In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Ohio Department of
Transportation

Employer.

Grievance No. 31-10-(92-05-13)
0014-01-14
Grievant (Lorubbio, P.)

Hearing Date: March 11, 1993

Closing Date: April 5, 1993

Award Date: May 13, 1993

First Supplemental Award:
June 21, 1993

Second Supplemental Award:
November 3, 1993

For the Employer: Thomas E. Durkee
Michael P. Duco

For the Union: Richard Sykes
Jamie G. Parsons

SECOND SUPPLEMENTAL AWARD

1. Grievant's work schedule shall be four 10 hour days or five 8 hour days at the employee's option.
2. Grievant will have use of a pool car as necessary while assigned as Prevailing Wage Coordinator, approximately one day per week, to visit work sites under the following conditions:
   a. The pool car will be located at the Athens County Garage, and

b. the use of the pool car shall not be unreasonably denied by management,

c. Grievant shall submit an itinerary a week in advance of her schedule for that day that may be changed due to weather or contractors' schedule, and

d. grievant shall be provided with all the equipment reasonably necessary to perform her duties.

3. The headquarters county shall be Washington, and the report in location shall be the District 10 office in Marietta.

4. The change in headquarters for the Administrative Assistant 3 position does not constitute a vacancy nor is the change subject to Article 17.

5. Neither travel time per section 13.06 nor mileage reimbursement per Article 32 is applicable as a result of the headquarters change.

6. The Employee and Mr. Michael Lang will meet with an outside counselor selected by the Employer, separately then jointly, to learn to appreciate diversity in the workplace and to learn how to deal with difficult people.

7. The effective date of this Agreement shall be November 5, 1993.

November 3, 1993
Date

Rhonda R Rivera
Arbitrator

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio

Employer.

Grievance No. 31-10-(92-05-13)
-0014-01-14
Grievant (P. Lorubbio)

Hearing Date: March 11, 1993

Closing Date: April 5, 1993

Award Date: May 13, 1993

Arbitrator: R. Rivera

For the Employer: Ted Durkee
Michael P. Duco

For the Union: Richard Sycks
Jamie G. Parsons

On June 17, 1993, the Advocates to the State (Durkee) and for the Union (Sycks) held a phone conference with the Arbitrator to determine the scope of the Award. Three issues were discussed.

1. During the period between the Grievant's abolishment/bump and the Grievant's reinstatement as an Administrative Assistance 3, the Grievant had gone on disability leave. In calculating the Grievant's back pay, the State paid her the amount by which her disability pay would have been increased for that period had she been an Administrative Assistant 3 at the time of her disability. The Union argued that but for the abolishment she never

would have gone on disability, and, hence, she should have received the difference between the disability pay and the pay of an Administrative Assistant 3.

Award: The Arbitrator approved the State's pay calculation, i.e., the difference between the disability paid and the disability that would have been paid at the higher position. The Grievant went on disability, presumptively in good faith. No evidence was introduced at the original hearing on this issue. Moreover, the Arbitrator will not attempt to make calculations on such a speculative and inherently subjective matter.

2. The Union requested that the State pay the Grievant for mileage traveled to the replacement job. Following Section 32.03 by analogy, the Arbitrator instructed the State to pay the Grievant mileage for any miles traveled per day over 120 miles roundtrip.

3. An issue arose with regard to the person bumped by the Grievant and what remedy was available to her. The Arbitrator stated that she presumed that the person would be reinstated in her old job and would be paid the differential lost in pay.

The State argued that the employee in question had not filed a timely grievance because she did not grieve at the same time as the Grievant. The Arbitrator stated that she did not believe a grievable issue arose until the Grievant was reinstated. The State did not accept the Arbitrator's jurisdiction in the matter. The Union indicated that the person affected has grieved. The Arbitrator deferred and left the matter to the new grievance and its resolution.

June 21, 1993
Date

Rhonda R Rivera
Arbitrator

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio

Employer.

Grievance No. 31-10-(92-05-13)
-0014-01-14

Grievant (P. Lorubbio)

Hearing Date: March 11, 1993

Closing Date: April 5, 1993

Award Date: May 13, 1993

Arbitrator: R. Rivera

For the Employer: Ted Durkee
Michael P. Duco

For the Union: Richard Sycks
Jamie G. Parsons

Present at the Hearing in addition to the Grievant and Advocates were Claudia Teatsorth, State Prevailing Wage Coordinator (witness), Beverly Calvert, EEO Officer, ODOT (witness), Mike Lang, Project Engineer 5, ODOT (witness), Jane Corbett, Eng. Clerk, ODOT (witness), Jean Nolen, Secretary, ODOT (witness), George M. Collins, District Administrative Assistant, ODOT (witness), and Pauline Mincks, Labor Relations Officer, ODOT.

Joint Exhibits

1. Contract
2. Ohio Revised Code sections 124.321-327
3. Ohio Administrative Code Chapter 123:1-41 -01 through 12
4. Department Rational for Job Abolishment

5. Grievance Trail

6. Performance Evaluations 1984-1992

7. District Prevailing Wage Coordinators

8. OAC Chapter 124-7-01

9. ODOT Directive DH-C-118

10. ORC 4115.071 § 4115.15

Employer Exhibits

1. Wage Interview Report form

2. Position Description 28307.0 EEO Compliance Officer 1 dated 6/17/83

3. Position Description 28300.0 Administrative Assistant 3 dated 11/20/87

4. Memo dated 5/25/92 signed by Claudia M. Teatsorth

Union Exhibits

1. Letter dated 7/8/91 from J. Wrary of ODOT to S. Perry, Director OAS

2. Memo on C-95 procedure

3. Confidential Report on Contractor Required by Rules and Regulations for Qualification of Bidders Form (C-95) (4 pages)

4. a) Memo to Grievant from M.H. Lang dated 10/21/91

   b) Memo to All Districts from Examiner dated 7/25/90 (with attachment)

   c) Route Slip/Memo dated 7/27/90

[1]5. Grievance Settlement Agreement dated 11/3/87

---

[1]The admission of this document for limited purposes is discussed at p. 22.

6. IOC dated 11/23/87 from Grievant to M. Lang

7. C-97 dated 4/3/92

8. Memo to Anderson Engineer from C. Teatsorth, State Prevailing Wage Coordinator re: District 10 Labor Compliance Review dated 6/15/92

9. IOC to Grievant from L. Grant dated 5/23/93(?)

10. Memo to J. Henry, Engineer of Construction from M.H. Lang re: C-95's dated 10/23/91

11. Position Description 29401.0(14) Administrative Assistant 1 dated 1/11/8?

12. IOC to Grievant from G. Collins dated 2/3/92

13. IOC to M. Lang from Grievant dated 5/19/92

Issue

Did the Employer meet the contractual obligations of Article 18 and Civil Service Laws when ODOT abolished the position of Administrative Assistant 3 in Athens County on May 22, 1992.

If not, what should the remedy be?

Stipulated Facts

1. The Grievant was transferred to ODOT on March 20, 1983 as a Clerical Specialist.

2. The Grievant was transferred to the Athens County Garage on November 22, 1987 as an Administrative Assistant 3.

3. On May 22, 1992, the position of Administrative Assistant 3, was abolished.

4. The Grievant exercised bumping right to the position of Administrative Assistant 1, held by Betty Jarvis in Washington County on May 24, 1992.

Facts

The venue of this Grievance is in District 10, Ohio Department of Transportation (ODOT). On April 23, 1992, Director Wray notified Director Perry of DAS that the Department of Transportation intended to abolish position No. 28308-0 Administrative Assistant 3 currently held by Grievant (Joint Exhibit 4). This letter indicated that the Administrative Assistant 3 position was located in Athens County but served as Assistant to the District Construction Engineer located in Washington County. The letter stated that the justification for the abolishment was for reasons of economy and for the more efficient operation of the District 10 Construction Office.

The letter indicated that the "normal work flow for this position (e.g., Administrative Assistant 3) is centered in Washington County." The letter then went on to list the inefficiencies resulting (apparently from the difference in location), to wit:

> There is an obvious waste of time and resources. Clearly, it would be more efficient to have Grievant in a location where work can be handed to her instead of being copied and sent by courier. There are inherent unnecessary transportation delays both to and from her work station and unnecessary photocopying of documents. The duties of this position were performed by other staff in a more efficient and productive manner while Grievant was on a leave of absence. This was due to the fact that all the employees who assumed these additional duties are headquartered within Washington County, District 10 Construction office. A description of the tasks involved and job assignments is attached (all duties are appropriate for the respective classifications). Reassignment of duties to employees within the District Construction office

> will eliminate unnecessary delay of the work products (see attached).
>
> In addition, the supervisor is unable to spontaneously avail himself of Grievant's assistance despite the fact that this position is his principal Administrative Assistant. Records maintained by Grievant are not readily available since they are kept in another County. The duties require interaction with other members of the District Construction office and other staff within Washington County. The location of this position once again precludes effective interaction. Attendance in meetings requires unnecessary transportation time, expense and delays.

On April 27, 1992, Director Perry of DAS notified ODOT that the job abolishment had been approved (Joint Exhibit 4, p. 8). On April 29, 1992, the Union and the Grievant were notified of the abolishment of the Grievant's position (Joint Exhibit 4, pp. 1-3). The Grievant was simultaneously notified of her bumping rights under the contract (Joint Exhibit 4, pp. 4-7). The Grievant exercised her right to bump and displaced an Administrative Assistant 1. On May 5, 1992, the Grievant filed a Grievance with regard to the job abolishment (Joint Exhibit 5). A step 3 hearing was held and a Step 3 decision was rendered on June 30, 1992 (Joint Exhibit 5). This decision upheld the abolishment on the grounds that the location of the position "away from the District office" created the problems and led to inefficiency and higher costs (Joint Exhibit 5). A Step 4 Grievance review was rendered on August 7, 1992. The Step 4 review upheld the abolishment for the following reason: "It was not practical nor efficient for reasons of timing, speed, work flow, cost and communication to have the

type of work required of the position to be done in another county which is one hour away from the District office." (Joint Exhibit 5) The Union requested arbitration, and a hearing was held March 11, 1993.

To support the necessity of the abolishment, the Employer called four (4) witnesses. The first witness was George M. Collins, District Assistant Administrator. Mr. Collins indicated that he began his duties in this capacity in March of 1991. His duties included overseeing labor and personnel matters. He indicated that shortly after commencing his duties, he undertook a review to increase efficiency and reduce costs. Mr. Lang, Construction Engineer, brought to his (Collins') attention that the location of the Administrative Assistant 3 in Athens was a problem because of duplication of files and the need for phone calls, travel, and mail to connect with the District office. Mr. Collins said that his initial decision was to transfer the position to the District office. He said that the Office of Collective Bargaining informed him that such a move would be a contract violation. Meanwhile, according to Mr. Collins, the Grievant went on disability leave, and the functions were handled by other employees in Marietta, apparently efficiently. OCB, Mr. Collins said, had indicated that job abolishment was a choice, and after the parceling out her job duties during the Grievant's disability, he concluded that job abolishment seemed workable. On cross examination, Mr. Collins said he was "unfamiliar" with how the position was originally placed in Athens. He also was unfamiliar

with how exactly the tasks were divided; he said he had received a report that things were going "ok." Lastly, he stated that he was unfamiliar with the tasks of a "prevailing wage coordinator."

Jean Nolen, the Construction Secretary, who was located in Marietta and who served as secretary to Michael Lang, Construction Engineer, also testified. Ms. Nolen indicated that prior to the job abolishment she had little contact with the Grievant. The Grievant filled out C-94's and sent them to Ms. Nolen who obtained the proper signature and distributed the copies. (A C-94 is a required form which shows the 1st and last days that work is performed on a particular project.) Ms. Nolen said that since the abolishment she now fills out the C-94 herself. Second, she now types the C-95's, and thirdly, she keeps track of overtime. All these functions were previously carried out by Grievant. With regard to the C-95's, Ms. Nolen does the heading, and she sends the form to the Inspector to complete one section and then sends it to Beverly Calvert (EEO Officer) to complete a second section. Ms. Nolen also said that she enters overtime into computers. Ms. Nolen said that extra work is not much on a regular basis but consumes a lot of time at the end of the year. However, the extra work has not required overtime on her part. Ms. Nolen indicated that she had received no training with regard to the tasks of a prevailing wage coordinator. Ms. Nolen indicated that any errors or problems arising out of the duties of a prevailing wage coordinator were referred to Mr. Lang.

Linda Jane Corbett, an Engineering Clerk, operating out of the Marietta office, also testified. Prior to the abolishment, Ms. Corbett worked with the Grievant on C-97A and C-97 forms. This cooperation involved telephone calls between the parties and involved copying of "diaries" by Ms. Corbett that were sent to the Grievant. Since the job abolishment, Ms. Corbett said she did not have to copy diaries and did not have to wait until the end of the month to enter certain information into computers. She indicated that she saved 1/2 hour to 3 hours a day on copying, depending on the season, and she also saved from 20 minutes to one hour a day on the phone, depending on the season. She said she could not calculate exactly how many hours a day she spent doing work formerly done by the Grievant, because now she did the tasks "all-together."

The main witness to support the Employer's position was Michael Lang, Construction Engineer, a position that he had held since 1985. His prime job duty is administering the various construction jobs within his district. He supervises 60 or more employees. He indicated that when the Grievant was moved to Athens, she was placed under his direct supervision. Hence, he was responsible for her evaluations (see Joint Exhibit 6). He indicated on all her job evaluations that the distance between Athens and Marietta caused problems.

He said that the "present way" (i.e., after the job abolishment) is much more efficient. First, because numerous documents had to be copied and sent to Athens for the Grievant to

"capture" certain information from those documents. The main items were diaries of projects. During the heavy season, i.e., summer, 30 diaries had to be copied for each day. Problems were created with regard to the C-95's because the "pony mail" system only went to Athens 3 days a week. He said payroll transcript records were also moved inefficiently by being sent to Athens. Completing C-97's required numerous phone calls to Athens from Marietta; the same problem arose with C-97A's. The distance also caused delay. Now the person doing C-97's and C-97A's can just walk to the next desk to get the information. Mr. Lang described similar efficiencies with regard to "verifying force accounting payrolls" and "the Wage Complaint log."

The primary efficiency is that (1) the office work force is in one location, (2) no files need to be duplicated, and (3) telephone calls are reduced. In essence, according to Mr. Lang, the position is not needed at all, a fact that was discovered when the Grievant was on disability leave. The primary cost saved is the high pay of the Grievant for clerical work. The position abolished was at a 32 pay range while the positions now utilized are at ranges 26, 27, and 31. The Grievant was paid over $50,000 a year for her work. Other costs saved are duplication costs and phone costs.

According to Mr. Lang, the duties of the Grievant have been distributed efficiently. Some duties went to (1) Ms. Corbett, mainly duties as prevailing wage coordinator, some (2) to Ms. Calvert, the EEO officer, and some duties (3) to secretary Jean

Nolen. All these duties have been absorbed with a minimal disturbance. No one has had to work overtime, nor has any backlog or delay arisen. Some minor things are handled by summer interns, but according to Mr. Lang, ODOT District 10 has always had summer interns.

On cross examination, Mr. Lang was asked who, after the job abolishment, became Prevailing Wage Coordinator. Mr. Lang indicated that he was the Prevailing Wage Coordinator. How many people are doing the Grievant's job? Mr. Lang said 3 people plus summer interns inside the office; Bev Calvert, the EEO Officer, handles work on job sites, i.e., outside the office.

Mr. Lang said the move to Athens was decided before he received his current position but that he had been ordered by George Dugan to have a meeting and ask for a volunteer to move.

The Union advocate showed Mr. Lang the settlement which resulted in the Grievant being in Athens (Union Exhibit 5). (The Employer objected to the introduction of the settlement. The Arbitrator allowed introduction provisionally and promised to rule on the objection in the Award. See p. 22.) Mr. Lang said that while the Grievant was in Marietta that 1) she was allowed to attend construction staff meetings, 2) she was the Prevailing Wage Coordinator, and 3) their communication was good. Mr. Lang said he spent not very much time on prevailing wage issues before and only a little bit more after the job abolishment, namely answering questions. Mr. Lang pointed out that no classification existed called Prevailing Wage Coordinator; rather the duties of Prevailing

Wage Coordinator were assigned to various positions around the state, and none of those positions were in as high a pay range as the Grievant (see Joint Exhibit 7).

The Union called three (3) witnesses to support the Grievance. Beverly Calvert is the EEO Coordinator for District 10. She testified that when the Grievant was on disability, some of the Prevailing Wage Coordinator duties were assigned to her on a temporary basis. When the Grievant returned to duty, the responsibility reverted to her. Now, Ms. Calvert said she has been requested to do the prevailing wage duties "in her spare time." Ms. Calvert said in the summer her EEO duties completely fill her time, but, in the winter, she can do extra items. When asked who carried out the Prevailing Wage Coordinator tasks when she (Calvert) cannot, she replied that to the best of her knowledge the duties were not done. She said she had received no training with regard to the prevailing wage duties. Ms. Calvert also said that while she did "on-site" visits for EEO responsibilities, she did not do on-sites for prevailing wage duties.

The Union's second witness was Claudia Teatsorth, the State Prevailing Wage Coordinator, a position she has held since 1978. She described in detail the functions of Prevailing Wage Coordinators. She said she did not know the Grievant in any social way and only knew her from work issues, primarily on the phone or in meetings. Ms. Teatsorth described the Grievant as one of the better Prevailing Wage Coordinators -- efficient, effective, and within the law. Ms. Teatsorth said that when the Grievant was on

disability leave, the work was apparently done by Bev Calvert, a "Jean, a Jane, and a Bob" and that quality of the work was poor -- incorrect items, missing items -- and the work had to be returned and repeated. She also testified that Prevailing Wage Coordinators were mandated by federal law, and federal funds could be lost if such work was either not done or improperly done. She said that when she audited District 10 she found that the personnel were confused, did not understand the issues and made errors. When she reported these matters, she was directed by the Deputy District Director of District 10 to only talk to Michael Lang on these matters. She indicated that, at present, she is not clear on who is doing the various functions assigned to a Prevailing Wage Coordinator. Ms. Teatsorth, responding to cross examination questions, indicated that all the other Prevailing Wage Coordinators did work out of District offices.

The Grievant testified on her behalf. She indicated that prior to coming to ODOT in 1983, she had worked for the State Auditor for two years. Prior to that, she was a city administrator for Athens County. She had become an Administrative Assistant 3 when she filed a grievance stating that she was doing an Administrative Assistant 3's job, and she won. She indicated that harassment had accompanied the grievance, and she went to Athens as a way to resolve the harassment at the District office. She claimed that even in Athens she was still harassed. The harassment consisted of 1) initially being denied equipment, 2) not being allowed to attend construction office meetings, and 3) not being

allowed to do on-site interviews required for her prevailing wage duties. She indicated that the IOC (Joint Exhibit 4) which alleged that she had made errors was factually incorrect. Rather, that Linda Grant discovered that a new person had failed to do the job properly (Union Exhibit 9).

She testified also that she was aware that District 10 was planning to transfer her because she received a copy of the letter to DAS (Union Exhibit 1) prior to going on disability. However, she had no knowledge of a possible abolishment until it occurred.

The Grievant reviewed in detail the "efficiencies" claimed by the Employer. Her main contention was that 1) many of the claimed inefficiencies were false in that the problems of phoning and using the "pony mail" remained, 2) back up records had proven useful on numerous occasions, and 3) many of the Prevailing Wage Coordinator tasks were not being performed or were being performed incorrectly.

Union Position

In the instant case, the Department of Transportation claims that the dissolution and relocation of the Prevailing Wage Coordinator duties to the office personnel in the District 10 office is more efficient then having the Grievant perform the job. This rationale is flawed in three ways.

First, the new system has proved to be functionally inefficient. Claudia Teatsorth, the Statewide Prevailing Wage Coordinator since 1978, in uncontroverted testimony, stated that the deletion of a District Prevailing Wage Coordinator in District

10 is less efficient then when the Grievant performed these duties. Both Ms. Teatsorth and Mr. Lang testified that the number of incorrectly processed documents increased and that Mr. Lang instructed her to resolve all procedural mistakes on the AU-10s, C94s, C97s, and C97As documents with him directly.

Secondly, both the statement of rationale and the Employer's opening statement allege efficiency based on the de minimis savings of copying and transportation costs. Alternatively, the Union recognizes the fact that having the District Prevailing Wage Coordinator in the District office does result in de minimis costs without diminishing the efficiency of the Wage Coordinator's duties then the logical conclusion would be to transplant the Grievant back to the District Office from whence she originally came.

Finally, the state has also violated Article 1.03 of the Agreement by allowing Mr. Lang, other engineers, co-op college students and summer work study high school students to absorb the duties of the prevailing wage coordinator, a bargaining unit position. In cases involving erosion of the bargaining unit, the precedential history of these two parties requires arbitrators to construe Article 1.03, the work preservation clause, strictly. This view is reaffirmed in OCSEA v. The Department of Mental Health, where Arbitrator Harry Graham quoted New Britain Machine Co.:

> The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the contract covers and therefore on one of the contract's basic purposes.

Arbitrator Graham then reiterated that work preservation clauses should be construed in the favor of the Union. They are the raison d'etre behind the protection a union is able to afford its members.

In the first sentence of Article 1.03 the state promises "that supervisors shall only perform bargaining unit work to the extent that they had previously performed such work." In the second sentence the state limits the first sentence by promising to never increase the amount of bargaining unit work performed by a supervisor and make every effort to decrease the amount of bargaining unit work done by supervisors over the life of the agreement. In the instant case, management's reorganization resulted in supervisors and college students preferring bargaining unit work.

The state has failed to prove by a preponderance of evidence that the abolishment of the Administrative Assistant III, Prevailing Wage Coordinator, was either efficient or economical.

The Union through testimony and the presentation of evidence has demonstrated that the Grievant's position has been abolished for invalid reasoning and, in fact, demonstrates that the state's actions are a pretext to continue discriminating and harassing her. While this abolition and its de minimis rationale also serve as a constructive breach of the discrimination and harassment settlement agreement, the Grievant would prefer to perform the job under any situation rather than losing her job.

Employer Position

The Employer has demonstrated by a preponderance of evidence that the job abolishment was undertaken due to a reorganization for the efficient operation of the District 10 Construction Department and for reasons of economy. The Employer assigned the prevailing wage duties to three existing bargaining unit construction employees, two of which were already performing some of the tasks. No "new" position was added to the roster either in the County Garage or in the District Headquarters to perform substantially the same work. The consolidations that District 10 made were minor alterations in the work flow and represented a small percentage of the employees activities. Thus, no "new" position was created by consolidating job elements from the old position that represented a substantial percentage of the "new" position.

The redistribution and consolidation actually occurred on a temporary basis with the Grievant's disability leave for four months. Witnesses testified that the District 10 Construction Office ran smoothly, and the prevailing wage tasks were completed without any backlog, overtime, or weekend work.

The burden shifts now to the Union to prove by a preponderance of evidence that the Employer's action was taken in bad faith. Though the Union and Grievant alleged this was the case, they failed to meet their burden with evidence or testimony.

The Union introduced the Settlement Agreement of November 3, 1987 (Union Exhibit 5) as support for the retaliation/harassment allegation. The Employer's advocate objected throughout the

hearing to the introduction of this document and continues his objection. The Settlement Agreement is prejudicial, not relevant to the job abolishment issue and distanced by its age. The parties have mutually agreed that settlement agreements are banned from introduction or reference in any subsequent arbitration proceeding.

The last Union argument was the Employer's ability to transfer the Grievant and avoid the job abolishment. The issue of the transfer is irrelevant as the Employer made the decision to eliminate the position. The Employer relied, to its detriment, on the Union's position that the Collective Bargaining Agreement does not allow the transfer of employees into the bargaining unit, transfer between classifications, and transfer between offices or jurisdictions without posting the vacancy pursuant to Article 17.

The Employer must characterize the transfer argument proffered by the Union as nothing more than "smoke and mirrors." Yes, perhaps the Employer with the Union's concurrence could have transferred the Grievant. However, the Union has missed the point. The Employer has determined there is no longer a need for the same number of employees to perform the duties at issue in this case as previously were utilized. Therefore, exercising its rights and privileges consistent with the Agreement, the Employer abolished the unnecessary position.

Discussion

This Grievance questions the propriety of a job abolishment under Article 18 of the Contract and under state code and

regulations incorporated by Article 18. In Grievance #56-00-(91-09-19)-02-01-14 (Throckmorton), this Arbitrator laid out the requirements to be met both procedurally and substantially for a contractually proper job abolishment. Those same requirements were outlined in Grievance #25-12-(91-11-18)-150-01-06 (Hilliard).

The test as laid out in Hilliard is as follows:

> Layoffs are covered under Article 18 of the ORC 124.321-327 and OACR 123:1-41-01-22 are incorporated by reference into Article 18. Under ORC 124.321 job abolishment is one form of layoff. Under 124.321(D) "employees may be laid off as a result of abolishment of positions." In that same section, job abolishments are distinguished from other forms of lay off: "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." (124.321(D)) The section also provides the standard for abolishment: "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." (124.321(D)) The decision is left to the Appointing Authority: "Appointing Authorities shall themselves determine whether any position should be abolished and shall file a statement of rationale and supporting documents with the Director of DAS prior to sending the notice of abolishment." (ORC 124.321) The section also establishes the procedures: "if an abolishment results in a reduction in force, the Appointing Authority shall follow the procedures for laying off employees, . . ." (124.321(D)(1) - (5))
>
> Job abolishments have been the subject of numerous court cases and arbitrations. These decisions have established some reasonable and appropriate criteria for making judgments about the appropriateness both procedural and substantial of individual job abolishment actions. For example, Arbitrator Pincus said in Grievance No. 24-03-(88-10-25)-0079-01-04 (Caldwell v. MRDD) at p. 90 . . . [N]othing in the abolishment statutes and regulations forbids an appointing authority from consolidating or redistributing some of the employee's duties to other employees. As such, if the specific work in

question needs to be performed and it is not accomplished by consolidation or redistributing (sic), the position cannot be legitimately abolished . . . Consolidations take place when job elements are assigned to others within the organization but the consolidated job elements do no represent a substantial percentage of the new position . . ." (emphasis added) This same standard was stated in a different way by Arbitrator Graham in Grievance No. 25-20-(91-08-02)-0001-01-09 (Lacy v. ODNR) at p. 16 where he said the consolidation should not add an inordinate addition to the work load of the continuing employee.

This Arbitrator spelled out some additional standards in Grievance No. 56-00-(91-09-19)-02-01-14 (Throckmorton v. OHSRA): First, the employer "shall demonstrate by a preponderance of the evidence that the job abolishment meets the standards of the statute" (SS Admin. Code 124-7-01 and Bispeck v. Trumbull County Bd. of Commissioners 3705 (3rd) 26, 523 N.E.2d 502 (1988) and Esseburne v. Agriculture Department, 49 App. (3d) 37, 550 N.E.2d 512 (Franklin 1988).

2. The evidence of not having to pay the salary (of the abolished position) BY ITSELF is not sufficient to prove efficiency and/or economy (see Bespeck supra).

3. Abolishments can only be affirmed if the appointing authority has substantially complied with the procedural requirements set forth in Section 121.32 of the Revised Code (124-7-01) (see Throckmorton pp. 24-26).

4. "Job abolishments . . . 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." (OAC 124-07-01(A)). (See Throckmorton at pp. 27-28)

In this case, the Arbitrator finds that the Employer substantially complied with the procedural requisites of the statute and the contract. The next question is whether the abolishment met the substantive requirements of the Contract and the statute. The testimony of all the parties clearly indicated

that inefficiencies existed because the Administrative Assistant 3 position was located in Athens and not Marietta. Certainly, a relocation of the position and its incumbent made logical sense organizationally. However, the action taken by the Employer that is at issue herein is not movement of the position but abolishment of the position for reasons of economy and efficiency. According to Mr. Lang, the chief economy for District 10 was the Grievant's high salary, i.e. over $50,000 a year. But under Bispeck v. Trumbull, the evidence of not having to pay the salary (of the abolished position) BY ITSELF is not sufficient to prove economy. Movement of the position to Marietta and/or abolishment of the job would also save some copying costs; however, these amounts were not quantified. Testimony also indicated that some phone costs would also be saved, again an unquantified amount.

The "efficiency" of abolishing the job was significantly less clear than the efficiency of change of location. The Employer can redistribute the duties to other employees but only if the transferred tasks do not represent a substantial percentage of the other employee's work or do not represent an inordinate addition to the work load of the continuing employee. The evidence indicated that no one person felt inordinately burdened nor did the additional tasks represent a substantial portion of their position, at least over the year. The evidence indicated that during the summer months the additional duties could be burdensome to some of the parties. The testimony of the EEO officer and the State Prevailing Wage Coordinator left doubt in the mind of the

Arbitrator as to whether all of the tasks of the Grievant's position were actually being performed. In particular, how Grievant's tasks as Prevailing Wage Coordinator for District 10 were divided was confusing. On one hand, Joint Exhibit 7 indicated that three persons occupied the position, yet under examination Mr. Lang said that he was the designated Prevailing Wage Coordinator.

Secondly, the Employer claimed that on-site interviews that were part of the Prevailing Wage Coordinator job were being performed by the EEO officer, but the EEO officer said she was only to do such jobs if her primary task was finished. She indicated that in the summer, the busiest time, she did not have time for extra duties. Lastly, Mr. Lang indicated that he was the "official" Prevailing Wage Officer; this statement raises real question as to whether bargaining unit work was moved out of the bargaining unit. This question of distribution of tasks is also raised by the use of summer interns.

The Employer only has to show by a preponderance of the evidence that the abolishment was for efficiency and economy. The Employer has clearly demonstrated that the movement of the job to Marietta would be efficient and economical. The economy and efficiency of the abolishment is a separate matter. If the Employer has met this burden, it has done so only by the slimmest measure.

Once the Employer has shown prima facie a substantively and procedurally correct job abolishment, the Union has the burden to

show by a preponderance that the abolishment was not in good faith. The Union has met that burden.

To arrive at this conclusion this Arbitrator must rule on the admission of Union Exhibit 5 -- the settlement. The provisions of the settlement clearly provide that the settlement "shall not be introduced, referred to or in any other way utilized in any subsequent arbitration . . . without the written consent of all parties hereto." The Employer clearly did not consent but objected strenuously to the admission of the document. However, the settlement also provides that "in the event of any claim or grievance substantially alleging a breach of this Agreement, any party hereto may without consent of the other parties, use this Agreement as necessary to allege or prove the Agreement itself."

The Arbitrator finds that the job abolishment at issue was not in good faith and hence constituted a breach of the settlement. Therefore, the Exhibit is admitted.

The Arbitrator has already noted that movement of this position to Marietta made sense in terms of both efficiency and economy. The Employer reached the same conclusion (see Union Exhibit 1). The Employer claims that the transfer could not be accomplished either because it violated the settlement or violated the Contract. However, no evidence existed that the Employer approached the Union to negotiate either a new settlement or an exception to the Contract. Moreover, the failure to adequately appraise the Grievant that if the transfer did not work, the Department was going to abolish the job, left the Grievant without

sufficient information to make a legitimate decision. Instead, without more, the Employer turned to a job abolishment. Evidence exists that the abolishment in itself lacked good faith. Mr. Lang knew that the Grievant's location was the result of the settlement, a settlement mutually agreed to by the Employer and the Union. Yet, if one examines Mr. Lang's evaluations of the Grievant, he constantly, year after year, cited the work location as a reason to rate down the Grievant. His duty was to rate the Grievant's performance not second guess the settlement and use the settlement result inappropriately to penalize the Grievant. Mr. Collins indicated that initially Mr. Lang was the person who suggested the efficiency of transferring or moving the Grievant's job. Mr. Lang was well aware of the settlement; Mr. Collins was not.

The failure to consult the Union, coupled with the inappropriate evaluations and with the questions raised about the truthfulness of the claim that all the work was being fully and efficiently performed, leads this Arbitrator to find that the abolishment of the Grievant's job was NOT in good faith.

Award

1. The Grievant is to be re-instated as an Administrative Assistant 3 with her work location in Athens, and she is to be made whole for all salary and benefit losses incurred as a result of the Employer's improper action.
2. The Employer is directed to facilitate the proper performance of Grievant's job in Athens and to caution all employees both

managerial and non-managerial to avoid any harassment of the Grievant.

3. If the Employer wishes to re-locate the Grievant to Marietta, the Arbitrator instructs the Employer to re-negotiate the settlement in good faith with the Union over this issue.

4. The Arbitrator retains jurisdiction solely to be the final judge of award to the Grievant and to be available should the parties desire assistance with the settlement.

May 13, 1993
Date

Rhonda R Rivera
Arbitrator