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 In the Matter of Arbitration *
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 Between * Case Number:
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 Fraternal Order of Police- * 23-12-911209-0284-05-02
 Ohio Labor Council *
 * Before:
 and *
 * Harry Graham
 *
 The State of Ohio, Department *
 of Mental Health *
 *

Appearances: For Fraternal Order of Police-Ohio Labor Council

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 Fraternal Order of Police-Ohio Labor Council
 222 East Town St.
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For The State of Ohio:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham on February 12, 1993. At that hearing both 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 March 26, 1993 and the record closed on that date.

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

Did the Employer violate Article 35 of the Collective

Bargaining Agreement when it abolished the Grievant's position? If so, what shall the remedy be?

Additionally, the Fraternal Order of Police questions whether the Employer violated Articles 2, 7 and 9 of the Agreement? If so, what shall the remedy be?

Background: There is no dispute over the events that give rise to this proceeding. The Grievant, Mike Bailey, was hired as a police officer at the Oakwood Forensic Center on January 11, 1988. On December 28, 1991 his position was abolished. He was dismissed from State service.

During Fiscal Year 1992 the State was experiencing budgetary difficulties. The Department of Mental Health was required to reduce its personal services budget line item by 3.7% from the amount received in the prior fiscal year. When this reduction was apportioned throughout the Department the Oakwood facility was expected to reduce its expenditures by approximately \$720,000. In order to deal with this problem the Employer resorted to layoffs of employees, including that of the Grievant, Mr. Bailey. It was the view of the Employer that Mr. Bailey's services were not needed. As a police officer at Oakwood his primary task was to patrol the perimeter of the facility. This task had been reduced in significance due to improvements in the security system. These included electrical alarm fencing, closed circuit television and a double 10 foot high fence with razor ribbon wire on it. In addition, the Employer gave consideration to the physical siting of the Oakwood facility. It is adjacent

to the Lima Correctional Institution. Correction Officers (a different classification from Police Officers) patrol the perimeter of both facilities. Hence, the Employer was of the view that the Grievant's services were no longer required.

A grievance protesting the discharge was promptly filed. It was processed through the machinery of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points out that there is a conceptual difference between a layoff and a job abolishment. The former situation occurs when a separation is temporary. It is expected to last no longer than twelve months. The latter situation is concerned with a permanent separation from employment. In this case it is clear that the State has abolished Mr. Bailey's position. Hence, the State bears the burden of convincing the arbitrator that the abolishment was both necessary and properly performed.

In this situation the State asserted the Grievant's position was abolished for reasons of economy and efficiency. The Union asserts that the State cannot support that claim. A principal justification proffered by the State for the abolishment was economy. In the budgetary process of the State the funds for the Oakwood facility are combined with those of the Psychiatric Services Department. Transfers are possible between the two entities. It was conceptually

possible to transfer monies between them to alleviate any funding shortage at Oakwood according to the Union. Such a shortage was illusory in any event in its view. The Chief Financial Officer of Oakwood testified at the hearing. It was his view that the facility decided to terminate Mr. Bailey prior to passage of the Budget. In addition, he was and remains of the view that the facility had sufficient funds to retain Mr. Bailey's position.

Another argument made by the State in defense of its action is irrelevant to the dispute in the Union's view. At the hearing the State made much of the fact that the patient population at Oakwood had declined. That is true and is acknowledged by the Union. However, the decline occurred prior to Mr. Bailey being hired in 1988. The population at Oakwood was neither less nor greater at the time of Mr. Bailey's layoff than at the time of his hiring. Hence, the reliance of the State on that argument is misplaced in the opinion of the Union.

In order to support the layoff in question in this proceeding the State must act with clean hands. It cannot be engaged in subterfuge. In Hubbard v. Hilty, 31 Ohio Law Abs. 538 (Allen Cty. C.A.)(1940) the Court determined that one of the tests of subterfuge is whether or not another person has been employed to perform a "substantially identical service, either under the same title or classification or a different

title." (Hilty, supra. at 541). The State cannot remove the Grievant and redistribute his work to other employees who may be in other job classifications. In this situation the main task of the Grievant was to patrol the perimeter of the facility. This task is still being performed but by people who are in a different classification and who are in a different bargaining unit and who work at a different facility, Lima Correctional Institution. This situation represents the sort of erosion of the bargaining unit that is prohibited by Article 7 of the Collective Bargaining Agreement. Corrections Officers at Lima and at Oakwood are doing work properly belonging to the Police Officer classification. There is no permanent deletion of Mr. Bailey's position. His tasks are being performed by others. Hence, the Employer cannot correctly be found to have abolished his job. As a result, the Union urges the grievance be granted in full and that Mr. Bailey be restored to employment with a make-whole remedy.

Position of the Employer: The State points out that this dispute involves its assumption of the burden of demonstrating to the arbitrator that the job abolishment at issue meets the statutory criteria. This is required by Esselburne v. Agriculture Department, 49 App. (3d) 37, 550 N.E. 2d. 512. The Agreement at Article 35 sets forth the procedures for a reduction in force. Except as modified by

the Agreement the applicable provisions of the Revised Code and the Administrative Rules govern reduction in force. Section 124.321(D) permits the Employer to abolish positions. An abolition is a permanent deletion of a position due to, among other things, a "lack of continued need for the position." The 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...." In this case the State abolished Mr. Bailey's position for reasons of economy. This is permitted by the Statute. Section 124.321 defines a lack of funds as when "appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected levels of staffing and operations." Those circumstances were met in the present case. The Employer was faced with a 3.7% reduction in its personal services funds. This resulted in a deficit in the previous year's accounts for Oakwood Forensic Center and Psychiatric Services which are budgeted together. Of the \$1.2 million deficit the share attributable to Oakwood was about \$720,000. This establishes without doubt that Oakwood met the criteria of economy. After the layoff of the Grievant and other employees the fiscal year ended with the facility having a balance of \$66,000. This is essentially no balance at all. In addition, the concept of "economy" is a broad one. It encompasses the efficient use of resources. In

this instance, considerations of efficiency enabled the Employer to do without the Police Officer position at issue in this proceeding. The position simply was not needed any longer. Corrections Officers from Lima Correctional Institution could easily perform the tasks formerly performed by the Grievant. Examination of the Position Descriptions of the Police Officer and the Corrections Officer indicates they overlap. When the Corrections Officers at Lima patrolled the grounds of Oakwood they were not acting beyond their capacity. Furthermore, the sophisticated security system in place at Oakwood minimized the need for the patrol functions once done by Mr. Bailey.

The State notes that after being laid off the Grievant possessed bumping rights to a facility in Toledo. He declined to exercise them. The State urges this be held against him in determination of this dispute.

One of the claims raised by the Union in this proceeding is that the bargaining unit has been eroded by the layoff of Mr. Bailey. In Case No. G87-1922, OCSEA v. ODOT (Bumpgrinder staffing dispute) this Arbitrator was of the view that the Union bore the burden of demonstrating that the State had staffed the bumpgrinder in order to avoid the payment of overtime. Similarly, Arbitrator Roberta Rivera placed the burden of proof on the Union in a dispute involving an alleged contract violation in a job abolishment dispute.

OCSEA v. Ohio High Speed Rail Authority. In this situation the burden is on the Union to establish that the State has violated Section 7.03 of the Agreement dealing with erosion of the bargaining unit. This instance involves a permanent deletion of Mr. Bailey's duties. They are not being performed by other people who did not perform them prior to the layoff of the Grievant. His duties were not transferred to anyone. As noted above, the Police Officer and Correction Officer position descriptions relevant to this dispute overlap. Similar tasks are performed by people in both classifications. The position description for the Correction Officers at Lima provides they too can patrol the grounds. Correction Officers at Oakwood also have patrol responsibilities.

There is a substantial difference in the position descriptions pertaining to police officers and correction officers. The former have arrest powers, the latter do not. This difference is more apparent than real according to the State. In the past several years police officers have not once been called upon to use their arrest authority at the Oakwood facility. In the final analysis the tasks performed by Mr. Bailey were rendered unnecessary by the security system at Oakwood. The residual patrol function was performed by the Correction Officers at the contiguous Lima facility. Given the economic and efficiency considerations in this

dispute the State urges the Grievance be denied in its entirety.

Discussion: This dispute is concerned with the abolition of a position. It is a permanent deletion from the table of organization and a permanent separation from employment that has been experienced by the Grievant. In order to support such an action the Employer must meet the tests established by the Ohio Revised Code, Section 124.321 (D). One of the tests is "lack of need for the position." In this situation the Grievant, Mr. Bailey, was principally concerned with patrol. This is shown by his job description, Joint Exhibit 10. This is also the case for the Correction Officer at Oakwood, Joint Exhibit 11. The nature of the patrol is somewhat different but the essential task is identical to both positions. In addition, it was not disputed by the Union that Corrections Officers at the contiguous facility, Lima Correctional Institution, have routinely patrolled their joint perimeter. Testimony from John Allen, Superintendent of Oakwood, is unrebutted on this point. It has not been shown that the amount of patrol work performed by officers from Lima has increased as a result of Mr. Bailey's layoff. The question thus becomes, does the ability of Corrections Officers at Lima to patrol at Oakwood satisfy the test of lack of need for the position? Obviously this is a judgement call. Arbitrators should be circumspect in substituting their

authority for the judgement of experts in the field, particularly when those people are responsible for the consequences of their decisions. In this case, it was the judgement of the responsible officials at Oakwood that they could ensure the security of the institution without the position occupied by the Grievant. This judgement is entitled to great weight.

These same observations apply to the test of reorganization for the efficient operation of the appointing authority. In the opinion of the management responsible for the facility it was efficient to turn the patrol function over to the officers assigned to Lima Correctional Institution. The record does not indicate that as a Police Officer Mr. Bailey ever exercised the authority attached to that position. That is, in the course of his employment he did not use his arrest power. The fundamental task associated with his day-to-day duties was patrol. This is a task that can be performed by Corrections Officers per their job description. It is a task that has been performed by Corrections Officers at Lima. Hence, the test of "reorganization for the efficient operation of the appointing authority" is satisfied in this instance. This view was adopted by Arbitrator Pincus in a dispute involving OCSEA, Case No. 24-03-881025-0079-01-04, May 6, 1991. In that dispute Arbitrator Pincus was of the view that "Nothing ...

prohibits an appointing authority from consolidating or redistributing some of the employee's duties to other employees." He continued to observe that a valid redistribution of tasks occurs "when various aspects of the abolished position are distributed among other existing positions, to the extent that the abolished position becomes permanently deleted or unnecessary." Those observations apply to the performance of patrol work once done by the Grievant now being done by Officers employed at Lima Correctional Institution.

A central element in the decision to abolish Mr. Bailey's position was the need asserted by the Employer to operate more economically. This was due to the reduction of the funds available for personal services. The Statute at Section 124.321 specifically addresses the definition of lack of funds. It means that the employer has a "current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations." The amount of money at issue was approximately \$720,000 attributable to Oakwood according to the Employer. There is a continuing dispute between Union and Management fiscal experts concerning the accuracy of this figure. When consideration is given to the testimony of both witnesses on this point it is unnecessary to resolve the contradiction in their viewpoints. The Union witness, Richard Maye, Business Administrator at

Oakwood, acknowledged that there would likely be a \$300,000 funding shortfall under his scenario. The Employer projected a deficit in excess of \$700,000. In either event, the facility had substantial funds to make up. At the end of the fiscal year the Employer had a balance in the accounts of approximately \$66,000. In the final analysis it is not doubted that there was a necessity for the Employer to economize. In this connection Mr. Bailey's layoff was not done in isolation. It was part of a larger abolition of 37 positions at Oakwood in Fiscal Year 1992. In spite of this sizeable number of abolishments the institution ended the year with a very small balance. The need for economy was real in this case.

This situation is unlike that presented in the Department of Mental Health, Athens Mental Health Center dispute. (Case No. 23-08-900516-0422-05-02). In that case the Employer had eliminated the positions of all police officers. In their stead supervisors performed their duties. I found in the Athens dispute that the "conclusion is inescapable that supervisors are performing work that is properly within the province of the bargaining unit." (p.7). That has not occurred in this instance. The work being done by Mr. Bailey is now being done by employees who work at the Lima Correctional Institution. They are bargaining unit employees, albeit members of a different bargaining unit. The position

descriptions of the officers from Lima who now patrol Oakwood duplicate in large measure the position description of the Grievant. In addition, prior to Mr. Bailey's layoff officers from Lima patrolled at Oakwood. The major difference between the two position descriptions involves the arrest power inherent in the police officer position held by Mr. Bailey. That authority has never been used. It is included within the section of his job description which represents 80% of his tasks. That is a bureaucratic fiction. During the entire course of his employment with the State Mr. Bailey never once exercised the most significant part of the police authority; the ability to make an arrest. In essence, he was a patrol officer. This task can be performed by officers from Lima, supplemented by the security devices installed at Oakwood. The duties once performed by Mr. Bailey no longer need to be performed by a person in his position. That, coupled with what the Arbitrator believes to have been a bona-fide need to economize, compels the conclusion that no violation of the Agreement occurred in this instance.

Article 2 of the Agreement is concerned with the intent of the parties to promote their cooperation and harmonious relations. This situation is concerned with abolition of a position. Understandably neither the Union nor the Grievant are happy with this situation. That does not rise to a violation of the contractual commitment of the parties to


promote harmonious relations between them.

Article 7 contains the commitment of the Employer not to erode the bargaining unit represented by the Union. In this case supervisors are not performing work formerly done by the Grievant. It was not shown that the patrol tasks being performed by the Corrections Officers at Lima have been increased by the abolition at issue in this proceeding. There has been a numerical reduction in the complement of the bargaining unit. That does not rise to erosion within the meaning of the Agreement.

No discrimination whatsoever was shown by the Union in the abolition of Mr. Bailey's position. Not a shred of evidence is on the record to lead the Arbitrator to suspect that his position was abolished due to his "age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation [or] sexual preference...." No violation of Article 9 took place in this instance.

Award: The grievance is denied.

Signed and dated this 9th day of April, 1993 at South Russell, OH.



Harry Graham
Arbitrator