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IN THE MATTER OF THE ARBITRATION BETWEEN	*	
FRATERNAL ORDER OF POLICE	*	Grievance Case No. 15-03-951017-0100-04-01
-and-	*	Grievant : Timothy Callen, *Et al.*
STATE OF OHIO HIGHWAY PATROL	*	

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the FOP: Paul Cox, Esq.

For the State: Lt. Richard Corbin

The Fraternal Order of Police, Ohio Labor Council, Inc. (the FOP) brought this matter to arbitration challenging the decision of the State of Ohio Highway Patrol (the State/the Employer) to contract out certain communication equipment repairs as a violation of the parties' collective bargaining Agreement. The Hearing in this case was held at 10:00 a.m. on August 19, 1996, at the State of Ohio Office of Collective Bargaining. Both parties were represented. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party. At the end of the Hearing, the parties presented oral closing oral arguments in support of their respective positions. The entire record has been considered carefully by the Arbitrator in reaching her decision.

ISSUE

Whether the Employer violated Article 5.03 of the collective bargaining Agreement and, if so, what shall the remedy be?

RELEVANT CONTRACT PROVISION

ARTICLE 5. 03 Bargaining Unit Work

Management shall not attempt to erode the bargaining

unit, the rights of the bargaining unit employees, or adversely affect the safety of employees.

Except in emergency circumstances, work normally performed by uniformed employees shall be first offered to uniformed employees.

This Article shall apply to special duty or special assignments which result from requests by private individuals or groups for security or traffic control.

The parties recognize Electronic Technician 3's perform and shall continue to perform the following duties regarding the functional supervision of Electronic Technicians 1's and 2's , including but not limited to evaluating , recommending discipline and promotions, assessing files, and conducting internal investigations.

BACKGROUND

The essential facts of this case are not in dispute. Timothy Hetzler, the Employer's Electronic Technician Manager, ascertained in September 1995, that District 6 had "a rather large amount" of defective patrol communications equipment which was not being repaired. The equipment in question consisted of 8 General Electric (GE) repeaters, 24 GE Hi/Lo mobile radios, 18 GE control head bottom boards, and 13 GE head top boards. At the time in question, the Employer had 140 Troopers, 120 patrol cars, and two Electronic Technicians in District 6.[1] Electronic Technicians wear uniforms as a part of their working conditions.

Hetzler made recommendations to get the repair work done. Among these recommendations, Hetzler urged that the Employer

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[1] At some time after this grievance arose, the Employer hired another Electronic Technician for District 6.

contract out the repair work because of the large backlog in District 6 and of the serious safety considerations associated with having functioning communications equipment for Troopers and in patrol cars. His testimony is unrebutted that the policy was to have at least a 10% backup of spare radios, but the 24 GE Hi/Lo mobile radios needing repairs constituted 24% of the radios available in District 6. Hetzler determined that Central Install Technicians were otherwise occupied and could not then assist in the repairs. He also concluded that the repairs could not be made by Electronic Technicians in other Districts because they also had backlogs to address. The outside contractor Hetzler contacted affirmed that the disputed repair work would be completed within three weeks.

According to Hetzler, there had been "quite a bit" of contracting out of other repair work in the past. In that regard, he mentioned the contracting out of dictaphone repair for seven years, of datamaster/breathalizers for the last year and half, and recently, of generators. It was Hetzler's unrebutted testimony that no Electronic Technicians had been displaced for any amount of time as a result of the outside repair contract. It is also a fact that there has not been a layoff of any Electronic Technicians in 24 years.

Major Darryl Anderson testified that in the contract negotiations pertaining to the current language of Article 5.03, there was never any discussion, proposal or counter proposal,

regarding subcontracting.

Timothy Callen (the Grievant) testified that he has been employed as an Electronic Technician for 14 years, during which time no employee in his classification has been laid off by the State. He said that he filed the grievance because the work contracted out was work he, and other similarly situated Electronic Technicians, normally performed. The Grievant gave testimony about Hetzler telling him that the work was being contracted out because of the difficulty District 6 was having in surmounting the repair backlog. The Grievant also acknowledged that he had worked "about 80 hours" of overtime during 1995, and had difficulty at times, keeping up with repair demands.

On direct examination, Hetzler testified that the outside contract was a "one time contract to repair all of the equipment in District 6 that was broken". He also said that the outside repair facility was located in Westerville, where District 6 Electronic Technicians could drop off and pick up the equipment without incurring the time and the transportation costs of using other vendors. On cross-examination, Hetzler acknowledged that "additional equipment other than that on" the District 6 list was sent out to the contractor and that "any District in the State that wanted to use it [the outside contractor] could". He added that, "the only District that has used the contractor is District 6 and District 8 has sent one radio".

These are the essential facts and circumstances that were

submitted to the Arbitrator for final decision in this case.

POSITIONS OF THE PARTIES

FOP Position:

It is the FOP's position the Employer violated Article 5.03 of the Agreement. According to the FOP, the language of that Article is clear and unambiguous, and must be applied accordingly, as well as consistently with two arbitration awards rendered by Arbitrator Harry Graham involving the FOP and the Department of Mental Health.[2] By way of relief, the FOP seeks a "cease and desist" order against the Employer and 18 hours' compensatory time for Electronic Technicians in District 6.

The FOP admits that Article 5.03 of the Agreement does not expressly address subcontracting. It asserts, however, that the "common law of subcontracting, applied in the private sector" has no bearing upon resolution of the instant case.

According to the FOP, there has been a displacement of work that employees in the bargaining unit have historically and normally performed, to a vendor outside the bargaining unit. which is prevented by the clear language of Article 5.03. It argues that the history of Article 5.03 is neither relevant nor controlling in the instant case. The FOP maintains that to enforce the broad language of that Article, prohibiting erosion of the

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[2] Case #23-08-900516-0422-05-02 (December 21, 1990), and Case #23-03-940120-0402-05-02, et seq. (December 9, 1994).

bargaining unit, requires the Employer to have the work in question performed by bargaining unit employees, on overtime, if necessary, or by the Employer hiring more Electronic Technicians.

Based upon these arguments and the arbitral awards of Harry Graham, the FOP submits that this grievance should be sustained and the remedy requested should be granted.

Employer Position:

The Employer contends that it did not violate Article 5.03 of the Agreement and, thus, that this grievance should be denied. In support of its position, the Employer emphasizes that there is no language in that Article or in the bargaining history regarding subcontracting. The Employer also stresses that its decision to contract out the work in question was based upon not only a legitimate business need, but also was neither arbitrary nor capricious. Additionally, the Employer maintains that this grievance should be denied because no evidence or testimony was presented that the bargaining unit had been eroded and/or that the job security and/or overtime opportunities of any Electronic Technician had been adversely affected by contracting out the work in question.

According to the Employer, there was a demonstrably unacceptable amount of equipment down in District 6, which represented a real safety hazard to both Troopers and to the public they are expected to serve. The Employer maintains that this

deficiency in functioning, readily repairable equipment grew to such proportions in District 6, that it constituted an "emergency" because the time of Electronics Technicians in District 6 was more than fully occupied already, and because there were no Central Install and/or other District Electronics Technicians who had any time to take on extra work to diminish the backlog. The Employer also contends that the FOP's suggestion that the work should have been performed by bargaining unit employees at overtime rates is unacceptable because the Grievant had already put in at least 80 hours of overtime during the last year. Compensatory time is not a reasonable alternative, the Employer argues, because Article 27.03 of the Agreement clearly and unambiguously limits such time.[3]

The Employer maintains that the Graham arbitration awards relied upon by the FOP have no bearing on the outcome of this case because the factual situations addresses therein are not involved here. In particular, the Employer points out that those decisions involved employees being laid off and vacant positions not being filled. The Employer stresses that no Electronic Technician has been laid off in 24 years.

ANALYSIS

The FOP, as the moving party in this contract enforcement

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[3]Article 27.03 provides:"The Maximum accrual of compensatory time shall be three hundred sixty (360) hours for all employees." However, the record does not reflect the totality of compensatory time all employees had as of the time of the contracting out.

controversy, has the burden of persuasion to establish that its interpretation of Article 5.03 governs in the factual circumstances involved herein. Essentially the FOP's position is that the subcontracting of the communication equipment repairs at issue constitutes an erosion of the bargaining unit. In contract enforcement actions, it is a well recognized principle of labor arbitration that clear and unambiguous language in the collective bargaining agreement is the best evidence of the parties' intentions as to what they agreed upon. If the wording and meaning of the language at issue is clear and unambiguous on its face, such language must be enforced by the Arbitrator according to its precise terms and common meaning to maintain the integrity of the parties' Agreement. Only where the applicable language is unclear or ambiguous, is it generally accepted that extrinsic evidence, including bargaining history and past practice, if any, may be relied upon to determine the parties' intent.

Thus, the initial inquiry that must be made here is whether or not the language in Article 5.03 is clear and unambiguous. Neither party claims the operative language of that Article is ambiguous or unclear. Nor is there anything in the actual wording of that Article to support a finding other than its language is direct and clear as to the meaning expressed. It is undisputed that the language contained in Article 5.03 does not prohibit subcontracting. The specific language in Article 5.03 relied upon by the FOP provides the Employer "shall not attempt to erode the

bargaining unit".

In support of its position on that language, the FOP's reliance on the two Graham arbitration awards is misplaced. The arbitrator in those cases found an erosion of the bargaining unit under factual circumstances quite different from those involved here. Arbitrator Graham's 1990 decision was based upon the employer not filling vacancies in bargaining unit positions. His 1994 decision involved layoffs found to be in violation of Section 124.321 (D) of the Ohio Revised Code. Those cases are simply not comparable to the present situation.

In the present case, there was no layoff or failure to fill vacancies involving bargaining unit positions. There is no evidence that the Grievant's position or that of other Electronic Technicians in the bargaining unit were in any way placed in jeopardy by the Employer's decision to contract out certain repair work. To the contrary, the Employer has since hired another Electronic Technician in District 6. The facts also remain that the Employer was faced with a situation in which there was a backlog of radio communication equipment repairs in an amount constituting two times that which was normal or acceptable to the Employer, and was beyond the capacity of the bargaining unit employees to perform at that time.

It is undisputed such communication equipment is essential not only for Troopers' to properly perform their duties, but also for their safety. Under these circumstances, it would be inappropriate

to second guess the Employer's claim that this backlog of repair work constituted an emergency. The second paragraph of Article 5.03 addresses this particular situation, to wit: "Except in emergency circumstances, work normally performed by uniformed employees shall first be offered to uniformed employees." Hetzler's assessment was unrebutted that the then current workload bargaining unit employees were experiencing precluded them from timely performing the repairs in question.

In conclusion, based upon the circumstances of this case, the Employer did not violate Article 5.03 of the parties' collective bargaining Agreement.

AWARD

The grievance is denied. The Employer did not violate Article 5.03.

Dated: August 31, 1996

Mollie H. Bowers

Mollie H. Bowers, Arbitrator