

In The Matter of the Arbitration Between

OHIO DEPARTMENT OF REHABILITATION :
 & CORRECTION, LIMA CORRECTIONAL
 INSTITUTION, :

Employer, :

and :

DISTRICT 1199 HEALTH CARE AND
 SOCIAL SERVICE UNION, SERVICE
 EMPLOYEES INTERNATIONAL UNION,
 AFL-CIO :

Union. :

OPINION AND AWARD
OF
ARBITRATOR GIBSON

Case No. 27-12 (11/18/94)
 0674-02-12

Appearances:**For the Employer:**

Colleen Wise, Office of Collective Bargaining, Labor Relations Specialist
 Rachel Liveingood, Chief of Contract Compliance, Office of Collective
 Bargaining
 David Burrus, Department of Rehabilitation and Correction, Management
 Representative, Central Office
 G.E. Dunningan, Administrative Assistant, Labor Relations, Lima Correctional
 Institution
 John McNally, Observer, Office of Collective Bargaining

For the Union:

Kent M. Woodward-Ginther, Administrative Organizer, District 1199/SEIU, AFL-
 CIO
 Jeff Robey, Delegate - Union Steward, Lima Correctional Institution

OPINION**A. Introduction**

Pursuant to Article 7 of the 1994-1997 labor contract, Rankin M. Gibson was selected from a panel of arbitrators to hear and determine the Union's class Grievance No. 27-12 (11/18/94) 0674-02-12 protesting the assignment of work as a Correctional

Program Specialist (aka Case Manager), Alpha Unit, at the Lima Correctional Institution (LCI) on the 7th, 8th, 14th, 15th, 21st and 22nd days of November, 1994 to J.S. an unpaid volunteer. Having exhausted the grievance procedure the grievance was referred to arbitration on January 9, 1995 for a final and binding decision.

A hearing was held in Lima, Ohio at the Lima Correctional Institution, on August 30, 1996, before the undersigned arbitrator, between the hours of 9:00 a.m. and 11:45 a.m. Ample opportunity was afforded both parties to offer proofs. At the close of the Union's case, the Employer chose not to present evidence. Both parties submitted written closing statements on September 19, 1996, with objections and response on September 30, 1996.

B. Background Facts

This case involves the assignment of work in the Department of Rehabilitation and Corrections. The Department consists of 28 correctional institutions, including LCI, located throughout the state as well as the Adult Parole Authority and its various regional offices.

By certification of the State Employment Relations Board, the Employer in Article 2 of the Contract, recognizes District 1199 as the sole and exclusive bargaining agent for all employees employed in the classifications listed in Appendix A of the contract with respect to all matters pertaining to wages, hours, terms and other conditions of employment.

The dispute presented concerns personnel actions taken at Lima Correctional Institution (LCI) a medium security facility. Administratively, the institution is organized by living quarters called "Units". A unit consists of a large open room with bunks for inmates, a bathroom area, a day room and offices. Each unit is staffed with (a) a "Unit Manager", an exempt position, who supervises the social and rehabilitation programs in the Unit, (b) two employees classified as Correctional Program Specialist, also known as "Case Manager", positions in the District 1199 bargaining unit. Each unit is also staffed by two Correctional Counselor (aka Sergeant) who are in charge of the Unit's security, and a Unit Secretary. These positions are in a bargaining unit represented by the Ohio Civil Service Employees Association.

In the Autumn of 1994 the Alpha Unit staff consisted of Richard Jenkins, a Case Manager, who in the absence of the regular Unit Manager, was Acting Unit Manager, and the Unit Secretary, who, in October, left on pregnancy leave. During her pregnancy leave, the institution contracted with a temporary placement agency to provide secretarial service. Ms. J.S. worked as a temporary secretary in the Alpha Unit until the end of October when the regular Unit secretary returned from leave of absence.

At the end of October 1994, J.S. applied to work in the Institution as a "Volunteer". She reported for work in early November as a "Volunteer" to help maintain the work load of the short staffed Alpha Unit. As a volunteer she initially prepared and signed security classification forms with recommended changes in social programs, such forms were later approved by the acting Unit Manager and a Correctional Counselor.

On November 18, 1994, the Union filed Grievance 27-12, which reads in pertinent part:

"Statement of Grievance - *** [J.S.] has worked [Nov. 7, 8, 14, 15, 21 and 22] these dates as a Corr. Program Spec. She is not employed by the state. I was informed today (11/18/94) that ***[J.S.] was working as a volunteer (CPS) on Alpha Unit. She has not completed any training at C.T.A. She is being trained by Mr. Burton. No overtime was offered in accordance with the 1199 Contract.

Resolution Requested - Volunteer (CPS) work stop immediately. Overtime pay for all hours worked by volunteer in said position be awarded to affected class employees for failing to contact for overtime."

The Employer's Third Step Answer of February 21, 1995, reads in part:

"STEP 3 RESPONSE
GRIEVANCE #27-12-(11/18/94)-674-02-12 RE: JEFF ROBEY
February 21, 1995

A grievance was filed by the above-named in accordance with Article 7 of the collective bargaining agreement between the State of Ohio and Ohio Health Care Employees Union, District 1199. Therein, it is alleged that Articles(s)

24.03 24.17
24.16 24.18
27.05

were violated. A step 3 hearing was held at LCI on 2/1/95, and present were J. Robey, P. Mayer and D. Burrus.

To the question of procedural objection, the Union/Management had none and the hearing was considered properly constituted.

Union Contention

The grievant, through the Union, contends that an individual, not employed by the State, has been doing the duties of a Correctional Program Specialist on a volunteer basis. The individual was not paid for these duties.

The Union seeks as remedy immediate cessation of volunteer work, overtime payment for all hours worked by the volunteer to be paid to affected members.

Discussion and Decision

The Union related at this meeting that part of this grievance has been resolved at the local Professional Meeting. The remaining issue, that being the request for compensation for those hours worked by the volunteer remains to be addressed at Step 3.

The hours worked by the volunteer are simply not considered eligible for overtime by management. Section 24.03 of the contract indicates that the agency determines when overtime is necessary and such a determination was not made.

The parties did not stipulate the issue or issues to be adjudicated. The Employer proposes that the issues are: Did management violate Section 24.03, 24.16, 24.17, 24.18, or 27.05 of the collective bargaining agreement, when *** {J.S.} worked as a volunteer on Alpha Unit? If so, any overtime award shall be applicable to Mr. Richard Jenkins."

The Union asserts that the Employer "with deliberate and malicious intent took extreme measures to erode the bargaining unit at Lima Correctional Institution (L.C.I.)" Accordingly, it requests that the practice of using volunteers rather than hiring bargaining unit members cease, and that management fill vacant posted positions with qualified full-time employees, and that specified bargaining unit employees, who were denied overtime opportunities, be compensated.

C Analysis

At common law, the owners of a private business enterprise and their managers have rights that were and are in substantial measure based upon property ownership. There were and are numerous limitations by law, and sometimes by contract, over the exercise of such rights. The rights and powers of public employers are based upon the consent of the governed as delegated by their elected representatives to Congress, the General Assembly, the City Council, the Board of Education, etc.

The General Assembly of Ohio in enacting the Public Employees Collective Bargaining Law in 1983 set forth extensive "management rights" of a public employer in R.C. §4117.08. That such rights are not unlimited, see Lorain City School District Board of Education v. State Employment Relations Board, et al., 40 Ohio St.3d 257, 533 N.E.2d 264 (1988). The basic question presented therein was whether the Board of Education, as a public employer, must bargain over its decision to reassign work previously performed by bargaining unit nurses to non-bargaining unit health aides. The Court in reviewing the decision of State Employment Relations Board, after giving due deference to SERB's interpretation of R.C. Chapter 4117 held in ¶13 of its syllabus:

"3. The reassignment of work previously performed by members of a bargaining unit to persons outside the unit is a mandatory subject for collective bargaining under R.C. 4117.08(A) and (C)."

From a reading of the current collective bargaining agreement and its predecessor it is apparent that the parties have negotiated with respect to the performance of bargaining unit work by outsiders. Thus, the issues for the determination by the arbitrator are: (1) whether under the terms of the labor contract the assignment of work as a Case Manager in the Alpha unit at LCI on the 7th, 8th, 14th, 15th, 21st and 22nd days of November, 1994 to J.S., an unpaid volunteer violated the collective bargaining agreement between the parties, and (2) If so, what shall the remedy be?

By Article V entitled "Management Rights", the parties agree:

"ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08 (C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs, and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

The right of management in private industry to "subcontract" or "contract out" has been the subject of numerous arbitrations. The problem in disputes concerning the exercise of such right is to strike a proper balance between the employer's legitimate interest in efficient operation and effectuating economies, and the union's legitimate interest in protecting job security for its members and the integrity of the bargaining unit. In public employment the problem is to balance public employer's rights as set forth in R.C. §4117.08, with the union's interest in job security for its members and in maintaining the integrity of the bargaining unit.

As noted in Elkouri, How Arbitration Works, (3rd Ed., 1973) p. 501, et seq., in early private sector cases involving subcontracting or contracting out, arbitrators generally held that management had the right to subcontract work to independent contractors unless the agreement specifically restricted that right. On the basis of extensive analysis of such cases, Elkouri asserts that more recent cases fall into either of two categories: (a) those finding the recognition, seniority, wage and other clauses of the agreement contain an implied limitation upon management's right to subcontract or contract out; or (b) those in which management can subcontract if it does so reasonably and in good faith. Also, see Elkouri, (4th Ed. 1985) p. 538, and this arbitrator's opinion and award in National Distillers & Chemical Corporation, 76 LA 286.

Article 5 of the collective bargaining agreement entitled "Management Rights" must be read together with Article 41 entitled "Subcontracting" which provides:

"ARTICLE 41 - SUB-CONTRACTING

41.01 - Contracting Out

The Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, or programmatic benefits or other related factors.

Changes in State policy or methodology for delivering services may result in the discontinuation of services or programs directly operated by the State.

Every reasonable effort will be made to avoid the layoff of an employee as a consequence of the exercise by the State of its right to contract out.

41.02 Facility Closing/Service Elimination

Should it become necessary to close a facility or eliminate a service, the following guidelines will be utilized:

- A. Where individual facilities are closed or services eliminated, the provisions of Article 29 Layoff and Recall would apply;
- B. Departments will seek to absorb all affected employees or help laid off workers obtain employment in other areas of the public sector;

- C. A concerted effort will be made to relocate laid off employees within the frame work of any new delivery system. Management will seek to involve the Union and any newly-created structure in a positive program for the hiring and possible retraining of any displaced employee;
- D. In cooperation with the Union, the agencies will aggressively search for any available program assistance for the purpose of job training and/or placement. The joint efforts of the Union and Management will closely examine all possible avenues for human resource assistance both in the public and private sectors.

41.03 Supervisors/Managerial Employees

The State will make every effort to reach the goal of supervisors doing supervisory work and non-supervisory work done by bargaining unit employees. The Employer and the Union will discuss any concerns about the ratio of supervisors to bargaining unit members.

41.04 Volunteers

Every effort will be made to avoid the elimination of a position or displacement of an employee due to the use of volunteers.

41.05 Contracting-In

The Union will be granted a reasonable opportunity to demonstrate that bargaining unit employees can competitively perform work which has been previously contracted out, including access to available information regarding costs and performance audits. In considering renewal or continuation of competitively bid contracts for work normally performed by bargaining unit employees, which has been contracted out, to the extent feasible the Employer will examine information provided by the Union regarding whether or not such work can be performed with greater efficiency, economy, programmatic benefit or other related factors through the use of bargaining unit employees rather than through renewal or continuation of the contract." (Emphasis added).

Although, by Paragraph 41.01 the Employer declares its intention to utilize bargaining unit employees to perform work that they normally perform, the Employer clearly reserves the right "to contract out any work it deems necessary or desirable because of greater efficiency, economy, or programmatic benefits or other related

factors." The only references to the use of volunteers the arbitrator finds in the contract is contained in Paragraph 41.04 where the public employer agrees to make every effort to avoid the elimination of a position or displacement of an employee due to the use of volunteers.

The record would have benefited by a more complete exposition and presentation of the historical extent of the use of volunteers in the state's correctional institutions, and particularly at LCI. Joint Exhibit 5, is a statement of policy and procedures relating to citizens involvement and volunteers at LCI issued in 1993 by the Department of Rehabilitation and Correction. The exhibit recites that it is issued in compliance with R.C. 5120.38 which purportedly delegates to the warden the authority to manage and direct all inmates, personnel, volunteer programs and activities within the institution. Whether R.C. 5120.38 confers authority upon the superintendent or managing officers to issue this statement of policy and procedure is, in the opinion of the arbitrator, subject to question. The arbitrator notes that in 1982 the Department of Rehabilitation and Correction filed an administrative rule 5120:1-3-15 entitled "Citizens and Volunteer Involvement" which sets certain standards applicable if volunteers are used, with the Legislative Service Commission. Thus, volunteers, have been used at LCI since 1982. Moreover, the language of ¶41.04 implicitly acknowledges the right of the public employer to utilize volunteers subject only to two limitations, to wit: (1) avoidance of the elimination of a position; or (2) displacement of an employee. The evidence shows that vacancies in Alpha Unit as case managers were posted for bid. Two of the Union's witnesses P.Z. and P.H. were hired for the vacancies posted while J.S. was a volunteer in the Alpha Unit. The evidence also fails to disclose that any case manager was displaced as an employee in the Alpha Unit as a consequence of the use of volunteer J.S.


The Union contends that management does not have the right to use volunteers who are unqualified. However, no evidence was offered respecting the qualifications of J.S. a volunteer. Thus, the arbitrator is unable to make a judgment of whether or not she was qualified to perform the work of Correctional Program Specialist (Case Manager) at LCI on the 7th, 8th, 14th, 5th, 21st and 22nd days of November, 1994. Importantly, ¶41.04 does not expressly limit the use of volunteers on the ground of lack of qualifications.

Having found that the position of Correctional Program Specialist aka Case Manager was not eliminated and that no Correctional Program Specialist aka Case Manager was displaced due to the use of volunteer J.S. it is unnecessary for the arbitrator to consider the Union's claim for payment of overtime to regular Case Managers in the Alpha Unit during the period in question. Accordingly, the grievance should be denied.

AWARD

Having found that the Employer did not violate the collective bargaining agreement by utilizing J.S. as a volunteer to perform some of the duties of a Correctional Program Specialist aka Case Manager in November, 1994, it is the arbitrator's award -

- (1) That Union grievance No. 27-12 filed on November 18, 1994 be denied; and
- (2) That the arbitrator's fees and expenses be borne equally by the Employer and the Union.



RANKIN M. GIBSON, ARBITRATOR

DECIDED AND ISSUED AT Columbus, Franklin County, Ohio this 3rd day of October, 1996.

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