
In the Matter of Arbitration

Between

Fraternal Order of Police-Ohio
Labor Council

and

The State of Ohio, Department of
Mental Health

Case Numbers:

23-03-940120-0402-05-02

23-03-940228-0553-05-02

23-03-940120-0426-05-02

23-03-940228-0551-05-02

23-03-940228-0552-05-02

Before: Harry Graham

Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul L. Cox
Law Enforcement Legal Association
222 East Town St.
Columbus, OH. 43215

For Department of Mental Health

George R. Nash
Labor Relations Officer
Ohio Department of Mental Health
30 East Broad St., Room 1180
Columbus, OH. 43266-0414

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on July 20 and September 19, 1994. At those hearings they were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on November 8, 1994 and the record in this dispute was closed.

Issue: The parties agree upon the issue in dispute between them. That issue is:

Did the Employer satisfy requirements for the layoff of

the Police Officer 2 positions at the Southeast Psychiatric Hospital per the Revised Code, the Administrative Rules and the Contract, Articles 7.03, 9, 20.08-4 and 35? If not, what shall the remedy be?

Background: The facts prompting this dispute are agreed upon by the parties. For many years the Department of Mental Health Operated a facility in Athens, OH. known as the Athens Mental Health Center. In the Spring of 1993 the Athens Mental Health Center facility was closed and the patients and staff were transferred to a newly constructed facility, the Southeast Psychiatric Hospital. That Hospital is modern in every respect. It is smaller than the facility it replaced and is fitted with electronic security devices.

As the State was planning construction of the new facility the patient population at Athens experienced a decline. Attributed to enactment of the Mental Health Act of 1988, patients have been removed from the institutional setting and remanded to the community for assistance. This has resulted in a reduction of about fifty percent (50%) of the in-patient population.

In order to deal with the reduced physical size of the establishment and the smaller number of in-patients being served, the Employer determined it was necessary to reduce the number of employees at Athens. Effective February 26, 1994 three Police Officers, James Webster, Dierdre Brooks and Thomas Metcalf, were laid off. Their positions were subsequently abolished.

The layoffs referenced above were protested in the grievance procedure of the parties. No resolution of the grievances was reached and the Union advanced them to arbitration. The parties agree that those grievances are properly before the Arbitrator for determination on their merits.

Position of the Union: The Union points out that there is a substantial conceptual difference between a "layoff" and a "job abolishment." The former occurs when there is a temporary lack of work or funds. The latter is a permanent deletion of a position from the table of organization. This occurs when it is determined that the need for the position no longer exists. In order for the Employer to abolish a position the tasks associated with it must no longer be performed. They cannot be performed by someone other than people properly classified to perform them. It is necessary to focus upon the tasks once performed by those discharged and to determine whether or not those tasks are being performed by others today according to the Union.

In this situation the duties carried out by those discharged are being performed by others in the Union's view. In February, 1994 the Employer created a new position at the Athens facility. Known as the "safety and health officer" it was filled by the former Police Chief at Southeast Psychiatric. Testimony was received from the Acting Chief

Executive Officer and the Safety Officer that she performs tasks formerly done by the Police Officers. The job descriptions of both call for them to investigate and prepare incident reports. Both check fire and other emergency equipment. In the Union's view, the overlapping duties of both positions is not coincidental. It is the result of a deliberate attempt by the Employer to subvert the bargaining unit.

The Employer bears the burden to demonstrate that there exists a lack of work sufficient to justify a job abolishment. In this case it cannot meet its burden in the Union's view. Patient population has declined. That is the result of the Mental Health Act. The statute facilitated movement to the new, smaller physical plant. That facility has new security technology. That is irrelevant according to the Union. The work load of Police Officers did not decline with the advent of new technology. When they were on duty they assisted in patient admissions. They continued to patrol the facility. They conducted the sort of safety checks associated with their job descriptions. Incidents were investigated and reports drafted by them. Subsequent to their discharge, administrators perform investigations. The safety officer conducts safety inspections. That position is not in the bargaining unit represented by the Union. The safety officer also conducts investigations of suspected hazardous

situations and engages in fire emergency training. Those were tasks done by Police Officers.

Not only do supervisory personnel perform duties once performed by Police Officers, nonsupervisory personnel do so as well. Custodial employees check doors, patrol the grounds and do certain fire safety tasks not previously performed by them. Those jobs were done in the past by Police Officers.

In the Union's view abolishment of the Police Officer positions at Athens is a subterfuge. It points out that since 1989 the Employer has been attempting to abolish the Athens police force. In 1990 I found that the bargaining unit was being eroded and directed the Employer to hire police officers. In this case, the Employer is utilizing the Safety Officer to perform essentially the same tasks as those once performed by police officers. It created a new position to displace bargaining unit members in the Union's conspiratorial view of the world. That position, a Mental Health Administrator 3, was filled by the former Police Chief at Athens. In essence, bargaining unit members have lost employment and an administrator has been retained. As a Mental Health Administrator 3 the former Police Chief performs many tasks associated with that position. In essence, the Indians have been terminated and the Chief retained. That cannot occur according to the Union.

The Agreement at Article 7.03 prohibits erosion of the

bargaining unit. The Employer has been attempting to erode the unit for many years according to the Union. There were once six unit members. Now there are none. The tasks once performed by unit members continue to be performed. As that is the case, it cannot occur that they be done by non-unit personnel. As that is the case, the Union seeks an award directing the grievants be reemployed and made whole for their losses.

Position of the Employer: The State points out that at Article 35 the Agreement incorporates both the Ohio Revised Code and the Ohio Administrative Rules and indicates that layoffs must satisfy the tests established therein. Section 124.321(D) of the Code provides that a job abolishment may occur "... due to lack of continued need for the position." It may also occur for lack of work or for reasons of economy, or as a "... result of a reorganization for the efficient operation of the Appointing Authority...." In this case, the Police were terminated for reasons of efficiency.

Safety related tasks at Southeast Psychiatric are now performed by the Safety and Health Inspector. This is a new position which incorporates such duties as fire and disaster drill, safety inspection and investigation of accidents, incidents and injuries. The tasks associated with that position are proper according to the State.

When various sorts of incidents occur at the facility it

is required that the Ohio State Highway Patrol be notified. This has not changed with the abolishment of the Police Officer positions. During the past several years Police at Athens have conducted very, very few investigations. Additionally, all employees are required to complete incident reports. Nothing has changed in the reporting or investigation of incidents with the lack of Police Officer 2's.

As the State portrays the change in operation of the Athens facility there has occurred a reduction in the need for Police Officers. The patrol function which once took up half their time is not necessary any longer. Police Officer 2's never had any special responsibility for investigations. The Safety Officer now performs safety related tasks once done by Police Officer 2's. Traffic control was a minor part of Police Officer duties. All employees do that today in the new parking lot.

When the Police Officers worked at Athens they were not replaced when they called-off. There were no Police Officers at night nor on holidays.

Pointing to various arbitration decisions of this and other arbitrators the State asserts they support its action in this case. In a dispute involving the Oakwood Forensic Center I determined that in order for a job abolishment to be proper tasks previously performed must not be performed by

other personnel. In this case that test is satisfied according to the State. Whatever addition to the tasks being performed by other employees that may have occurred, it is minimal in the State's view. PO 2's at Athens performed no investigation work.

In the opinion of the State this dispute is very similar to Case No. 23-12-911209-284-05-02. That dispute concerned a job abolishment. An Officer at Oakwood Forensic Center, Mike Bailey, was dismissed from State service. Among others, I found that the tasks of patrol associated with Mr. Bailey's position could adequately be performed by Corrections Officers at the adjacent Lima facility. The State urges the same finding in this instance. In essence, the State argues that such patrol functions as are necessary are performed by other employees. Similarly, employees lock doors and speak to visitors who may be improperly parked. This does not constitute such an accretion to their tasks as to justify maintaining a police department in the opinion of the State.

As the Employer views this situation it has met its statutory burden of showing that the abolishment of the Police Officer 2 positions at Athens was for efficiency. The patient population diminished. New technology has reduced the need for Police Officer 2's. Such patrol as was once done has been diminished and is easily done by other employees. No difficulties in operating the Athens facility have developed

as a result of the absence of police. Hence, the tests specified by the Ohio Revised Code for job abolishment have been met in this instance. The State urges the grievances be denied.

Discussion: By way of introduction to this discussion and without belaboring the issue, it is well settled that if the Employer desires to abolish a position or position it must meet the tests established by the Agreement, the Ohio Revised Code and the Administrative Rules. At Section 124.321(D) the Code provides that a position may be abolished "due to lack of continued need for the position." Positions may also be abolished "for reasons of economy or for lack of work."

In Esselburne v. Ohio Department of Agriculture, 49 Ohio App. 3d, 1988, p. 41 the Court pointed out that the burden is on the appointing authority to demonstrate that there exists a lack of work. Intuitively it may appear that as the patient population of the Athens facility has declined and that clients and staff have moved to a new facility and modern technology has come to be utilized that there is a reduced need for Police Officers. Intuition is not a substitute for reality. In Esselburne the Court cited the Ohio Administrative Code at 124-7-01(A)(1). It noted that the burden of proof placed on the Employer may be satisfied by a "comparison between current work levels and work levels when a lack of work did not exist, which may include statistical

data and additional supporting materials." Essleburne, p. 41, (emphasis in original) In other words, intuition must be supported by data. In this situation the data does not support the abolishment of the positions at issue. Union Exhibit 6 in this proceeding is a monthly compilation of incident reports from January, 1992 through January, 1994. The data are summarized in Table 1 below.

Table 1
Monthly Incident Reports

1992

January	12
February	13
March	7
April	14
May	4
June	10
July	10
August	18
September	16
October	11
November	8
<u>December</u>	<u>11</u>
Total	134
Average	11.16

1993

January	19
February	2
March	8 *
April	12
May	12
June	12
July	16
August	16
September	10
October	13
November	12
<u>December</u>	<u>9</u>
Total	141

Average 11.75

* Moved to new facility.

January, 1994 8

In order to compare apples to apples when examination of the March, 1992 and March, 1993 periods is done the data is presented in Table 2, below.

Table 2

Incident Reports, March - December 1992 and 1993

March - December, 1992	98	Average 9.8 per month
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March - December, 1993	120	Average 12.0 per month
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The data does not show that there has been a decline in the amount of work being performed by police at Athens in the new facility. The test established by the Administrative Code has not been satisfied by the Employer in this instance.

Approximately one month prior to the abolishments under review in this proceeding the Employer created a new position: Safety Officer. During the hearing the Employer attempted to justify its action by pointing out that the Safety Officer performs many tasks related to the safety of patients, employees and the physical structure of the Hospital. The differentiation between the Police Officer and the Safety Officer asserted to exist by the Employer is not supported by the evidence. Joint Exhibit 3-3E in this proceeding are the Position Descriptions of the Police Officer and the Safety Officer. Occupants of both positions

"plan and direct others in fire drills and disaster drill."

Those duties are found in the same place on the Position Description and, together with other tasks, account for sixty percent (60%) of the duties of both positions. Certainly the Employer may include safety related tasks among the duties to be performed by the Safety Officer. What it may not do is assign those duties to a new position and then assert that as tasks are no longer being performed by another position, eg. Police Officer, that the need for that position has disappeared.

That the duties of the Police Officer and the Safety Officer contain much duplication is also evidenced by the posting for the Safety Officer vacancy. (Employer Exhibit 7). The duties associated with the Safety Officer deal with such tasks as investigations, preparing of reports and making recommendations to enhance safety of the facility. Those duties are those of the Police Officer as well. It cannot serve to justify a job abolishment to transfer tasks to a new position and then abolish the prior position under the guise of efficiency.

In Bispeck v. Board of Commissioners of Trumbull County, 37 Ohio St. 3d 26 (1988) the Supreme Court of Ohio quoted the finding of the State Personnel Board of Review that "Evidence of not having to pay the salaries on its own is not sufficient to prove increased efficiency and economy as

required." (p.30). Standing alone, in the absence of a claim of insufficient funds, which was not made by the State in this proceeding, the saving of funds does not provide sufficient rationale to support a job abolishment. If the tasks formerly being performed continue to be performed the State cannot act as it did in this instance. The Employer has failed to satisfy either the tests of increased efficiency or the need for economy in this instance.

In this situation the findings of the Court of Appeals in In re Appeal of Woods 7 Ohio App. 3d 226 (1982) bear recitation. In Woods the Court noted:

A job is not abolished under circumstances where the appointing authority simply transfers that job's duties to a new employee to perform. State, ex rel Stine v. McCaw (1940), 137 Ohio St. 13 [17 O.O. 303]. What the evidence does support is the conclusion that the jobs of Woods and Hornsby were merged or consolidated into one position in which the same duties were to be performed under slightly different conditions and that the duties of that merged position were handed to a recently hired employee, and the merged position was given a new title. The result was that one position was abolished.

The observation of the Court is particularly relevant to this proceeding as it precisely describes what occurred in this instance.

The subterfuge alleged by the Union to have occurred in this instance is not supported by the evidence. The Arbitrator is unwilling to jump from coincidence as represented by creation of the Safety Officer position and termination of the police officers at Athens. The inference

suggested by the Union must be supported by some sort of evidence. In this situation, that evidence is lacking.

Award: The grievances are SUSTAINED in their entirety. The claim that as one of the Grievants did not attend the arbitration proceedings that he is no longer a party to them is rejected. If the Agreement is violated, as it was in this instance, all grievants are entitled to remedy regardless of whether or not they are physically present at the hearing. The Union is the representative of the grievants. The Grievants in this proceeding are to be restored to employment at Southeast Psychiatric Hospital. They are to receive all straight time wages they would have received but for the action of the Employer. Any shift differential they would have received is to be paid to them. They are to be paid one-hundred percent (100%) of all medical expenses that would otherwise have been paid by health insurance. All seniority credit and pension credit that would have been earned by the Grievants is to be credited to their accounts.

Signed and dated this 9th day of December, 1994 at South Russell, OH.



Harry Graham
Arbitrator