisions found in the Revised Code and Administrative Code and incorporated by reference into the Contract. (See Award itself at pp. 43-53.) Bargaining Unit employees who bump employees in lesser appointment categories (types) that are outside the bargaining unit shall be given the maximum retention points available for their performance evaluations. This award of retention points is to be done under the Code provisions that state if a performance evaluation is not completed, the employee receives the maximum points available [123:1-41-09(B)(3)]. The remainder of the employee's retention points shall be calculated according to the Code provisions. (See 123:1-41-09.)

4. Once bargaining unit employees bump outside the bargaining unit, subsequent displacements shall occur according to the appropriate provisions of the Revised Code and the Administrative Code.

December 31, 1992
Date

Rhonda K Rivera
Arbitrator

In the Matter of:)

Ohio Civil Service Employees Association,)
AFSCME Local 11, AFL-CIO)

and)

State of Ohio)
Bureau of Employment Services)

) Grievance Nos.
11-02-911002-01-09
) 11-06-920207-0111-01-09
(B. Northup, P. Hill)

Brief of Employer State of Ohio, Bureau of Employment Services

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In the Matter of:	)
Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO	) Grievance Nos. 11-02-911002-01-09 11-06-920207-0111-01-
and	)
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State of Ohio Bureau of Employment Services	)

Brief of Employer State of Ohio, Bureau of Employment Services

STIPULATIONS OF ISSUE

1. Did the Employer, the Ohio Bureau of Employment Services, violate Article 18 and Article 43 of the Contract when it laid off the grievant, Barbara A. Northup? If so, what shall the remedy be?

2. This matter is properly before the Arbitrator.

STATEMENT OF FACTS

The Ohio Bureau of Employment Services (OBES) conducts two different programmatic operations throughout the state--the administration of unemployment compensation claims, and the operation of employment services--counseling unemployed persons and assisting them in obtaining new jobs. Test. Powers[1].

The federal government often funds specific types of programs in employment services. One such program was the Public Assistance Service Operations program, commonly called PASO. The purpose of

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[1]For the purposes of citation in this brief, and in the absence of a transcript, the Employer will note citations to testimony as "Test. (Name of witness)."

the PASO program was to provide specialized employment counseling and recruitment to persons receiving public assistance. Funding for this program was made to the Ohio Department of Human Services, which in turn contracted with OBES to provide these services. In the spring of 1991, Human Services determined it would not continue this contract with OBES, thus precipitating the elimination of the Bureau's PASO program. Test. Powers.[2]

The grievant in the present case, an Unemployment Claims Examiner 2 in the OBES Sandusky office, was displaced from her position as a result of a PASO job abolishment. Stip. 3. The PASO employee whose position was abolished (an Employment Services Counselor in the Cleveland office) displaced an Employment Services Interviewer. Stip. 3. The latter employee, having no option to displace a less senior employee in her home office, was able, pursuant to Article 18 of the contract, to displace the grievant, whose position was in the same-or-similar job grouping, in the Sandusky office. Stip. 3. The grievant, Ms. Northup, was displaced to no employment, although six weeks later, she was appointed to an intermittent position. Stip. 3, 4. Throughout the scenario, each of the employees involved subsequent to the abolishment was displaced by a more senior employee in her classification grouping, within her office, county, or geographic layoff jurisdiction. Stip. 3.

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[2]The Arbitrator is respectfully requested to note that the rationale for the job abolishment action is not disputed by the parties, pursuant to Stipulation 6. The facts recited above are merely presented as background information.

ARGUMENT

I. The State is Not Obligated to Follow "Order of Layoff" Provisions in Job Abolishment Actions.

At issue in this case is the alleged requirement that an "order of layoff" be followed prior to the abolishment of an employees position. The Union asserts that the order of layoff, set forth in §124.323 O.R.C.[3], requires that, prior to the job abolishment in this case, certain lesser appointment types of employees (intermittent employees, temporary employees, and seasonal employees, for example) must be laid off. Moreover, the Union argues, this order of layoff must occur each time a subsequent displacement occurs.

The State asserts that there is an important difference between a job abolishment and a layoff. The "order" alleged to be required, the State argues, applies only in layoffs and does not apply to job abolishments. Therefore, the abolishment and subsequent displacements were properly executed.

A. Job Abolishments are Different from Layoffs, and "Order of Layoff" Does not Apply to Job Abolishment Actions.

O.R.C. §124.323 sets forth a particular order by which employees must be laid off. The section recites a hierarchy of appointment types of public employees, and by requiring "lesser" appointment types to be laid off first, it gives additional

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[3]The State notes that all Revised and Administrative Code citations are incorporated by reference into the Contract, Article 18.

protection from layoff to full-time permanent employees.

However, §124.323 only applies to layoffs, and not to job abolishment actions. A job abolishment action is different from a layoff; in a job abolishment, a permanent elimination of a particular position is contemplated, while in a layoff, the position is retained but is temporarily unfilled. The case law is replete with support of this distinction. Howie v. Stackhouse, 392 N.E.2d 1081 (1977); Biehle v. Pendleton, Unreported Decision, Franklin County Court of Appeals, 77AP-625 (1977).

The statute in question makes no reference to job abolishments. Therefore, the order-of-layoff provisions should not apply to any job abolishment actions.

B. The Administrative Rules which Purport to Govern Job Abolishment Actions are Invalid.

The Union has pointed to O.A.C. §123:1-41-05(B) as support for its position that the order-of-layoff provisions must be applied in job abolishments and subsequent displacements. However, this rule is invalid, according to law.

In Howie v. Stackhouse, 392 N.E.2d 1081, at 1084, the Court of Appeals found that the Department of Administrative Services was "empowered . . . to establish rules pertaining to job abolishments. . . ." At issue in that case were the rules outlining the procedures for a layoff action. The court found that the section of the Revised Code enabling the Department of Administrative Services to promulgate rules only referred to layoffs. Id. Because of the distinction between layoffs and job abolishments,

the court said, a rule applying to job abolishments was not valid. Id.

Similarly, the statute in question only refers to an order of layoff. It does not refer to an order of job abolishment. Therefore, under Howie, the DAS rules regarding the application of order-of-layoff to job abolishment are invalid.

C. Utilizing "Order of Layoff" Procedures would produce an Impracticable and Untenable Result.

It also does not make sense for the rule to apply as the Union asserts. If a position is abolished and order-of-layoff applied, there would be no use for the abolishment. If, for example, a full-time permanent position is abolished, but an intermittent position is required to be laid off (under the Union's interpretation), the full-time employee would somehow remain in "limbo," and the efficacy of the abolishment would be severely undercut.

II. If the Rules Requiring "Order of Layoff" Procedures Do Apply, They Only Apply to the Initial Abolishment, and not to any Subsequent Displacements.

If the Arbitrator determines that the order-of-layoff rules do apply in job abolishment actions, the State asserts in the alternative that such procedures only apply to the initial job abolishment and not to subsequent displacements. As such, the State properly executed the grievant's displacement, because no lesser appointment types existed within the abolished

classification. Stip. 7.[4]

A. The Rule Regarding the Application of "Order of Layoff" in the Exercise of Displacement Rights is Temporal in Nature and Only Applies to the Initial Abolishment.

The Administrative Rule controlling displacement of employees whose positions are abolished requires that, "in order to exercise the displacement rights provided in this rule, the order of layoff shall be applied prior to an employee exercising his displacement rights" [emphasis added]. O.A.C. §123:1-41-05(B). The Union argues this means that in each subsequent displacement, the order-of-layoff provisions must be followed.

A close look at this rule, however, shows that the correct interpretation is that the rule applies only to the initial abolishment. The entire applies only to the "displacement rights of employees whose positions are abolished." O.A.C. §123:1-41-05(A). It does not apply to employees who are displaced as the result of a job-abolished employee exercising her displacement rights.

Moreover, section (B) is simply temporal in nature. It requires that the order-of-layoff procedures be accomplished prior to the abolished employee exercises his or her displacement rights. Again, no such rights are given to employees further down the chain of displacement.

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[4]The parties stipulated that, in the initial abolished classification, Employment Services Counselor, there were no intermittent positions statewide. This means that, even if order-of-layoff provisions were to be followed, there were no lesser appointment types to be laid off, and the Employment Services Counselor position was properly eliminated.

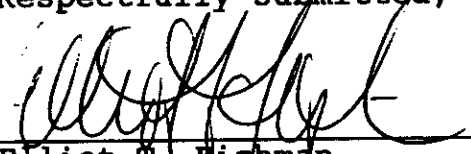
B. The Practice and Past Interpretation of the State Indicates that "Order of Layoff" Does not Apply to Displacements which are Subsequent to an Abolishment.

The State's interpretation is consistent with its past practice and interpretation. Mr. Gulyassy, the State's witness, testified that the state has never implemented a job abolishment or subsequent displacement in the manner asserted by the Union. The Union, Mr. Gulyassy, stated, never argued with this interpretation in all of the layoffs he supervised. This testimony simply bolsters the State's assertion that its interpretation is correct.

CONCLUSION

For the reasons asserted above, the State asks this Arbitrator to uphold its action and deny the grievance in full.

Respectfully submitted,



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