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 In the Matter of Arbitration *
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 Between * Case Number:
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 Fraternal Order of Police-Ohio * 24-02-(4-14-92)-05-02
 Labor Council *
 * Before: Harry Graham
 and *
 *
 The State of Ohio, Department *
 of Mental Retardation and *
 Developmental Disabilities *
 *

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 Department of Mental Retardation and
 Developmental Disabilities

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Introduction: Pursuant to the procedures of the parties two days of hearing were held in this matter before Harry Graham. At those hearings the 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 May 6, 1993 and the record in this dispute was closed.

Issue: At the hearing the parties agreed upon the issue in

dispute between them. That issue is:

Is the Grievance properly before the Arbitrator? If so, did the Employer violate Article 7, Sections .01 and .03 of the Collective Bargaining Agreement by hiring a Security Officer at Montgomery Developmental Center? If so, what shall the remedy be?

Background: No dispute exists concerning the events that prompt this proceeding. The Employer commenced operations at the Montgomery Developmental Center in 1981. No police department existed at the facility during much of the 1980's. The investigation requirements of the facility were met by a Health and Safety Inspector. Subsequently they were provided by an Administrative Assistant 2. Security needs were met through a subcontract. In 1989 the Employer created a Police Chief position at Montgomery Developmental Center. That person was to supervise the Administrative Assistant 2. Subsequently, that position was replaced with a Police Officer position.

With the passage of time the Employer considered replacing the subcontracted security service with a State employee. This occurred on January 27, 1992 when the State hired a Security Officer. It is that event that prompts this grievance.

On April 14, 1992 the Union filed a grievance protesting the filling of position at Montgomery Developmental Center with a Security Officer. The Union was of the view that a Police Officer should have been employed. The grievance was

processed through the procedure of the parties without resolution. As will be set forth fully below, they do not agree that it is properly before the Arbitrator.

Position of the Union: The Union is of the view that this grievance is arbitrable. Article 20, Section .05 provides that a grievance may be initiated by "any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement." In this situation the grievance was filed by a member of the bargaining unit who believed himself to be aggrieved. John Fritter, the person who filed the grievance is Vice-President of FOP Lodge 140. As a responsible union officer, when he became aware of the posting at Montgomery Developmental Center for a Security Officer he was concerned. Hence, he filed a grievance. As an active serving officer himself he learned of what he came to regard as a contract violation and grieved. The language of the Agreement specifically permits that activity to occur. In a dispute involving the Ohio Department of Mental Health, Athens Mental Health Center I specifically approved of a situation where a grievance was filed against that facility by a union member at the Dayton Mental Health Center. This situation is analogous to that one and the grievance should be determined to be arbitrable according to the Union. In addition, the Union presents several prior arbitration decisions in support of its claim that the grievance is

arbitrable. In re Weise Gear Company and Teamsters Local 688, 51 LA 714 (1968) (Bernstein) and In re Great Western Sugar Company and Teamsters Local 1063, 40 LA 652 (1963)(Seligson) stand for the proposition that the Union is able to file a grievance if it is of the view that the Agreement has been violated by the Employer. In this case the Union, through the actions of a responsible officer, Mr. Fritter, was of the view the Agreement had been violated by the hiring of the Security Officer at Montgomery Developmental Center. Hence, it may grieve in its opinion.

Article 7 of the Agreement provides that the Employer may not attempt to erode the bargaining unit. In this situation, the Union is of the view that the position at issue constitutes a police, rather than an security position. Citing In re Holsinger v. Ohio Department of Mental Retardation, Franklin Cty. C.A. 79-AP-322 the Union points out that under Civil Service law when a an employee spends the majority of his or her time doing duties the majority of which overlap two classification, the employee must be placed in the higher classification. The State's expert in classification disputes, Gail Lively of the Department of Administrative Services, acknowledged that when 20% or more overlapping duties occur the Department must place the employee in the higher rated classification. When the Employer sought to fill the vacant position at Montgomery

Developmental Center it initially desired to employ a Police Officer 1. It came to realize the position was more appropriate for a Police Officer 2. In the final analysis the position was filled by a Security Officer. That person is performing Police Officer duties in the Union's opinion.

The Union claims that this situation does not represent a jurisdictional work dispute with another Union in State service, OCSEA/AFSCME Local 11. That Union represents Security Officers. The Fraternal Order of Police-Ohio Labor Council represents Police Officers. As the position at issue is a police officer position in the opinion of the Union, it should represent the holder of that position.

In the case of the disputed position at Montgomery Developmental Center the incumbent is actually performing duties attributable to the Police Officer classification rather than that of the Security Officer according to the Union. it acknowledges that overlap exists between the two classifications. Both Security Officers and Police Officers patrol the grounds. Both check fire alarms and provide security to the facility. However, the Union strongly disputes the notion that such overlap permits the State to employ a Security Officer rather than a Police Officer in this instance. Security Officers investigate minor incidents at Montgomery Developmental Center. Joint Exhibit 5 is a compilation of incident reports. More than half of the

incidents in that Exhibit require use of a Police Officer. Yet they are handled by the Security Officer.

This situation is not analogous to that of a licensed practical nurse and a registered nurse. In this situation the Security Officer is performing Police Officer duties. The Union is not seeking an upgrade of the Security Officer position without actual evidence that they are doing Police Officer duties. Licensed Practical Nurses should not be upgraded to Registered Nurse positions absent evidence they are performing the tasks attendant upon that position and attainment of the necessary qualifications. In this case, the Security Officer is performing Police Officer duties with regularity. Hence, the position should be placed in the bargaining unit represented by the Union it asserts.

Position of the Employer: The State claims that this grievance is not arbitrable. The grievance was filed by John Fritter. He does not work at the Montgomery Developmental Center. He has no knowledge of its daily operations. There is no group grievance at issue in this proceeding. Mr. Fritter filed the grievance alone. No Union member at the Montgomery facility grieved. If the grievance is considered a class action dispute it also fails to pass muster as arbitrable according to the State. Section 24.04 of the Agreement provides that Class grievances must be filed within 14 days of the date on which any of the affected grievants "knew or

reasonably could have had knowledge of the event giving rise to the class grievance." On five occasions since 1990 the State posted for a vacant Security Officer position at Montgomery Developmental Center. All Developmental Centers receive the postings. No grievance was filed. The Union is untimely in this situation and the grievance should not be heard on its merits according to the State.

No erosion of the bargaining unit represented by the Union occurred in this situation in the State's view. In February, 1991 one Police Officer was hired at Montgomery Developmental Center. This was the first Police Officer ever employed at that facility. The complement employed there has increased by one person. That person is a member of the bargaining unit. No erosion occurred in that scenario. Hence, no violation of the Agreement occurred.

There is overlap between the Police Officer and Security Officer classifications. The Police Officer at Montgomery Developmental Center works on the first shift and performs duties related to the Police Officer classification. The Security Officers work only on the second and third shifts. They perform routine security tasks. They do not do Police Officer work. No need for a Police Officer exists on the second and third shifts.

Were a Police Officer to be employed at Montgomery Developmental Center that person would have to qualify for

the Ohio Peace Officer Training Certificate within 12 months of employment. If that did not occur, removal would follow. Under the Agreement, Police Officer 1's automatically become Police Officer 2's after one year of service. The work of the Security Officer does not require such extensive training.

In 1990 the State engaged in a large study of the positions in its employ. This study was termed the Classification Modernization study. The Union did not object to the Security Officer classification. Nor did it challenge the placement of the Security Officer in the bargaining unit represented by OCSEA/AFSCME Local 11.

The Chief Negotiator for the State in 1989 when Section 7.03 came into the Agreement was Eugene Brundige. He testifies that the language was intended to deal with special duty and overtime situations, not creation of positions that were the province of the FOP.

In this situation there has occurred no erosion of the bargaining unit. Supervisors did no bargaining unit work. Nor did the Union lose membership.

At Article 5 the Agreement confers upon the Employer the normal rights of management. So too does the Ohio Revised Code at Section 4117.08(C). In this situation, that this what it did.

This situation is unlike the case confronting this arbitrator in the Athens Mental Health situation. In that

case, the evidence indicated the supervisors were performing Police Officer work. No Police Officers were employed at Athens Mental Health Center when once there had been several. In this case Montgomery Developmental Center employed one police officer at all time. It has one such person in its employ today. Hence, no erosion of the bargaining unit occurred.

Discussion: At Section 20.05 the Agreement unreservedly confers upon members of the bargaining unit the right to file a grievance if he or she "believes himself/herself to be aggrieved by a specific violation of this Agreement." John Fritter is a Union officer. He saw the posting which brought to his attention the vacancy which became the issue in this proceeding. He fulfills the contractual criteria of being a member who believed himself "to be aggrieved by a specific violation of this Agreement." Whether he was aggrieved in fact is the function of this proceeding to determine.

The record in this dispute indicates that the Employer has filled identical vacancies from time to time in the past. Postings announcing the vacancy were sent to other Departmental facilities and then posted there. That does not mean that Mr. Fritter "reasonably could have had knowledge of the event giving rise to the class grievance." It is unknown whether or not he was a Union officer prior to the posting giving rise to this proceeding. If he were solely a member of

the bargaining unit it is expecting too much for him to have checked each posting upon its arrival at his work site, Apple Creek Developmental Center. It cannot be determined with any degree of confidence that he "reasonably could have had knowledge of the event giving rise to the class grievance."

Furthermore, it is acknowledged that this specific posting has occurred on more than one occasion in the past. This means that the event subject to the grievance is of a continuing nature. It occurs each time the Employer posts for a Security Officer vacancy at Montgomery Developmental Center. Mr. Fritter grieved a specific posting when he became aware of it. It must be determined that the grievance is arbitrable.

The crux of this dispute are the duties actually being performed by the Security Officer at Montgomery Developmental Center. If that person is performing tasks that are properly within the province of the Police Officer classification the Union must prevail in this dispute. Conversely, if it may be determined that the Security Officer is performing tasks appropriate to that classification the grievance must be denied.

Examination of the Classification Specifications in Joint Exhibit 4 indicates a great amount of overlap between the Security Officer and Police Officer classifications. People in both classifications patrol. Both make security checks.

Both conduct safety inspections. The difference between the two classifications is found in the law enforcement activities of the Police Officer which are absent from the Security Officer classification. That difference is also found on the specific Position Descriptions in Joint Exhibit 3. If it were the consistent policy of the Employer to assign the one Police Officer at Montgomery Developmental Center to investigate the major or serious incidents as reflected on Joint Exhibit 5 no violation of the Agreement would occur. The incident reports constituting that Exhibit do not indicate to whom the investigation was referred. In all incidents the responsible person for the case is indicated to be Anthony D. Yancey, the Police Chief at Montgomery Developmental Center. The data contained in Joint Exhibit 5 does not indicate that either Security Officers or the Police Officer investigate incidents. The evidence available to the Arbitrator does not provide sufficient basis to determine whether or not the Employer acted within or without of the boundries of the Agreement in this instance.

There is, however, unrebutted testimony from Sue Curtis, the Assistant Superintendent at Montgomery Developmental Center, which bears upon this dispute. Ms. Curtis testified without contradiction that the Security Officers at Montgomery Developmental Center do not investigate criminal or alleged criminal acts. She indicated that what may be

termed serious incidents are investigated by the one Police Officer or the Chief of Police at Montgomery. She further indicated that the Security Officers tasks consist of patrol and clerical functions. These are not the functions associated with the Police Officer Position Description.

Conspicuous by its absence in this dispute was testimony from any person involved in police or security work at Montgomery Developmental Center. Specifically, no Security Officer indicated he or she was performing tasks that might be more appropriately labeled as belonging to the Police Officer classification. That two Police Officers, Messrs. Fritter and Williams, testified in this proceeding is given little weight by the Arbitrator. Neither works at Montgomery. Doubtless their testimony is correct concerning the content of their tasks at Apple Creek and Massillon respectively. That does not control the outcome of this dispute which is specific to Montgomery.

This dispute differs from that confronting this Arbitrator at Athens Mental Health Center. In that situation people had been unquestionably performing police duties. They were no longer doing so. In fact, no member of the bargaining unit was performing police tasks. That notwithstanding, those tasks were being performed, albeit by nonbargaining unit personnel. In that situation the sort of erosion of the bargaining unit prohibited by Section 7.03 of the Agreement

unquestionably occurred. In this situation it cannot be concluded that work properly the province of Police Officers is being performed by Security Officers. As that is the case, this grievance must be rejected.

Award: The grievance is denied.

Signed and dated this 5th day of June, 1993 at
South Russell, OH.

Harry Graham
Harry Graham
Arbitrator