In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

The Ohio High Speed Rail Authority

Employer.

Grievance No. 56-00-(91-09-19)
02-01-14
Grievant (Ann Throckmorton)

Hearing Date: August 28, 1992

Brief Date: October 17, 1992

Award Date: November 20, 1992

Arbitrator: R. Rivera

For the Union: Robert Steele
John Gersper

For the Employer: Michael Duco
Paul Kirschner

Present at the Hearing in addition to the Grievant and Advocates were Robert Chizmar, Acting Executive Director, OHSRA (witness) and Pat Morgan, OCB (observer).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. Collective Bargaining Agreement

2. 124-7-01 of the OAC

3. Grievance Trail

   (a) Appeal and Preparation sheet
   (b) Grievance form
   (c) August 21, 1991 letter to Grievant
   (d) August 20, 1991 letter to Director Perry, DAS
   (e) August 21, 1991 letter from Judy Conti
   (f) Administrative Assistant I Position Description
   (g) Table of Organization of the OHSRA
   (h) September 9, 1991 letter to Grievant
   (i) Reemployment Rights form
   (j) Step 3 response (5 pages)
   (k) Step 4 response
   (l) Arbitration request

4. Chapter 4981 of the ORC

5. Resolution No. 91-5

6. Attorney General Memo dated April 19, 1988

Union Exhibits

1. Position Descriptions
   (a) Chizmar
   (b) Grievant (Secretary)
   (c) Grievant (Administrative Assistant)

2. OHSRA Resolution 90-6

3. OHSRA Resolutions 89-1 and 89-2

4. Letter from Chizmar to Dennis Van Sickle dated October 21, 1991

5. OHSRA Minutes for July 23, 1991

6. Memo from Grievant to Chizmar on 9/13/90 Summary of Job Duties

7. Memo to Grievant on July 26, 1991 and Grievant's reply of July 29, 1991 with Task logs attached from July 29, 1991 to August 22, 1991

Issue (Employer)

Did the Employer violate Article 18 of the Collective Bargaining Agreement or any civil service law (section 124 of the ORC) or administrative code (section 123 of the OAC) when it abolished the position of Administrative Assistant I at the Ohio High Speed Rail Authority?

If so, what should the remedy be?

Issue (Union)

Union accepts Employer's statement of issue but adds "Under R.C. 4981.02 can a job with the OHSRA be abolished without a Resolution of the Authority?"

Employer's Issue (in rebuttal)

The issue of what R.C. 4981.02 requires is not within the Arbitrator's power under the Contract to decide.

Contract Sections

§ 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.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units.

§ 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.

§ 25.01 - Grievance Procedure 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.

§ 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.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

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.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

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.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

Facts

This case involves the abolishment of a job (Administrative Assistant I) within the Ohio High Speed Rail Authority (hereinafter OHSRA). The Ohio High Speed Rail Authority was established by the enactment of Section 4981.02 of the Ohio Revised Code (O.R.C) in June, 1986. Section (C) of 4981.02 provides that

> [t]he authority may employ an executive director, who shall have appropriate experience as determined by the authority, and a secretary-treasurer **and other employees that the authority considers appropriate.**
>
> The authority may fix the compensation of the employees.

In 1986, Ms. Maggie Lewis was appointed acting executive director, and in 1988, a temporary service was hired to provide support service. The Grievant worked for that temporary service, and, in that capacity, she worked with Ms. Lewis. The Grievant testified that she worked about 40 hours a week plus overtime. When Ms. Lewis left, she was replaced by Mr. Greg Kostelac. During his tenure, the Grievant was hired as a full-time, permanent state employee in the position of Secretary I. (See Union Exhibit 1(b) Position Control No. 40509.1) She started in that classification on January 16, 1989. The Grievant testified that Mr. Kostelac was not familiar with computers, and hence, she handled all fiscal matters which were computerized, and she handled all secretarial duties as well; in particular, she typed all his correspondence from either handwritten material or dictated material. In March 1990, Mr. Robert Chizmar was made acting executive director. Like all his predecessors, Mr. Chizmar was classified as Research Staff. (See Union Exhibit 1(a) Position Control Number 40509.0) Mr. Chizmar testified that he did not see the position description when he was hired; however, he did not testify as to the exact date upon which he became familiar with the position description. The position description states that the duties of Research Staff are

as follows:

> Assists in facilitation of study to determine feasibility of construction and establishment of high speed rail system linking Cleveland, Columbus and Cincinnati. Develops policies and procedures for the conducting of final feasibility and engineering studies, assisting in evaluating merit of continuation.
>
> **Directly assists chairman** and members of Ohio High Speed Rail Authority, assists in search for Executive Director. **Handles day to day operations of Authority in absence of Executive Director. Acts for and speaks in place of Executive Director.**
>
> Prepares agenda, meeting locations and other details of working meetings of Authority, ensures open lines of communication in interaction of Authority with General Assembly and Ohio Department of Transportation. Coordinates reports of consultants and advisors to Authority. Interacts with legal counsel for Authority.

As both the Grievant and Mr. Chizmar testified, Mr. Chizmar, unlike Mr. Kostelac, was computer literate, and one month after he took the position, he acquired the use of a computer. Four months after assuming the position of acting executive director, Mr. Chizmar recommended to the Chair of the OHSRA that the position of the Grievant be up-graded from Secretary I to Administrative Assistant I. As part of this upgrade, the Grievant wrote Mr. Chizmar a three and one half page memo detailing the various responsibilities of her position. (See Union Exhibit 6) In a letter to Dennis Van Sickle (Union Exhibit 4, dated October 21, 1991), Mr. Chizmar indicated that during the first 10 days of October, he went to ODOT for help in the processing of the upgrade. Then he took the appropriate forms to Chair of the Authority (OHSRA). The then-Chair, Senator Boggs, refused to sign the

paperwork and told Mr. Chizmar that he was required to take the proposed upgrade to the three person personnel committee of the Board. Mr. Chizmar did so, and after the approval of the Personnel Committee, Senator Boggs signed the Personnel Action. The PA was not processed until January 14, 1991, and the reclassification was finally completed on March 10, 1991.

During the period from Mr. Chizmar's appointment as acting executive director until the Grievant's reclassification, both parties apparently, according to their testimony, worked cooperatively and harmoniously. The Grievant dated the start of disharmony from the day her reclassification occurred and the position description of the new position was given to Mr. Chizmar. She testified that, on that day, he came in apparently upset, handed her the position description, and refused to discuss it with her.

Mr. Chizmar testified that he had started the re-classification in early October, 1990, but that the reclassification took much longer than he had anticipated and by the time that it took effect, the work situation in the office had changed significantly. He said that, in his estimation, the Grievant was doing less and less work because he (Chizmar) was able to do more and more of the routine work himself with the use of his computer. He testified that she had never done his correspondence because he had always done his correspondence himself with his word processing program. He also testified that because of his previous job he was familiar with account keeping and had developed a budget

and accounting program for OHSRA with the use of "spreadsheets." The Grievant, however, claimed that during this period of time she had more work, not less, and worked so hard during this period that she did not even take breaks.

Mr. Chizmar stated that around the first of July he started considering the abolishment of the Grievant's job. He said that with budget cuts imminent and in light of the Grievant's lessening work load, such a decision made sense. Mr. Chizmar did not say whether or when he discussed this decision with the Members or Chair of the Authority. The Advocate for the Employer pointed to the minutes of the July 23, 1991 meeting that detailed an executive session as that point in time when the Authority allegedly discussed and decided to abolish the Grievant's job. These minutes (See Union Exhibit #5) did indicate an Executive Session had been called by the Authority, but the stated reason was to discuss "staff discipline problems" (at page 3).

The Grievant testified that after her reclassification the working relationship between her and Mr. Chizmar deteriorated. She also indicated that during that period she filed two (2) grievances against him. The second grievance was settled at a Step 3 meeting shortly before the abolishment. The Grievant testified that Mr. Chizmar was very reluctant to settle the grievance. On July 26, 1991, Mr. Chizmar wrote a memo to the Grievant asserting that she was not working; he demanded that she keep a log of her tasks in the future. The Grievant replied by letter and explained her work to him. (See Union Exhibit #7) Subsequently, she kept a daily log

of her completed tasks from July 29, 1991 until August 22, 1991 when she learned of the job abolishment.

On August 20, 1991, Mr. Chizmar wrote a letter to the head of DAS outlining the rationale for abolishment of Grievant's position. (See Joint Exhibit 3) On August 21, 1991, DAS notified Mr. Chizmar that the rationale had been approved, and hence, the abolishment had been approved. (See Joint Exhibit 3) On that same day, August 21, 1991, Mr. Chizmar wrote to the Grievant stating that her job had been abolished effective September 9th. (See Joint Exhibit #3) The Personnel Action (PA) which laid off the Grievant was signed one (1) day later on September 10, 1991 by Chair Betts. He signed over the line entitled Appointing Authority. (See Employer Exhibit 2) Mr. Chizmar testified that the PA was not signed until the 10th because the Chair of the Authority only came to Columbus from Tuesday to Thursday each week. The 9th was a Monday and the 10th, a Tuesday.

During his testimony at the Arbitration hearing, Mr. Chizmar was asked about his "power" to abolish a job. He said he had no such power, that such power lay with the Authority. He said that he only recommended actions. He was shown three resolutions of the Board dealing with his own salary (#90-6 Union Exhibit 2) and with the appointment and salary of the Grievant (#89-1 & 89-1 Union Exhibit 3). He admitted that most personnel actions were only taken after a Resolution of the Board. He testified that two actions were taken without a Resolution of the Board: one was the abolishment of the Grievant's job, and the second was a subsequent

pay raise for himself. Mr. Chizmar was shown the Rules of the OHSRA (Joint Exhibit #5) and, in particular, directed to Rule 4981-1-02 entitled MEETINGS: Rule C stated "Official Business shall be transacted only in meetings open to the public." and Rule E states "Three or more members of the authority present at any meeting shall constitute a quorum, and the affirmative vote of three members as defined in Rule 4981-1-01 of the Administrative Code shall be necessary for any action taken by the authority." Mr. Chizmar declined to comment on the relevance of those rules to the issue at hand; the Employer objected to the questions on the basis that the Arbitrator had no power to decide if, under R.C. 4891, the abolishment of the Grievant's job required 1) public action, 2) by a three person quorum, and 3) manifested in a Resolution. The Employer did stipulate that no Resolution had been passed that abolished the Grievant's job.

Mr. Chizmar testified at length with regard to the efficiency and economy of the abolishment. Using Employer Exhibits #3, 4, & 5 which detailed the budget situation of the OHSRA, he noted that in Fiscal Year 1992 (June 1991-July 1992), the Governor had imposed an $11,000 cut of their budget. By abolishment of the Grievant's job in September 1991, the OHSRA had saved $16,000. Then in Fiscal Year 1993 (July 1992-June 1993), the Governor had imposed a cut of $35,000, $27,000 of which was saved by the abolishment of Grievant's job. (See Employer's Exhibit #7) Thus, according to Mr. Chizmar, the abolishment obviously saved money. In addition, he claimed the abolishment was efficient because he assumed the

routine tasks which he had delegated to the Grievant. These tasks, he said, took only 136 hours to 200 hours a year of his time and thus, represented only 9.62% to 6.54% of his time. Looking at Grievant's position description (Union Exhibit 1(c)), Mr. Chizmar stated that he performed himself the rank 2 and rank 5 duties which amounted to 35% of the Grievant's job. His rationale was that these functions involved solely assisting the Administrator in tasks that were the responsibility of the Administrator. Thus, these duties were only delegated to the Grievant but were inherently those of the Administrator. In addition, the rank 1 duty entailed "acting for" the administrator in a variety of capacities when the administrator is not available. Basically, Mr. Chizmar testified that these tasks are no longer being performed; no one acts for him nor assists him. With regard to the Grievant's rank 3, 4, and rank 6 duties, these duties have been either eliminated or assumed by the Administrator. An example of the latter is that the Administrator now tape records the Meetings and then transcribes them himself. He testified that such transcription took him only 8 hours every 3 months or 32 hours a year. Almost all these tasks are found within the 2nd rank of the acting executive director's position (Union Exhibit 1(a)) namely "handles day to day operations of authority...". Mr. Chizmar testified that through the use of technology in the form of computers, transcribing machines, voice mail, etc, he was able to perform all his duties without assistance. Therefore, the abolishment of the position of administrative assistant both

efficient and economical.

After the abolishment of her position, the Grievant filed a grievance on September 17, 1991. The Grievance went directly to Step 3, and a Step 3 answer was given on October 25, 1991 which denied the Grievance. The Step 4 answer was given on January 14, 1992, and the Union requested arbitration on January 28, 1992. A hearing was held on August 28, 1992.

Union's Position

I. Under Article 1.03, the Employer has agreed not to perform bargaining unit work. Clearly, the Employer in abolishment of the Grievant's position has given bargaining unit work to a Supervisor.

II. The Employer has failed to justify the abolishment. No lack of work existed. Economy is not proven by merely showing that the salary is gone.

III. The Employer carried out the abolishment in bad faith. The abolishment was clearly in retaliation for the two grievances.

IV. The Employer violated procedures in the abolishment. To abolish the job, the Authority had to act under 4981.02.

Two theories exist under which the Arbitrator can retain jurisdiction in order to decide that management violated the procedural process set out in ORC 4981.02(C).

Under the first theory, the Arbitrator draws her jurisdiction from the Ohio Revised Code section 124.321-.327 as it is incorporated in Article 18.01 of the Agreement. Section 124

recognizes the autonomy of Appointing Authorities in deferring to the individual Authority's process for determining lack of work. ORC 124.321(D) (All other Appointing Authorities shall themselves determine whether a lack of work exists . . .). In order to satisfy this section, the Authority must determine according to its own procedures that there is a lack of work. In the present case, ORC 124.321 (by incorporating applicable Authority procedures) requires that the Grievant's abolishment be approved by at least three voting members of the OHSRA governing board. ORC 4981.03(c).

Neither the State nor OCSEA could individually incorporate all of the different layoff procedures followed by the various Appointing Authorities into the Agreement. No evidence exists that either party to the Agreement assumed that the grievance process was only meant to allow an employee to grieve the substantive reasons for her/his job abolishment while ignoring any procedural oddities, oversights or mistakes. By incorporating ORC 124.321-.327, the parties agreed to the general umbrella language in these sections which plainly includes, by implication, the specific decision-making process of each Appointing Authority. Recently, the Ohio Court of Appeals (10th Cir. 1992), in OCB v. OCSEA affirmed a lower court's ruling that the Agreement incorporates procedural steps not specifically mentioned in Article 18 or ORC 124.321-.327 and that an Arbitrator has the authority to decide whether the procedural steps outlined in other applicable code sections were followed. In the instant case, the Grievant's job abolishment, did not begin with the filing of rationale with the

Director of Administrative Services but rather when it was decided there was a lack of work. Therefore, under the plain language of ORC 124.321(D) the decision must be made in accordance with the Appointing Authorities governing rules. By incorporating this section into Article 18 of the Agreement, the parties to the Agreement meant for employees to be able to grieve mistakes or inconsistencies in this process under Article 25 Grievance Procedure and subsequently to allow an Arbitrator to decide if the correct procedural steps were followed.

Alternatively, if the voting procedure is not incorporated in ORC 124.321(C), the second theory under which the Arbitrator has jurisdiction is under Article 43.02: Preservation of Benefits. Under 43.02, employees are entitled to benefits conferred upon them by "State statutes, regulations or rules" in areas where the Agreement is silent. These benefits shall continue to be determined by the applicable statutes, regulations, rules or directives. The scope this Article has been affirmed in many arbitrations.

In the instant case, ORC 4981.02(C) provides that the governing board of OHSRA shall determine the amount of staff needed to effectively carry out the legislative intent for OHSRA. Inherent in this determination is analyzing the amount of work produced by OHSRA and creating or abolishing positions accordingly. The Grievant's original job was created by the governing board, and she was eventually promoted by the governing board. Evidence was presented that the determination that there was a lack of work for

her position was made by her supervisor and he, not the board, subsequently filed the necessary rationale concerning her job abolishment. While it may be that as the acting Director of OHSRA, Mr. Chizmar, can make the recommendation to the governing board that a position with OHSRA be abolished, he does not have the authority to abolish the position himself. No evidence exists that the Board ever made this decision or incorporated this authority into the position description of Mr. Chizmar.

The right to have the hiring, promoting or job abolishment decisions decided by a panel of impartial legislators is an apparent benefit. They are charged by the legislature to assess the economic success of the Authority and are in a better position to determine the staffing needs both at the present time and the anticipated needs of the Authority in the future as required under ORC 124.321(D). In addition, in the present case, the process outlined in ORC 4981(C) for employee decisions safeguards the Grievant from the apparent animosity and biased decisions of her supervisor.

In conclusion, not only are the staffing guidelines of ORC 4981 incorporated in the language of ORC 124.321(d) but also confer a benefit as preserved in Article 43.02.

Employer's Position

I. The Employer has the right to consolidate the duties of an administrator and an administrative assistant.

Section 1.03 is misconstrued by the Union in its argument.

The Union did not establish that the work done by an Administrative Assistant is solely bargaining unit work. An Administrative Assistant (hereinafter AA) is just that -- someone who assists the Administrator in the accomplishment of his/her duties.

The Union must either establish that the work assigned to the Administrative Assistant was "bargaining unit work" and is not within a range of duties which is permissive for both an Administrator and an Administrative Assistant to perform **OR** establish that the Employer took action "for the purpose of eroding the bargaining units."

The Union must establish that this work belongs exclusively to the bargaining unit; they failed. Union Exhibit 1, which they argue supports their position clearly establishes that the work that Grievant did was work which historically belonged to the acting Administrator and then was delegated to the Administrative Assistant. Technology allows Mr. Chizmar to reassume those duties without undue burden, thereby relieving, the State of the burden of paying the salary and benefits for the AA position. Article 5 of the Agreement and Section 4117.08(C) provides the State, as a public Employer, the inherent managerial right to determine the organizational structure of the Authority and to effectively manage and improve governmental operations.

The State established that it is more economical and efficient for the acting administrator to use computers, voice mail, tape recorders, and transcription equipment at a substantial cost savings over the next two fiscal years, instead of paying for the

Administrator to have an Assistant. The Union presented no credible evidence to dispute the cost savings outlined in Employer Exhibits 1, 3, 4, 5, 6, and 7.

II. Section 127-7-01(A) requires that the employee bear the burden of proving that the Employer acted in bad faith.

The sole evidence presented in support of this contention is that there existed a coincidence of time between the filing of the grievance and the notice of abolishment. The relationship in time was purely coincidental.

124-7-01(A) is a balancing statute. It requires that the Employer prove that the job abolishment was undertaken due to lack of 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. It requires that the Union or Employee prove bad faith. In weighing the evidence on both issues, the cost savings, by eliminating the AA position and using existing technology, clearly outweigh the evidence presented in support the Union's bad faith argument.

III. The Arbitrator has limited jurisdiction to review the Employer's abolishment of the AA position.

The Union urges you to review the Employer's action to determine if the OHSRA complied with section 4981.03(D) of the ORC. This section of the ORC is not part of the Collective Bargaining

Agreement. It is not incorporated in the terms of the Agreement.

The burden of proving defects in the procedure used to effect a job abolishment or layoff action on the employee and have held that the substantial compliance by the Employer renders the abolishment procedurally valid. The courts have held, as a general matter, that a failure of strict compliance with the requirements does not prejudice the employee.

The Chairman of OHSRA subsequently signed the personnel action abolishing the position. The members of the Authority subsequently did not budget funds for the position. The Authority thereby ratified the acting Administrator's action by its own actions.

In conclusion, the state has met its burden. It has shown that the work required by the Authority does not warrant the expenditure of $29,700 on the AA I position; it is more efficient and economical for the administrator to assume the minimal amount of support work.

Discussion

To arrive at an award in this Grievance, the Arbitrator must decide four sub-issues:

First, the Arbitrator must decide if the abolishment was substantively justified.

Second, the Arbitrator must decide if the abolishment was carried out in a procedurally correct manner and, if not, was the error harmful or prejudicial to the Grievant.

Third, the Arbitrator must decide if the abolishment was

carried out as a result of the bad faith of the employer, and

Fourth, the Arbitrator must decide if the abolishment contravened Section 1.03 of the Contract by allocating bargaining unit work to the acting executive director.

First Issue:

To be substantively justified, a job abolishment must meet the standards of Ohio Revised Code 124.321 (D) which reads as follows:

> Employee 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 determination of the need to abolish positions shall indicate the lack of continued need for positions within the 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....

The first job of the Arbitrator is to see if the abolishment at issue is due "to lack of continued need for the position." This lack of continued need may result from "reorganization for efficient operation" or "for reasons of economy" or for "lack of work." The statute requires the appointing authority to file a rationale with DAS with regard to an abolishment. On August 20, 1992, a rationale was filed over the signature of Robert Chizmar, acting executive director. The Union has questioned the authority

of Mr. Chizmar to provide such a rationale. At this point, the Arbitrator need not be bound to the contents of the rationale because the review of the substantive justification of the abolishment is a trial de novo before the Arbitrator. In that trial de novo, the employer "shall demonstrate by a preponderance of the evidence that the job abolishment meets the standards imposed by the statute." This burden of proof is taken from 124-7-01 of the Ohio Administrative Code. The application of this standard of proof has been upheld by both the courts (See Bispeck v. Trumbull County Bd. of Commrs. 3705 (3rd) 26, 523 N.E.2d 502, 1988 and Esselburne v. Agriculture Dept., 49 App (3d) 37, 550 N.E.2d 512 (Franklin, 1988) and by distinguished arbitrators; moreover, both parties referenced this standard of proof in their briefs and arguments.

At the hearing, the Employer presented clear evidence that the abolishment in question would save the Employer money. However, evidence of not having to pay the salary BY ITSELF is not sufficient to prove increased efficiency and economy. (See Bispeck, supra) A job abolishment requires the permanent deletion of a position; nothing can be left for another person to fill. Arbitrator Pincus in the Caldwell grievance spelled out very clearly what MORE is required. "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." (Citing Carter et al. v. Ohio Department of Health (1986))

"Nothing in the abolishment statues and regulations prohibits an appointing authority from consolidating or redistributing some of the employee's duties to other employees." (Citing In Re Appeal of Woods) "As such, if the specific work in question needs to be performed, and it is not accomplished by consolidation or redistributing, the position cannot be legitimately 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 among other existing positions, to the extent that the abolished position becomes permanently deleted or eliminated." (Pincus Award # 24-03-881025-0079-01-04 (Caldwell) May 6, 1991 at page 90a)

The Arbitrator finds that the tasks formerly done by the Grievant as delineated in her job description (See Union Exhibit 1(c) have either been eliminated (e.g., the newsletter function) or have been consolidated with the tasks of Mr. Chizmar, Research Staff. (See his position description Union Exhibit 1(a).) In the rank 2 of the Research Staff position description, one finds the task "handles day to day operations of the Authority..." This task encompasses all routine operations of the Authority. This task is not "supervises" day to day operations, but "handles." Almost 90% of the Grievant's tasks in her position description comprise "handling the day to day operations" or "assisting the executive

director or the Chair or acting for the acting executive director." All of these tasks lie originally within the position description of the acting executive director i.e. Research Staff position. The testimony of Mr. Chizmar, often corroborated by the Grievant, was that he was handling all these tasks by himself with the use of technological aides. Those tasks that he was not handling had been, according to his testimony, eliminated in the interests of economy dictated by budget cuts. Those budget cuts were detailed in his testimony and of common knowledge.

The Union sought to rebut this description of consolidation and elimination by the testimony of the Grievant. The Arbitrator was not persuaded. The Arbitrator concluded that the Grievant's testimony was, to a large extent, self serving in that she exaggerated the length of time and amount of effort the various tasks took. Moreover, a number of her descriptions of tasks contained a strong element of "make work" to enlarge the importance and length of the task at hand. Even though Mr. Chizmar was also often evasive in his answers, the preponderance of the evidence fell to the Employer on this issue. The Arbitrator concludes that the abolishment was substantively justified and meets the standard of the statute.

Second Issue:

The Employer argues that the Arbitrator cannot properly decide whether the job abolishment was procedurally correct because the statute which set up the OHSRA is not incorporated into the

Contract. Under Section 25.03 of the Contract, the Arbitrator is limited in his or her scope of decision. However, the proposition that the Arbitrator cannot rule on the procedural propriety of the abolishment but can rule on the substantive propriety flies in the face of logic and common sense. The Employer says that the Arbitrator can find a job abolishment to be substantively proper but must ignore evidence of procedural irregularities.

Article 25 defines a grievance as "any difference complaint or dispute affecting terms and/or conditions of employment regarding the application, meaning, or interpretation of the Agreement." (See Joint Exhibit 1) As Arbitrator Pincus says in the Caldwell grievance (at p. 74a), "obviously, the procedural and/or substantive underpinnings of an abolishment decision dramatically impact employees' terms and conditions of employment." The application and meaning of Article 18 requirements fall well-within this proviso. Nothing in Article 25.01 precludes the filing of a grievance contesting the propriety of an abolishment decision. According to Arbitrator Pincus, this section is an "empowerment vehicle" which fails to expressly articulate any limitation on the Arbitrator's power. To decide the propriety of an abolishment is to decide both its procedural propriety and its substantive propriety. Moreover, this logical expression of the arbitrator's power is supported in statute and code. ORC 124.321 requires in section (A) that the "appointing authority shall lay off employees or abolish their positions in accordance with sections 124.321 and 124.327 of the Revised Code and the rules of the director of

administrative services." The rules also provide that the "appointing authority abolishes positions" See 123:1-41-01. Moreover, 124-7-01 which both parties have cited as appropriate and as included in the Contract, states specifically "Layoffs and abolishment may only be affirmed if the APPOINTING AUTHORITY has substantially complied **with the PROCEDURAL requirements set forth in section 124.32 of the Revised Code et seq. and the administrative rules promulgated pursuant to these statutes.** This rule empowers the Arbitrator to make sure that the appointing authority is the actor. Moreover, this section empowers the arbitrator to make sure than the appointing authority has acted in a procedurally proper manner pursuant to the administrative rules.

However, the Arbitrator is limited in that role; if he or she finds a procedural error, the Arbitrator must allow the abolishment to stand if the appointing authority has SUBSTANTIALLY complied. This standard of substantial compliance is upheld in numerous court opinions and is embodied in this rule. The first step is to determine "the appointing authority" in the case at hand. Section 4981.03 created the OHSRA. Is there a better place to go to define the appointing authority? To carry out the mandate of 124-7-01 the Arbitrator must go to that statute, and this Arbitrator holds that under Article 25 the Arbitrator is so empowered. In support of this conclusion is that the Employer cited to 4981.01 to support its premises that the OHSRA had the authority to hire the acting executive director and delegate tasks to him. If the Employer relies on that section, why cannot the Arbitrator? 4981.02(D)

specifically requires that any action taken by the authority requires an affirmative vote of three members of the authority.

While the Employer has the burden to show substantive justification for the job abolishment, the Union has the burden of rising any procedural defect. State, ex rel. v. Kuth, 61 Ohio St. 2d 321, 325 (1980). The Union argues that the "appointing authority" did not itself abolish the Grievant's job and hence procedurally the abolishment fails. Certainly by this strict standard, the Union's position is well taken. Moreover, the Employer stipulated that no resolution existed abolishing the position. However, the courts and the rule both enjoin the decision maker (formerly PBR, now the arbitrator) to uphold decisions which "substantially comply" with procedural mandates. Substantial compliance must be accompanied by a showing of harmless error and a lack of prejudice to the Grievant. (See Yates et al. v. Wallingford, 7 Ohio App. 3d 316, 317 (1982).) To support its argument of substantial compliance, the Employer points to a number of factors. First, the Employer notes that the Chair of the Authority did in fact sign the Personnel Action (PA), albeit one day after the effective date of the abolishment. The opinion of the Attorney General (See Joint Exhibit 8) was that the "chairman of the OHSRA would be the appointing authority and could appoint this secretary." This AG Opinion creates a good faith belief that the same chair could sign a personnel action abolishing a job and be considered the act of the appointing authority. The fact that the signature was one day late, while certainly not a preferred

situation, was harmless error and readily explicable given the Chair's normal schedule. In addition to a good faith belief that the Chair could act as the appointing authority, the Employer states that the act of abolishment was indeed ratified by the whole Board when the budget was approved which included the abolishment of the job. The Arbitrator finds that this combination of events rises to the level of substantial compliance where the Union has made no showing of prejudice to the Grievant. The Arbitrator finds that the Union has not met the level of proof sufficient to overcome the abolishment on the basis of procedural error.

Third Issue:

The Union attacks the job abolishment on the basis of bad faith. According to Ohio Administrative Code 124-7-01 (A), "Job abolishment and layoffs shall be disaffirmed if the action is in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence." Both parties recognize that 124-7-01 provides the appropriate standard of evidence to be used by the Arbitrator to decide issues affecting job abolishment.

The Union's allegation is not without basis. The fact that the abolishment occurred close in time to two grievances is suspicious. The fact that the minutes of the authority on July 23rd indicate an Executive session to discuss employee discipline issues raises more questions than it answers. However, on balance, the abolishment is supported by reasonable concerns about money and efficiency. The statement by the Employer that the timing is

coincidental is possible. Moreover, treating employee discipline and personnel matters in executive session is protective of the employee's privacy rights and thus is not without justification. While the Union has raised some inference of bad faith, the Arbitrator finds that the Union's proof does not rise to the level of a preponderance of the evidence.

Fourth Issue:

The Union attacks the abolishment not only as unjustified, but also as a violation of Article 1.03 of the Contract. Where the Union argues that the Employer has violated a specific section of the contract, the burden is on the Union to produce evidence sufficient to carry that issue. The essence of the Union's argument is that the tasks consolidated in the Research Staff position are in truth "bargaining unit" work and, hence, cannot be consolidated into the position of the acting executive director (Research staff). The position description of the research staff i.e. the acting executive director, specifically states that his task includes "handling day to day operations." The Arbitrator has found that the tasks which were consolidated into that position from the job abolished fell within the rather broad task of "handling the day to day operations." The Employer proved to the Arbitrator's satisfaction that those functions represented less than 10% of the acting executive director's yearly tasks. The Union provided no standard for the Arbitrator to judge what is "inherently bargaining unit work" nor did the Union present any

evidence that bargaining unit work per se had been usurped. Merely stating a conclusion does not rise to the level of proof. To argue that the consolidation was improper in that it robbed the bargaining unit of its rightful work requires, it would seem, an attack on the classification of the acting executive director as Research staff or an attack on the elements of the position description of that position. Neither attack was mounted by the Union. The Union failed to carry its burden on this issue.

Award

Grievance denied.

November 20, 1992
Date

Rhonda R Rivera
Arbitrator