

869

ARBITRATION DECISION

May 3, 1993

DEMONSTRABLY
SUPERIOR
- REMEDY
AVAILABLE

In the Matter of:

Ohio Civil Service Employees)	
Association, AFSCME Local 11)	Case No.
)	04-00-901116-35-01-13
and)	Hilma Slone,
)	Grievant
State of Ohio, Department of)	
<u>Agriculture</u>)	

APPEARANCES

For the Union:

Dennis Williams, Staff Representative
Joseph C. Raggola, Arbitration Clerk
Hilma Slone, Grievant
Delores James, Former Steward
Robert Swingle, Steward
Vicki Gilger, Witness
Roberta Meredith, Witness
Mary A. Hilt, Witness
Carol Bowshier, Witness

For the State:

Barbara Valentine, Presenting, Department of Agriculture
Rachel Livengood, Second Chair, Office of Collective
Bargaining
Wilbur F. Highley, Witness
Roland E. Jenkins, Chief, Consumer Analytical Laboratory

Arbitrator:

Nels E. Nelson

BACKGROUND

The instant dispute involves the meat laboratory of the Consumer Analytical Laboratory of the Ohio Department of Agriculture. From 1986 to 1988 Vicki Gilger, a chemist 2, was assigned to the lab and served as lead chemist. She was given orders by Wilbur Highley, a chemical laboratory supervisor 1, and she passed them on to the chemists working in the lab. Highley was also in charge of other labs including the general food chemistry and microbiology labs.

In the spring of 1989 Gilger left the lab and Mary Hilt, a chemical laboratory supervisor 1, was assigned to the lab. Her duties included directing the work to be done, training chemists in the lab, monitoring the quality of the work performed, and distributing samples for analysis. She reported to Highley who was located in an office outside of the lab. He supervised Hilt and was responsible for approving leave requests, disciplining employees, and conducting performance evaluations of the chemists in the lab.

The supervisor 1 position was a "split position" -- some supervisor 1's were in the bargaining unit and some were considered exempt employees. Highley's position was among those classified as exempt while Hilt was placed in the bargaining unit.

In the spring of 1990 the classification modernization plan was implemented. At that time Hilt's title was changed to chemical laboratory coordinator. However, her duties did

not change and the job remained in the bargaining unit. Highley continued to be her supervisor and to perform his previous duties.

In late 1990 a series of changes occurred in the meat lab. On November 2, 1990 Hilt resigned. Because of problems concerning the accreditation of the lab by the U.S. Department of Agriculture, Highley was moved from the office to the lab where he could monitor testing and provide direct supervision. At the same time Roberta Meredith, an agricultural inspection manager, was moved to Highley's place in the office. She took over the administrative tasks that Highley had performed including purchasing equipment and supplies, accounting for funds from cooperative agreements, completing requisitions, reviewing feed and fertilizer reports, and receiving samples.

On November 16, 1990 a grievance was filed by Hilma Slone, a chemist 1 in the meat lab. It charged that Highley was placed in a bargaining unit position and was performing the same work as Hilt had done while the administrative work that Highley had done was being performed by Meredith. The grievance asked that the chemical laboratory coordinator's position held by Highley be filled with a bargaining unit employee according to Section 17.06 of the collective bargaining agreement and that the employee be made whole for any losses suffered.

On December 20, 1990 the grievance was denied at step three. The state pointed out that it had requested approval

to fill Hilt's position but that its request was denied due to a statewide hiring freeze. It claimed that the duties being performed by Highley were included in the position description for supervisor 1. The state maintained that Hilt's lead worker duties were similar to a supervisor 1's duties except that a lead worker cannot approve leave, discipline employees, or conduct performance evaluations.

The grievance was appealed to arbitration. The hearing was conducted on February 19, 1993. Written closing arguments were received on March 15, 1993.

ISSUE

The issue as agreed to by the parties is as follows:

Did Management violate Article 1.03 of the AFSCME/OCSEA Agreement of 1989-1991? If so, what should the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION

* * *

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.

ARTICLE 17 - PROMOTIONS AND TRANSFERS

* * *

17.03 - Vacancy

A vacancy is an opening in a permanent full-time or permanent part-time position within a specified bargaining unit covered by this Agreement which the Agency determines to fill.

* * *

17.06 - Selection

A. The Agency shall first review the bids of the applicants from within the office (or offices if there is more than one office in the county), county or "institution." The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee...

UNION POSITION

The union argues that the state violated Section 1.03 of Article 1. It points out that Section 1.03 states that supervisors shall perform bargaining unit work only to the extent that they had previously performed such work. The union notes that the state agreed that the amount of bargaining unit work done by supervisors would not increase during the life of the agreement and that every reasonable

effort would be made to decrease the amount of bargaining unit work done by supervisors. It indicates that the fourth paragraph of section 1.03 declares that new and revised classifications would exclude supervisors from doing bargaining unit work.

The union contends that Section 1.03 should be strictly construed. It points out that in Ohio Civil Service Employees Association/AFSCME Local 11 and State of Ohio, Department of Mental Health, case no. G-86-1107, Arbitrator Harry Graham quoted Saul Wallen's decision in New Britain Machine Co. (8 LA 722) which indicates that the transfer of work out of the bargaining unit is an attack on job security which is the soul of a collective bargaining agreement.

The union charges that Highley violated Section 1.03 by assuming bargaining unit work. It points out that from 1989 to 1990 Hilt directed and trained chemists, monitored the quality of the work performed, and distributed samples for analysis. The union states that when Hilt retired, Highley was moved to the meat lab and assumed these duties. It claims that his administrative duties were taken over by Meredith.

The union argues that the instant case is extremely similar to the Joe Sorrell arbitration case. (State of Ohio, Marion Correctional Institution and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, case no. 27-16-(89-06-07)-0920-01-01). It claims that the Sorrell case involved the application of Section 123:1-17-16 of the

Ohio Administrative Code which states that "no person shall be assigned duties other than those properly belonging to the position to which he has been legally appointed." The union notes that in that case Arbitrator Hyman Cohen held that the state was required to post a vacancy consistent with the terms of the agreement.

The union rejects the state's argument that there was no violation of Section 1.03 because Highley was only doing bargaining unit work to the extent he did it before the 1989 contract and prior to classification modernization. First, it maintains that to determine the extent to which a supervisor has done bargaining unit work, an Arbitrator must look at the allocation of duties at the inception of the contract. The union states that in the instant case the logs demonstrate that by the time the 1989 contract went into effect Hilt was trained and performing all of the duties. Second, it asserts that classification modernization negated any past practice or cross-classifications that existed prior to its effective date. The union contends that when the state determined that Hilt should be in the bargaining unit, a supervisor was barred from doing her work except for the limited circumstances enumerated in the contract which do not apply in the instant case.

The union disputes the state's contention that the duties which Highley assumed when Hilt resigned are included in the supervisor 1 classification. It states that the supervisory 1 classification does not include maintaining

logs, acting as lead chemist, or other duties for which Hilt was responsible. It claims that a supervisor 1 does not perform routine tests but is responsible for them.

The union argues that the cases relied upon by the state can be distinguished from the instant case. It states that in the Ann Throckmorton case (56-00-910919-02-01-14) the grievant's position description was virtually identical to the executive director's position description except that the duties listed in the grievant's position description were preceded by the phrase "in the Director's absence." The union maintains that in Kelsey Memorial Hospital, 88 LA 406 (Pincus, 1986) the parties agreed that the supervisor's responsibilities included performing bargaining unit work.

The union challenges the state's claim that the log books establish a past practice in support of its case. First, it states that the initials in the log books pre-date the effective date of the 1989 collective bargaining agreement and classification modernization so that they are irrelevant. Second, the union maintains that Highley's initials in the log books in late-September of 1989 and from mid-April to mid-May of 1990 fall under the exceptions in Section 1.03. It indicates that Hilt was absent from work in late-September of 1989 due to illness or vacation and that in the Spring of 1990 the lab was working double shifts and Highley's initials are for tests done on the second shift.

The union rejects the argument that budgetary considerations caused the effective abolishment of the lab

coordinator position. It states that Jenkins testified that Highley was doing the coordinator's job due to budget constraints. The union points out that Arbitrator Cohen in the Sorrell case stated that the "lack of funds is not an adequate contractual justification for the state's violation of Section 1.03 of the agreement...Section 1.03 refers to several circumstances when supervisory employees may perform bargaining unit work but lack of funds is not a circumstance that is mentioned." It further claims that three positions have been posted and filled since the grievance was filed.

The union asks the Arbitrator to sustain the grievance. It requests him to order the state to cease and desist from allowing a supervisor to perform a lab coordinator's duties. The union further seeks to have the Arbitrator require the state to pay the grievant the difference in pay between what she received and what she would have been paid as lab coordinator from November 1990 to the present.

STATE POSITION

The state argues that the burden of proof is on the union. It states that in contract interpretation cases Arbitrators hold that the union has the burden of presenting evidence and persuading the Arbitrator. The state contends that in the instant case the union must prove that Highley performed work that is exclusively bargaining unit work or that its action was taken for the purpose of eroding the bargaining unit.

The state maintains that the union failed to prove that

the work at issue belongs exclusively to the bargaining unit. It claims that the instant case involves a "split classification" with a range of duties which overlap different classifications. The state indicates that it did not determine who fell in the exempt or non-exempt categories but that this was done by the State Employment Relations Board. It charges that the union is trying to appeal SERB's decision through the arbitration process.

The state contends that classification modernization does not change the substance of the split classification. It claims that Hilt's title was changed but not her duties. The state asserts that it makes no difference to the case whether the position is listed as supervisor 1 or coordinator since the duties still overlap with those of an exempt employee. It further claims that classification modernization shows that the union did not object to the overlapping duties but acquiesced in order to gain more bargaining unit positions.

The state argues that Highley's duties are not distinctly bargaining unit work. It points out that the classification specification for supervisor 1 states that he or she "supervises chemist and related laboratory positions, reviews, evaluates & reports results generated." The state asserts that the only true difference in major worker characteristics between supervisor 1 and coordinator is that supervisor includes knowledge of "supervisory principles/ techniques."

The state contends that the classification concept also constitutes proof of overlapping duties. It notes that the classification concept for coordinator states:

The advanced level class works under general direction and requires thorough knowledge of chemistry in order to act as lead chemist of laboratory or laboratory section, provide work direction and training to lower-level chemists and other chemists and other laboratory personnel and conduct routine and complex chemical analysis.

The state indicates that the classification concept for supervisor states:

The first supervisory level class works under direction and requires thorough knowledge of chemistry in order to supervise chemists and other assigned laboratory personnel in one laboratory section and ensure timely and accurate analysis of samples submitted to the laboratory.

The state emphasizes that the union cannot claim that duties properly within an exempt position are bargaining unit work.

The state asserts that the union's argument that Highley was doing supervisor 2 work is immaterial. It points out that under Article 5 it can use exempt employees in any way it wishes and that the union does not represent Highley. The state further contends that if Highley was a supervisor 2, Hilt also would have been working out of classification and should have been classified as an exempt supervisor.

The state rejects the union's contention that Highley took over the coordinator's bargaining unit work. It points out that Gilger testified that since 1986 Highley reviewed the chemists' work but did no bench work. The state claims that he continued in this manner after Hilt's resignation. It maintains that this is different from the case decided by

Arbitrator Cohen where the work in question was determined to be bargaining unit work and where exempt employees were found to be working out of their classification. The state asserts that the instant case differs from the case decided by Arbitrator Graham because the work at issue in that case was found to be bargaining unit work and because supervisors previously had not performed the work.

The state contends that the fact that Highley moved to the meat lab does not matter. It states that both before and after he was located in the lab he supervised Hilt and the chemists in the lab. The state indicates that he reviewed and evaluated reports, received samples, took consumer complaints, trained chemists, approved leaves, disciplined employees, and did performance evaluations. The state stresses that all of these duties are performed by a supervisor.

The state contends that the log books do not show that Hilt oversaw the lab. It notes that the union claimed that Gilger first did the coordinator's job but points out that as a chemist 2 she could not sign off on other chemists' work and that the logs show that only Highley signed off on the tests. The state claims that when Hilt was in the lab, she and Highley alternated in signing the log book which proves that their duties overlapped.

The state maintains that there is an important difference between the supervisor 1 and coordinator positions. It points out that Highley testified that he did

not perform bench work which is part of the coordinator's job. The state indicates that this is supported by the logs which it entered into the record in their entirety.

The state argues that even if the work performed by Highley is considered bargaining unit work, the amount of work done did not increase. It notes that Meredith testified that 25% of her time is spent on administrative work that Highley used to perform so that 25% is the maximum amount of time he could spend on work that Hilt did. The state further maintains that given Highley's testimony that he did no more bench work after Hilt left and that the work connected with the other labs that he supervises varies, it may be that he did none of Hilt's work.

The state contends that the "amount" referred to in Section 1.03 should be looked at in the aggregate. It points out that the postings submitted by the union show that other bargaining unit employees were hired. The state further maintains that it has the right to determine whether or not to fill a vacancy provided it does not violate the collective bargaining agreement.

The state contends that the "amount" of bargaining unit work performed by Highley did not change. It notes that the dictionary defines "amount" as the range or scope. The state indicates that Highley did not extend the range or scope of duties he performed after Hilt resigned. It claims that the fact that it changed its delegation of purely exempt duties does not change the scope or range of duties supervisors are

allowed to perform.

The state argues that the union presented no evidence that it took any action for the purpose of eroding the bargaining unit. First, it states that it moved Highley to the meat lab to take advantage of his chemistry experience and expertise because the lab was facing the loss of accreditation. Second, the state claims that it tried to fill Hilt's position when she resigned but that the Office of Budget and Management denied its request. It acknowledges that there were five job postings but states that they were for only two jobs and it asserts that some were based on federal funding.

The state contends that even if the grievance is granted, the remedy requested is inappropriate. It claims that it is not proper to award the grievant the coordinator's job even though she is the most senior chemist because that does not prove that she is qualified for the position. The state points out that there was no testimony regarding the grievant's qualifications and that an employee with superior qualifications might have been awarded the job. It further states that under Section 17.03 it has the discretion whether or not to fill a position.

The state concludes that if the Arbitrator were to grant the grievance, it would be eating away at management's rights as set forth in Article 5 of the contract and Section 4117.08(C)(1)-(9) of the Ohio Revised Code. The state claims that the union could say when, where, and how supervisors

were allowed to do their jobs. It maintains that the result of the arbitration would be to ban exempt supervisory employees from the Consumer Analytical Lab.

The state asks the Arbitrator to deny the grievance.

ANALYSIS

The facts giving rise to the instant grievance are clear. Between 1986 and 1988 Gilger, a chemist 2, performed many of the functions of a lead worker in the meat lab. Highley, a supervisor 1, was responsible for the meat lab. He was located in an office apart from the lab.

In 1989 Hilt, a supervisor 1, was moved into the meat lab. She assumed Gilger's duties as well as some additional duties. Supervisor 1 was a "split classification." Hilt was classified as non-exempt and Highley, who remained in charge of the lab, was classified as exempt. However, in March, 1990, as part of the classification modernization program, Hilt's title was changed to coordinator but her duties did not change and she remained in the bargaining unit.

On November 2, 1990 Hilt resigned. Because there was concern about the lab losing its accreditation, Highley was moved into the lab. At the same time Meredith, an agricultural inspection manager, was moved to Highley's former office and took over a number of his routine administrative functions. This allowed him to assume some of the tasks which had been done by Hilt.

On November 16, 1990 a grievance was filed by Hilma Slone, a chemist 1. It charges that the state violated

Section 1.03 of the collective bargaining agreement when it placed Highley in a bargaining unit position where he was performing the same work that had been done by Hilt. The grievance requests that the position be filled by a bargaining unit employee pursuant to Section 17.06 and that the employee be made whole for any losses suffered.

Section 1.03 governs the performance of bargaining unit work. It has a number of restrictions on the performance of bargaining unit work. First, it states that "supervisors shall only perform bargaining work to the extent that they have previously performed such work." Second, the contract requires that "the amount of bargaining unit work done by supervisors shall not increase and ... [that] the Employer shall make every reasonable effort to decrease the amount of bargaining work done by supervisors." Third, it indicates that "it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work ... [and] whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work." Finally, the section includes a pledge that "the Employer ... will not take action for the purpose of eroding bargaining units."

The Arbitrator believes that it is clear that when Hilt resigned and Highley moved into the meat lab, he assumed some new duties. Prior to moving to the lab he was responsible for a number of routine administrative chores. When he went to the lab, a number of these administrative activities were

assigned to Meredith. She testified that she spent about 25% of her time on such activities. This would free up 25% of Highley's time to perform other duties.

The Arbitrator feels that it is also clear that with Hilt's departure from the lab Highley had to assume many of her responsibilities. The direct supervision of the chemists and the review of their work was essential given the problems with accreditation. The task of initialing the log book for various tests was among the specific tasks taken over by Highley.

The Arbitrator believes that the work assumed by Highley was bargaining unit work. First, the change in Hilt's title from supervisor 1 to coordinator indicates that the work she performed was bargaining unit work. Section 1.03 states that the intent of the classification modernization program was to differentiate between supervisors' work and bargaining unit work and to exclude supervisors from doing bargaining unit work. The change in Hilt's title clearly defined the work she was performing as bargaining unit work.

Second, a comparison of the classification descriptions for coordinator and supervisor 1 supports the conclusion that Highley was doing bargaining unit work. The description for coordinator includes among the job duties "provides work direction & training to chemists ..., distributes samples to lower-level chemists for analysis ..., monitors quality & quantity of work produced ..., [and] keeps & maintains logs." The description for supervisor 1 includes among the duties

"supervises chemists ...; reviews, evaluates & reports results of analysis ...; prepares new testing procedures...; and performs miscellaneous duties (e.g., advises and assists in budget preparation ...)." The major worker characteristics include "knowledge of supervisory principles/techniques." Testimony and evidence clearly establish that Highley performed work which belongs to the coordinator classification and is not included in the supervisor 1 classification.

The violation of Section 1.03 is readily apparent. In 1990 Highley significantly increased the amount of bargaining unit work that he was performing. Furthermore, the intent of the classification modernization process was frustrated. Although the purpose of the state's action was not to erode the bargaining unit, its actions had that effect.

The Arbitrator recognizes that the state faced a very difficult situation in 1990 regarding the meat lab. It had to deal with accreditation problems and at the same time it was unable to fill Hilt's position because of a budget freeze. However, the financial plight of the state does not relieve it of its obligation to comply with the contract. As Arbitrator Cohen indicated in State of Ohio, Marion Correctional Institution and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, case no. 27-16-(89-06-07)-0920-01-01:

The lack of funds is not an adequate contractual justification for the State's violation of Section 1.03 of the Agreement. The State is prohibited from unilaterally abrogating the clear terms of the

Agreement. Section 1.03 refers to several circumstances when supervisory employees may perform bargaining unit work but lack of funds is not a circumstance that is mentioned. (Pages 25-26).

The remaining issue is the proper remedy. The union requests that the Arbitrator issue a cease and desist order forbidding the state from allowing a supervisor to perform the coordinator's duties. It also seeks to have him place the grievant in the coordinator's position and grant her the difference in pay between what she earned and what she would have earned in the coordinator's job from November, 1990, when Highley began performing bargaining unit work, to the present.

The Arbitrator will grant the union's request for a cease and desist order. The state must stop having bargaining unit work which was performed by Hilt done by a supervisor. It constitutes an increase in such work done by a supervisor and is contrary to the intent of the classification modernization program.

The Arbitrator, however, cannot place the grievant in the coordinator's position and grant her back pay. First, Section 17.06 requires the state to award a job to "the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee." The state stipulated that the grievant was the senior employee but stated that it does not prove that the grievant was qualified and charged that the grievant was attempting to circumvent Article 17.

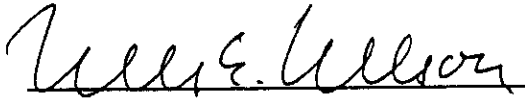
Without testimony or evidence regarding the grievant's

qualifications, it would be inappropriate to place her in the coordinator's position. In November, 1990 the grievant was classified as a chemist 1. The classification specification which differentiates between the job classifications in the chemist series describes the chemist 1 as a "developmental level class." The duty indicated for the classification is to "conduct routine chemical analysis." Chemist 2 and chemist 3 require higher levels of knowledge and the performance of complex tests on a broad range of samples. The coordinator's position is an "advanced level class." The coordinator acts as a "lead chemist of lab or lab section" and "provides work direction & training to lower-level chemists." On the surface it would appear that the grievant as a chemist 1 was not qualified to be promoted to coordinator and no contrary testimony or evidence was presented.

Second, the Arbitrator believes that it would be inappropriate for him to order the state to fill the coordinator's position. He can order the state not to allow a supervisor to perform bargaining unit work but how the state gets the work done is a management right. This is essentially the position taken by Arbitrator Graham in Ohio Civil Service Employees Association/AFSCME Local 11 and State of Ohio, Department of Mental Health, case no. G-86-1107 where he denied the union's request to order the state to post a position of mental health administrator 3.

AWARD

The state is directed to cease and desist from having the bargaining unit work of a chemical laboratory coordinator performed by a supervisor.


Nels E. Nelson
Arbitrator

May 3, 1993
Russell Township
Geauga County, Ohio