ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1096
OCB GRIEVANCE NUMBER: 24-04-940602-0573-06-10

GRIEVANT NAME:	Theron P. Harding
UNION:	OEA
DEPARTMENT:	MR/DD
ARBITRATOR:	Dr. David Pincus
MANAGEMENT ADVOCATE:	Georgia Brokaw
2ND CHAIR:	Rachel Livengood
UNION ADVOCATE:	Henry Stevens
ARBITRATION DATE:	August 25, 1995
DECISION DATE:	November 22, 1995
DECISION:	Denied
CONTRACT SECTIONS AND/OR ISSUES:	Article 18 -- Layoffs / RIFs The grievance was filed alleging that the abolishment of a Teacher 2 position was not proper.

HOLDING: Dr. Pincus first ruled that the only grievant was the one who was in the Teacher 2 position; the other employees, though affected by the RIF, could not be considered in the merits due to his own prior Arbitrability Award. As to the merits, Dr. Pincus found the RIF to be proper under Article 18, ruling out that either the ORC or OAR apply to OEA layoffs. The procedural defects were not properly before the arbitrator. In dicta, the arbitrator addressed the issue and found that while the rationale did not clearly identify all the reasons for the layoff, the body of the documents submitted to the Association clearly enumerated the general themes delineated as appropriate reasons in the provision. The Association was not misled and should not have been surprised by the arguments and theories put forth by the employer.

1096

VOLUNTARY LABOR ARBITRATION
PROCEEDING UNDER THE AUSPICES OF
THE STATE OF OHIO AND THE STATE
COUNCIL OF PROFESSIONAL EDUCATORS (SCOPE)
OHIO EDUCATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES, CAMBRIDGE
DEVELOPMENTAL CENTER

-AND-

THE STATE COUNCIL OF PROFESSIONAL EDUCATORS (SCOPE),
OHIO EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION

GRIEVANT: SUSAN MAY, ET AL (MERITS)
GRIEVANCE NO.: 24-04-940602-0573-06-10

ARBITRATION'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: NOVEMBER 22, 1995

Appearances

For the Employer

Michael Ihlenfeld	Superintendent
Cheri Stevens	Operations Director
David Lynch	Personnel Director
Laurie Hankins	Assistant Program Director
Mike Fuscardo	Labor Relations Officer
Rachel Livengood	Second Chair
Georgia Brokaw	Advocate

For the Association

Theron P. Harding	Teacher
Natacha Oley	Scope Secretary
Susan D. May	Grievance Chair
Henry L. Stevens	Advocate

INTRODUCTION

This is a proceeding under Article 6, entitled Arbitration, of the Agreement between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, Cambridge Developmental Center, hereinafter referred to as the "Employer," and the State Council of Professional Educators (Scope), Ohio Education Association, National Education Association, hereinafter referred to as the "Association," for the period of July 1, 1992 through June 30, 1994.

The Arbitration hearing was held on Friday, August 25, 1995 at the Office of Collective Bargaining, Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated they would submit post hearing briefs .

ISSUE

Was the abolishment of the Teacher 2 position held by Theron Harding proper per Article 18.01 of the 1992-1994 Collective Bargaining Agreement. If not, what shall the remedy be?

STIPULATED FACTS

Grievance was filed under the 92-94 Collective Bargaining Agreement between OEA/SCOPE and the State of Ohio.

The Teacher 2 (MSRP) position at Cambridge was occupied by Theron Harding.

Mr. Harding's position was abolished effective June 19, 1994.

Mr. Harding holds a Bachelor of Science +20 in Physical Education K-12 Teaching Certificate and is certified as a M.S.R.P. K-12.

Mr. Harding's seniority date is 6/8/86.

PERTINENT CONTRACT PROVISIONS

ARTICLE 1-BARGAINING UNIT

XXX

1.04 Legal References

The Agreement governs the wages, hours, and terms and conditions of employment of employees within the bargaining unit. The provisions of this Agreement shall be interpreted in accordance with, and be subject to, the provisions of Chapter 4117 of the Ohio Revised Code. Pursuant to Ohio Revised Code 4117.10(A), where this Agreement makes no specification about a matter, the Employer and employee are subject to all applicable state laws pertaining to the wages, hours, terms, and conditions of employment for public employees.

1.05 Savings Clause

This Agreement shall be interpreted to be in conformance with the Constitution of the United States, the Constitution of the State of Ohio, all applicable federal laws, and Chapter 4117 of the Ohio Revised Code.

Should specific provision(s) of this Agreement be declared invalid by any court of competent jurisdiction, all other provisions of the Agreement shall remain in full force and effect.

In the event of invalidation of any portion(s) of this Agreement by a court of competent jurisdiction, and upon written request by either party, the Employer and the Association shall meet within thirty (30) days at mutually convenient times in an attempt to modify the invalidated provision(s) by good faith negotiations.

Amendments and modifications of this Agreement may be made by mutual agreement of the parties subject to ratification by the Association and/or the General Assembly as required pursuant to Chapter 4117 of the Ohio Revised Code.

ARTICLE 18 - REDUCTION IN THE WORK FORCE

18.01 Pre-Reduction in Force Action

A. A reduction in force of employees may only be effected by the employing agency when such action is based upon any of the following reasons: (1) a reorganization for the efficient operation of the employing agency; (2) for lack of funds or lack of work to sustain current staffing; (3) for reasons of economy; a reduction in force may be either of temporary (less than one year) or permanent (more than one year) duration.

At least forty-five (45) days prior to the anticipated effective date of a reduction in force, the Association must be afforded an opportunity to meet with the Employer. At this meeting, the Association must be provided a written rational, with supporting documentation if any has been prepared, setting forth the basis for the reduction in force. At this meeting, the Employer must also inform the Association of the anticipated classification(s) where reductions may occur, the particular positions and appointment types which may be reduced, the names of employee(s) in the classification(s) where the reduction is anticipated with the seniority dates of employees within the classification(s) and series affected, the expected duration of the reduction in force, the facility or facilities to be affected and a listing of any vacancies which might be available for displacement.

Either at this meeting or within ten (10) days thereafter, the Association shall be provided an opportunity to challenge the rationale offered and/or to discuss the reduction in force with the Employer so as to offer suggestions as to how the reduction in force may be avoided or its impact lessened. Input from the Association shall be seriously considered before any final decision is made as to a reduction in force.

Within five (5) days after the Association provides its input, but no later than thirty (30) days prior to the proposed effective date of the reduction in force, the Employer shall make a final decision as to whether it will effect a reduction in force. Such final decision shall be communicated to the Association. If a reduction in force is to be effected, the Employer shall supply to the Association a written rationale, with supporting documentation if any, revised if necessary, setting forth the basis for the final decision.

The Association shall also be provided with a final listing of the classification(s) where reduction in force will occur, the particular position(s) and appointment types, names of employees affected with seniority and work facility or facilities, vacancies available, and the expected duration of the reduction in force. The Association shall also be provided a complete

seniority list of all employees within each facility affected, and the facilities within the county and countries contiguous to each facility affected.

When the Employer makes it final decision to effect a reduction in force, it may not move employees into or out of affected classifications within the affected facility and facilities in the county of or counties contiguous to the affected facility by means of promotions, transfers, voluntary reductions (as per Article 17), classification changes or reassignments except that transfers out of a classification or implementation of the findings of a position audit commenced prior to the employing agency's final decision may be implemented.

B. After the Agency makes a final decision to implement a layoff, job abolishment or institutional closing, the Agency in which the layoff, abolishment, closing occurs shall cause notice of the job action to be sent to all other agencies employing Unit 10 members. The notice shall specify the number of Unit 10 employees being laid off or abolished, general job titles, and when the employee will be available for other employment.

Agencies and institutions receiving notice of a layoff, job abolishment or institutional closing shall respond to such notice if the agency or institution has any Unit 10 vacancies. Responses to the notice shall be issued within five (5) working days of the receipt of the notice and shall be transmitted by telephone/facsimile machine.

The Agencies and institutions receiving notice of available job vacancies shall make the information about the vacancies available to employees who are being laid off.

C. Should the Association disagree with the Employer's rationale to effect a reduction in force, it may grieve the final decision for a determination of its substantive validity or any procedural errors regarding this Article, directly to Steps 3 and 4 in accordance with Section 5.09. Such a grievance shall be filed by the Association with the Office of Collective Bargaining and the Agency at Steps 3 and 4 of the Grievance Procedure within fifteen (15) work days of the date the Association receives the final decision from the employing agency. In expedited arbitration, the Employer bears the burden of proving by a preponderance of the evidence the substantive reason for the proposed reduction in force.

18.02 Implementation

If no appeal is received by the Agency and Office of Collective Bargaining within the fifteen (15) work day time period specified above, the Association waives any and all rights it

may possess to arbitrate or appeal the substantive validity of the Employer's final decision and the Employer shall proceed to implement the reduction in force.

18.03 Reduction in Force Order

A reduction in force shall proceed within the employing agency in the affected facility so that the employee with the least state seniority in a classification title and/or parenthetical subtitle and appointment type in which a reduction in force is to occur shall be first reduced in force. The reduction in force shall proceed by inverse seniority within the classification title and/or parenthetical subtitle and affected appointment type except as provided for in Section 18.05(A)(8) and (A)(9). If both full-time and part-time employees are to be reduced within the same classification title and/or same parenthetical subtitle, all part-time employees within the classification title and/or parenthetical subtitle shall be reduced in force prior to the reduction of full-time employees.

18.04 Notification of Reduction in Force or Displacement

A. Notification

Each employee whose particular position is reduced in force or displaced shall be given advance written notice by the Employer. Such written notice shall be hand delivered to the employee at work or mailed by certified mail to the employee's last known address on the file within the official personnel file of the employing agency. If hand-delivered, such notice shall be given at least fourteen (14) days before the effective date of reduction in force or displacement and the date of hand-delivery shall be the first day of the fourteen (14) day period. If mailed, such notice shall be mailed at least seventeen (17) days before the effective date of the reduction in force or displacement. The date the letter is mailed shall be the first day of the seventeen (17) day period.

B. Content of Notice

Each notice of reduction in force or displacement shall at a minimum contain the following information:

1. the reason for reduction in force or displacement;

2. the effective date of reduction in force or displacement;

3. the employee's state seniority;

4. a statement advising the employee that he/she may have the right to displace another employee and that he/she must exercise his/her displacement rights within five (5) days of the date he/she is notified that he/she is displaced or is notified of the reduction in force and that failure to provide timely notice shall result in waiver of the employee's right to displace;

5. a statement advising the employee of the right to recall;

6. a statement that the employee is responsible for maintaining a current address with his/her employing agency which shall be maintained in the employee's official personnel file;

7. a statement setting forth any conversion of benefit rights which the employee may exercise;

8. a statement indicating that the expedited arbitration procedure may be directly utilized by an employee, with the approval of the Association, concerning any of the following matters: selection of the employee for reduction in force pursuant to Section 18.03; displacement of an employee as a result of the reduction in force; timeliness of the notice of reduction, displacement or recall; or failure of the employee to be placed on a recall list or to be properly recalled from reduction in force or displacement.

THE ASSOCIATION'S MOTION TO AMEND THE ARBITRABILITY PORTION OF THE AWARD

The Association's Position

The Association made a motion asking that all three (3) employees affected by the reduction in force be considered as part of the arbitration on the merits. Even though the grievance only identified the Teacher 2 Classification, the other positions were equally abolished improperly. They should, therefore, be considered in terms of the substantive validity of the

Employer's action.

The Employer's Position

The Employer strongly urges the Arbitrator to disallow the amendment proposed by the Association. It relies on the Arbitrability Award rendered by the Arbitrator as providing the guidelines necessary to deal with this issue.

This Arbitrability Award references the particulars on the grievance from as containing matters ripe for adjudication on the merits. As such, the Teacher 2 position is the only classification in dispute with reference to the substantive validity of the reduction in force. Also, procedural defects regarding the questioned reduction in force are not ripe for adjudication because these matters were not previously articulated.

A ruling in the Association's favor would violate the clear and unambiguous nature of the arbitrability award. It would, moreover, violate Section 6.05 and 6.08 dealing with an Arbitrator's ruling. The Association, via its motion, would cause the Arbitrator to vacate his own award. An action clearly reserved to the Court of Common Pleas in ORC Chapter 2711.

THE ARBITRATOR'S RULING ON THE ASSOCIATION'S MOTION

The motion offered by the Association is hereby denied. The Arbitrability Award, and the analysis contained in the Opinion, clearly articulate the reasons in support of the finding. Nothing presented by the Association in support of the motion provides any sufficient rationale for reconsideration of the matter. As such, in accordance with Section 6.08, the matters contained in the Arbitrability Award dealing with the substantive validity of the Teacher 2 reduction in force will be relied upon in terms of proper application of the Agreement (Joint Exhibit 1).

THE MERITS

The Employer's Position

It is the position of the Employer the reduction in force of the Teacher 2 position held by Theron Harding was proper and in accordance with Section 18.01. The Employer opines it has proven by a preponderance of the evidence that the abolishment was substantively valid, and thus, in accordance with Section 18.01(C) and 18.02. The Employer's expressed reasons for the abolishment were ostensibly based on (1) reorganization at the facility for efficiency; (2) lack of work to sustain staffing levels; and (3) for reasons of economy.

The Employer argued that the legal actions introduced by the Association do not bar the abolishment in dispute. The **Barbara C.**[1] (Joint Exhibit 6) document has no impact on the present dispute since it merely reflects a position filed on behalf of complainants Barbara C. and three (3) other residents housed at the Orient State Institute. The Association, moreover, failed to provide any witnesses or testimony concerning the relevance of the petition to the disputed matter.

In an attempt to clarify the record dealing with the allegations raised by the Association's introduction of the petition (Joint Exhibit 6), and to bolster the testimony provided by one of its witnesses, the Employer obtained a copy of the Proposed Plan for Relief (Employer Attachment B) dealing with the **Barbara C** matter. This agreement was entered into by attorney's representing their respective parties.

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[1] United States District Court, Southern District of Ohio, Eastern Division, Barbara C., through her best friend, Ohio Legal Rights Service, individually and on behalf of all other similarly situated.

Mike Fuscardo, a Labor Relations Officer provided testimony supported by specifics contained in the agreement (Employer Attachment B). He stated that any class member transferred from Orient to another facility operated by the Department could only be transferred if the receiving Center possessed certification as an Intermediate Care Facility for the Mentally Retarded (ICF/MR). In the event a class member was indeed transferred to Cambridge Developmental Center, an evaluation would take place to determine programming requirements. Educational services, if necessary, would be provided by the County MRDD Board.

Section V of the agreement (Employer Exhibit B) confirmed Fuscardo's certification argument. It did not, however, confirm the Association's proposition regarding the requirement for teaching staff. It merely required a facility having sufficient staff.

The Association alluded to staffing ratios at the hearing. References to staff/resident ratios contained in the document indicate "at Orient Developmental Center" without placing any comparable requirements on any receiving facility.

The Sidles Consent Decree [2] (Joint Exhibit 7) discussed by the Association contains similar defects. The contained staffing ratios are specific to the Apple Creek Developmental Center. The consent decree requires ICF/MR (Employer Exhibit 1)certification for any receiving institution and the ability to provide services identified in the Individual Habilitation Plan (IHP). Nothing in the consent decree specifies which classifications are to provide services specified in the IHP's.

By referencing matters outside the four corners of the Agreement (Joint Exhibit 1), the

[2] United States District Court for the Northern District of Ohio, Eastern Division, James Sidles, et al, Plaintiffs vs. Kenneth D. Gossett, et al, Defendants, Case No.: C75-300A.

Association pursued its abolishment theory by applying inappropriate standards. Ohio Revised Code Sections 124.321 through 327 and Ohio Administrative Rules 124-7-01(A) (1) are not controlling in this instance. Article 18 contains particulars negotiated by the parties regarding the protocols and guidelines to be used when implementing and challenging any layoff or reduction in force decision. There is no reference to the ORC and OAC in Article 18. As such, ORC Section 4117.10 (A) does not require incorporation under these circumstances.

An application of the specified ORC and OAC sections by the Arbitrator would be in violation of the Agreement (Joint Exhibit 1). Section 6.05 specifies and limits an Arbitrator's scope and authority, and does not allow any addition to the Agreement (Joint Exhibit 1).

As previously specified, the Employer, in its Abolishment Rational (Joint Exhibit 2) based the abolishment on three (3) criteria. Each will be discussed in the sections which follow.

Michael Ihlenfeld, the Superintendent, discussed the reasons underlying the reorganization of staff and related service delivery issues. Cambridge Developmental Center is ICF/MR (Employer Exhibit 1)certified which means it operates under strict Medicaid guidelines. Compliance requires annual inspections which ensure adherence to existing policy regarding treatment protocols. Since sixty percent (60%) of the facility's annual budge derives from Medicaid funding, compliance is not only necessary but essential.

In 1991 the Employer decided to change the focus of treatment to an integrated hands-on approach which allowed all caregivers to train all clients in functional skills within the most "normal" environment throughout the day. Emphasis was placed on daily living skills training, which caused the assignment of Teachers, Teacher Aides and GATs to residential cottages. This approach mirrored the existing assignment of TPW. Rather than taking clients outside their

living areas and placing them in classroom type settings, training was continuously provided by all care givers in the living area.

It should be noted all staff since 1991, and Teacher Aides and Teachers prior to June of 1994, taught the clients daily living skills. As such, duties among Teachers, Teacher Aides and GATs become virtually interchangeable. A number of conditions were identified by the Superintendent, Harding and other witnesses to support this premise. Harding's Program Schedule (Employer Exhibits 4 and 5) references duties performed on a duty basis by TAs, GATs, and TPWs. Also, when one compares Harding's position description (Joint Exhibit 5) with those of a GAT (Employer Exhibit 7), the GAT duties are noticeably present while traditional teaching duties appear to be absent. Assessments and program development are done by QMRP's or a Program Director with input from direct staff, trained to do so. All direct care staff, including TPW's are allowed to provided input and participate in "Treatment Team" meetings. A formal classroom environment had not existed for a number of years. In fact, when cottages assignments were made, Teachers as well as other bargaining unit members were assigned on a seniority basis after they had identified their preferences (Employer Exhibit 4). Assignments did not, therefore, consider an employee's job classification. Teachers did not solely serve as lead workers in the cottages. Rather, all Program Staff members were directed to function in this capacity as evidenced by Program Staff Notes (Employer Exhibit 10).

Natasha Oley's testimony was viewed as irrelevant. She never worked at Cambridge Developmental Center. Also, her remarks dealing with Teacher Position Descriptions in other facilities (Association Exhibit 2) were viewed as incomplete because she had no knowledge regarding their current application.

Lack of work was also raised in support of the reduction in force rationale. The client population has declined from 159 clients in 1986 to 122 clients in 1993 prior to the reduction in force. This condition caused a decrease in personnel requirements and the closing of Keller Cottage. Not only were the Teachers impacted by the decline in client population; a total of twenty two (22) employees were displaced. Ihlenfeld testified that he had hoped that normal attrition would balance the reduction in personnel requirements and, as a consequence, delay the lay off. Unfortunately, this strategy worked for a short term period but could not eliminate the eventual need for the imposed reduction in force.

Reliance by the Association on a recent newspaper article (Association Exhibit 1) discussing record keeping problems at the Ohio Department of Mental Retardation and Developmental Disabilities was viewed as misplaced. Nothing in the article referenced the Cambridge Developmental Center nor Gurnsey County in terms of waiting list deficiencies. Also, the article dealt with county services and not State facilities covered by SCOPE'S Agreement (Joint Exhibit 1).

The age of the client population also engendered lack of work for the Teacher 2 position in dispute. For a considerable period of time, the Cambridge Developmental Center has not had a "chartered" school; no school age children have resided at the facility. Since the layoff, however, one (1) school age child has been probated into the facility. The child has educational needs attended to by a school off grounds at no cost to the Center. As such, a teaching function at the Center is not necessary to fulfill this child's educational needs. Cheri Stevens, the Operations Director, testified about existing contingencies in the event emergency situations required an "on-grounds" teacher. Several staff members are certified teachers and could,

therefore, fulfill these responsibilities.

The reduction in force was also justified on the basis of economy concerns. The ICF/MR (Employer Exhibit 1) guidelines view all staff members as teachers, and do not require certified teachers for adult clients. By following these guidelines, Harding and other similarly situated teachers had not taught, in a traditional sense, for a number of years preceding the reduction in force.

Duties preformed by Teachers prior to and at the time of the abolishment, were virtually identical to those performed by GATs and TPWs during the same time period. Teachers' duties, more specifically, also changed over time. If one reviews Harding's latest job description (Joint Exhibit 5) and a job description written for a Teacher's position in 1986 (Employer Exhibit 6), the focus and extent of the job duties changed remarkably as evidenced by the specifications.

The duplication of duties and responsibilities in the Teacher, GAT and TPW classifications caused an economic hardship based on relative compensation level differences. The creation of three (3) part-time GATs to replace the abolished teachers also decreased duplicated efforts in use of time and manpower. David Lynch, the Personal Director, testified these positions were created because they more closely approximate duties required by ICF/MR Guidelines (Employer Exhibit 1).

The substantive validity of the reduction in force decision is evidenced by several surveys presented by the parties at the hearing. A survey/inspection (Association Exhibit 1) conducted one (1) month after the layoff cites a number of problems related to Brown Cottage. It fails however, to identify any problems dealing with staff composition or deficiencies arising because teaching staff was not available. Another survey/inspection (Employee Attachment A) was

conducted on or about July, 1995; approximately one (1) year after the reduction in force decision. Only one (1) citation was issued for the entire facility dealing with propped open doors at Moore Cottage. Obviously, these results strongly indicate that continued certification and fulfillment of the Center's mission do not require the presence of teachers at the facility.

The reduction in force decision was not implemented in bad faith or an "unprofessional manner." If the Employer erred, it did so by retaining Harding and other teachers much longer than they should have. Such compassion should be appreciated rather than minimized. Erosion of the bargaining unit did not take place by creating three (3) part-time GAT positions. If anything, Teachers were eroding the bargaining unit work performed by the GATs. Nothing in the record supports the notion that GAT duties and responsibilities belong to the SCOPE bargaining unit.

The Association's Position

The Association argues the abolishment of the Teacher 2 position was not proper per Article 18.01 of the Collective Bargaining Agreement. The reduction in force, more specifically was not supported by a preponderance of the evidence and, therefore, was not substantively valid. The reduction in force, moreover, was implemented in violation of ORC Section 124.321 through .327 and Administrative Rules 123:1-14.01 through .22, and Administrative Rule 124-7-01(A)(1).

The Association cites the Barbara C and Sidles decisions as potential bars to the abolishment decision based on the school age children rationale. Several commonalities specified in both decisions were referenced in support of this premise:

1. both are class action suits;

2. both require client to received Individual Habilitation Plan;
3. both require the Employer to maintain Accreditation Council for Services for Mentally Retarded and other Developmental Disabled Persons (ACMR/DD);
4. both require some form of Adult Education;
5. both require provisions of habilitation and other services to class members as required by the suits and not made by decreasing staffing, programming or funding at other developmental centers/residential facilities, or programs owned or operated by the Ohio Department of Mental Retardation and Development Disabilities (Emphasis specified in Association's Brief).

The comparables clearly establish the abolishment violates the spirit of the lawsuits in terms of reducing habilitation services to class members and providing some form of adult and vocational education defined standards. A number of particulars require teacher participation which would be virtually impossible if the reduction in force was validated: Individual Habilitation Plan development; accreditation by the Accreditation Council for Service for Mentally Retarded and other Developmentally Disabled persons (ACMR/DD); and Adult Education programming requiring teacher input and monitoring.

Further noncompliance with the previously noted was identified in a survey conducted on August 11, 1994 (Association Exhibit 1). These violations clearly indicated a decrease in the degree of habilitation efforts and other client related services shortly after the abolishment decision. It also jeopardized the facilities's ACMR/DD accreditation.

The Association opined the abolishment rationale was defective. It contained reasons as justification in violation of Article 18.01(A) and Ohio Revised Code Sections 124.321 to .327 and Ohio Administrative Code Section 124.7-01(A)(1). "For reasons of economy" is the sole justification which is properly articulated. The other enunciated reasons such as "no school age clients" and "duties done by teachers can be done by others" do not support the action.

Even though the Association argued the reduction in force was inappropriately specified, it still challenged the propriety of the proposed justifications. The school aged person theory was challenged. Here, the Association referred to the previously discussed legal actions. Also, the fact the Center has served clients below and above twenty-two years of age, while employing teachers, serves as a binding practice. This justification is further dismissed since the record indicates the facility has received one (1) school-age person since the reduction in force. The certainty expressed by the Employer with respect to servicing this segment of the client population was misapplied. A recent newspaper article (Association Exhibit 1) implies the Employer is unable to make such predictions. Record keeping is so sloppy within the Department that the number of clients on waiting lists is most difficult to determine.

Duties performed by the Teachers cannot be performed by other staff members. The duties contained in the Teachers' job description (Association Exhibit 3) define responsibilities in order of importance, and identify minimum acceptable characteristics. These duties can only be accomplished by individuals holding a teaching certificate in special education or a certification in MSPR. As such, teachers are not "over qualified" to teach.

In terms of the declining population theory, this justification was never articulated as a reason for the abolishment or to establish a "Reason of Economy." The reduction, moreover, was insignificant in terms of client population trends, and still justified a teaching position. It was merely acknowledged to artificially justify assigning duties to other staff members.

Two reorganizations were discussed by the Employer which proceeded the reduction in force decision. As such, the 1988 and February, 1993 reorganizations of off-cottage programming referenced in the Executive Summary and the abolishment rationale (Joint Exhibit

2) were questioned in terms of propriety.

A sufficient economic reason to justify the abolishment was not provided by the Employer. Savings realized by not having to pay the wages and benefits to an employee whose position is abolished is not sufficient justification. As such, the intermingling of duties among staff and the creation of three (3) part-time General Activity Therapist positions for economic reason fails to meet the burden of proving by a preponderance of the evidence that the position was abolished properly.

The Association offered several procedural defects dealing with contractual and statutory violations. ORC Section 124.321(D) requires an appointing authority to file "a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of abolishment." Employer Exhibits 2 and 3 clearly indicate the appointing authority never sent the supporting documentation to the director of administrative services. Also, the letter (Employer Exhibit 3) sent to Director Conrad was sent on April 20, 1994, while the lay off notice (Employer Exhibit 2) was sent on April 14, 1994.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record including pertinent contract language, it is my opinion that the reduction in force of the Teacher 2 position held by Theron Harding was proper and in accordance with Section 18.01 (A). The Employer, more specifically, in accordance with Section 18.01(C), sustained its burden by a preponderance of the evidence. The substantive reasons for the reduction in force were obviously substantively valid.

The record fails to support the Association's attempt to bar the reduction in force based on the Barbara C (Joint Exhibit 6) matter and the Sidles Consent Decree. (Joint Exhibit 7). Without the introduction of the Proposed Plan for Relief (Employer Attachment B), the document presented by the Association failed to provide any significant clarification. It merely reflects a position paper filed on behalf of the complainants. The Proposed Plan for Relief, however, fails to support the Association's theory in terms of the propriety of the reduction in force decision. Most of the particulars deal with Orient specific requirements. Transfers to other developmental centers could only take place if the receiving center enjoyed certification as an Intermediate Care Facility for the Mentally Retarded (ICF/MR). There is no specific requirement for educational services provided by teaching staff at the receiving center. In the event programming requirements were necessary for any transferred client, the County MRDD Board would provide these services. In fact, even though such transfers have been quite infrequent prior to and after the reduction in force, a recent transfer has been handled in the manner discussed without any litigation indicating violation of the Barbara C and Sidles Consent Decree.

The Sidles Consent Decree argument enjoys similar defects. Again, most of the particulars contained therein deal with Apple Creek Developmental Center conditions. Further transfers require the receiving center's certification as an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Also, any receiving center must provide services identified in the transferee's Individual Habilitation Plan (IHP). These services, including educational services, do not have to be provided by any specific job classification.

Unlike other collective bargaining agreements negotiated by the State of Ohio and other public sector unions, especially the OCSEA Contract, the Agreement (Joint Exhibit 1) and the pertinent sections in dispute do not reference any portion of the Ohio Revised Code or the Ohio Administrative Rules in terms of reduction in force protocols. There is no such reference in Article 18.

The Association, moreover, failed to provide any parole evidence in the form of bargaining history to support the parties intent to incorporate these statutory requirements. As such, any reliance on statutory protocols outside the four concerns of the Agreement (Joint Exhibit 1) in an attempt to refute the abolishment decision is totally unwarranted. Ohio Revised Code Section 4117.10 (A) does not apply in this instance. The Agreement (Joint Exhibit 1) is not silent because the parties negotiated contract language specifying reduction in force guidelines.

Several cases support this interpretation. In State, Ex Rel. Clark vs. Cleveland Transit[3], the Supreme Court of Ohio found that when a conflict exists between a portion of the Ohio Revised Code and the provisions of a collective bargaining agreement, Ohio Revised Code Section 4117.10(A) requires that the parties be subject to all laws pertaining to wages, hours, and terms and conditions of employment when no specification as to such a matter is made. A similar interpretation was made by the court in Rollins[4]. Here, a specification does exist which causes the Agreement (Joint Exhibit 1) to be binding on the parties in terms of reduction in force

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[3] State, Ex Rel. Clark, vs. Greater Cleveland Regional Transit Auth. (1990), 48 Ohio St. 3d19.

[4] Rollins v Cleveland Hts. - University Hts. Bd. of Edn. (1988), 40 Ohio St. 3d 123.

protocols. The specification consists of the terms and conditions negotiated and contained in Article 18. As such, with such a negotitiated specification in force, there is no need or legal requirement to supplement Article 18; it is not silent.

I agree with the Employer's theory regarding application of Section 6.05. If this Arbitrator agreed with the Association's incorporation attempt, the Agreement (Joint Exhibit 1), and specifically Article 18 would be modified. Terms and conditions referencing certain statutory guidelines would be added; an outcome which is outside the scope of my authority.

The Association alleged that the reduction in force was procedurally defective for a number of reasons. First, it maintained that Section 18.01(A) allows a reductions in force for three (3) reasons. The Employer, however, only identified one valid reason in the abolishment rational (Joint Exhibit 3); the one dealing with economy. Raising this specification issue after this Arbitrator ruled in the arbitrability portion of the Award that only substantive validity issues would be considered on the merits, is highly unusual and lacks proper standing for adjudication purposes. Procedural defects of the sort were not contemplated by the Association. They were not specified on the grievance form, and as I previously ruled were not ripe for adjudication.

For clarification purposes, however, I deem it necessary to partially address this issue in the form of dicta. Even though the reduction in force rationale does not contain headings clearly identifying the reasons enumerated in Section 18.01 (A), the body of the documents submitted to the Association clearly enumerate the general themes delineated as appropriate reasons in this provision. The Association was not misled nor should it have been surprised by the arguments, theories, supporting documents and evidence introduced by the Employer at the hearing.

The Employer initiated its reorganization in response to Federal Medicaid Guidelines (Employer Exhibit 1) which caused a change in the focus of treatment to an integrated approach. This approach emphasized continuous client training in daily living skills and other functional skills. Training was to be provided by all staff members regardless of job classification.

By broadening the job duties of all individuals coming into contact with the clients by emphasizing daily living skills, the Center was able to more efficiently and economically provide the services called for by the Medicaid Guidelines (Employer Exhibit 1). The reorganization, moreover, eliminated for all purposes the classroom approach previously used, and thus, the programming duties and traditional teaching responsibilities engaged in by members of the class reduced in force.

The position in question was "eliminated" because the work performed or services provided were no longer required as a consequence of the changed focus. Harding's position was not eliminated while the facility allowed others to perform the same work. Harding admitted that the clients "educational" needs were not academically based but required living skills development. This statement is confirmed by the particulars contained on Harding's position description (Joint Exhibit 5). Traditional teaching duties are virtually non-existent and, in fact, the descriptions more closely approximate the duties identified in a GAT position description (Employer Exhibit 7).

A teacher's role in assessment and program development areas have also been dramatically minimized as a consequence of Medicaid Guidelines (Employer Exhibit 1). Section 483.44(c)(3)(v) indicates that QMRPs rather than teachers shall develop Individual Program Plans and daily living skills programs. Assessments of this sort are not to be done by

professional disciplines unless certain circumstances arise. These plans and programs are then implemented by direct care staff.

Efficiency and economy benefits are discernable by programming outcomes realized after the reduction in force. Shortly after the reduction in force, a survey (Association Exhibit 1) was conducted for ICF/MR certification purposes. There is no indication the Center was cited do to lack of teaching staff availability. More recently, another survey (Employer Attachment A) was conducted at the facility. Only one (1) citation was received for doors being propped open. Obviously, these results document the substantive validity of the reduction in force decision and the economy and efficiency reasons specified in the reduction force rationale (Joint Exhibit 2).

The lack of work reason provided the Association was also adequately substantiated. The client population has declined over time. A certain segment of the client population previously serviced by Teachers has, for all purposes, disappeared. This group deals with school aged clients. A comparison of a prior Teacher position description (Employer Exhibit 6) with the latest version (Joint Exhibit 5) identifies ones glaring difference. The more recent description does not contain duties dealing with the development and assessment of school age clients academic and educational goals.

The recent admission of a school age client does not subvert the previous analysis. This situation appears to be highly unique and infrequent. Educational needs, moreover, are being provided by the County MRDD.

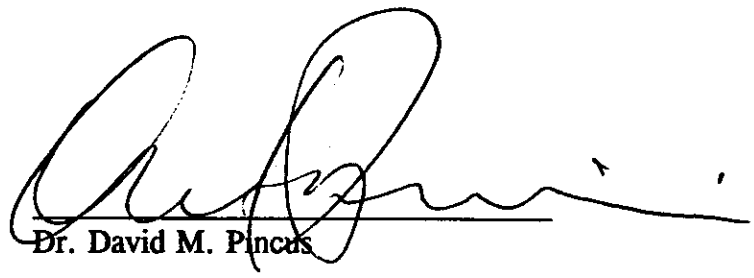
The record clearly indicates to this Arbitrator that the reduction in force could have been implemented much earlier. There was not enough work, for a considerable period of time, to maintain Harding's employment as a Teacher 2. The Employer engaged in a good faith effort

to deal with the matter through attrition and having employees bid on other available positions. As such, the Employer cannot be accused of acting in bad faith or eroding the bargaining unit as a consequence of the reduction in force decision.

AWARD

The abolishment of the Teacher 2 position held by Theron Harding was proper per Article 18.01(A) and Article 18.01(C). The grievance is, therefore, denied.

November 22, 1995



Dr. David M. Pincus