THE STATE OF OHIO AND DISTRICT 1199, THE HEALTH CARE AND SOCIAL SERVICES UNION, SEIU, AFL-CIO LABOR ARBITRATION PROCEEDING

In The Matter of the Arbitration Between:

The State of Ohio, Department of Mental Health

-and-

The Health Care and Social Services Union, SEIU, AFL-CIO

Grievant: John Mytrysak
Grievance No.: 23-10-960313-0264-11

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: April 7, 1997

Appearances

For the Union

Dave Regan	President
Peggy Kearney	Organizer
Mike Hunter	Advocate

For the Employer

Tim Wagner	ODMH-Labor Relations
Mike Duco	Chief of Arbitration Services
Bob Thornton	Executive Assistant
Rachel Livengood	Advocate

Introduction

This is a proceeding under Article 7, entitled Grievance Procedure, Section 7.07-Arbitration of the Agreement between the State of Ohio, Department of Mental Health,

hereinafter referred to as the "Employer", and The Health Care and Social Service Union, Service Employees International Union, hereinafter referred to as the " Union.", for the period June 1, 1994 to May 31, 1997 (Joint Exhibit 1).

The arbitration hearing was held on October 29, 1996. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective position 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. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

Issue

Does the Agreement allow exempt employees[1] to displace or "bump" bargaining unit employees when they are laid off?

Pertinent Contract Provisions

Article 2 - Union Recognition

***

This Agreement includes all employees employed in the classifications and positions listed in Appendix A of this Agreement. The Employer shall notify the Union of any changes in the classification plan sixty (60) days prior to the effective date of the change or as soon as the changes become known to the Employer, whichever occurs first.

***

(Joint Exhibit 1, Pg. 2)

[1] As stipulated by the parties, the term "exempt" means a position which is not encompassed in the definition of public employee pursuant to Ohio Revised Code 4117.01.

Article 7 - Grievance Procedure

***

7.07 Arbitration

***

E. Arbitrator Limitations.

1. Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

***

(Joint Exhibit 1, Pg. 17)

***

Article 28 - Seniority

28.1 Seniority Definition

A. State Seniority

The total length of continuous service in a position or succession of positions within the employ of the State dating back to the first date of hire.

However, service in an exempt position(s) shall not be credited as State Seniority.

B. Continuous service shall commence on the original date of hire. Continuous service shall be interrupted only by the following:

1. Separation because of resignation.
2. Discharge.

3. Failure to return from leave of absence.
4. Failure to respond to recall from layoff.

***

(Joint Exhibit 1, Pg. 60)

Article 29 - Layoff and Recall

29.1 Notice

When the agency determines that a layoff is necessary, the agency shall notify the Union and inform them of the classification(s), the number of employee(s) and the work site(s) affected. When the layoff involves a work site with more than one (1) employee in a classification series, the layoff shall be within the entire classification series. In the event the duties of a higher classification in the class series are no longer needed, employees in the higher classification may be laid off.

The agency will schedule a meeting with the Union to explain their reason for such action. The Union's comments and ideas given to avoid the layoff will be seriously considered before making a final decision.

If after this meeting the agency deems that the action is still necessary, the following procedures shall be adhered to.

Every effort will be made to place employees in comparable employment in the public or private sector. The agency shall notify all affected employees of the impending layoff at least forty-five (45) days prior to the effective date of any layoff, if the reason is for lack of funds, and ninety (90) days prior notice shall be given to affected employees for any other reason.

29.2 Layoff Procedures

A. In the event of a layoff within a higher classification(s) within a classification series, as a result of the elimination of duties:

1. There shall be the opportunity for any employee in the affected classification series at the work site(s) to volunteer for layoff.

2. Employees with the least state seniority within the classification(s) at the work site(s) affected shall be laid off first.

Those individuals in the classification(s) affected who have special qualifications or duties may be exempt from the layoff and will not be displaced by individuals without those qualifications or the ability to perform those duties. A laid off employee shall have the right to displace a less senior employee in the same classification at another work site within the agency bumping jurisdiction, or the employee shall have the right to displace a less senior employee at their own worksite within their own classification series. No promotion shall result from this action.

B. In the event any layoff is implemented within the bargaining unit in the classification(s) series affected other than as outlined in A above:

1. There shall be the opportunity for any employee in the affected classification series at the worksite(s) to volunteer for layoff.
2. Employees with the least state seniority within the classification series at the worksite(s) affected shall be laid off first.

Those individuals in the classification series affected who have special qualifications or duties may be exempt from the layoff, and will not be displaced by individuals without those qualifications or the ability to perform those duties. A laid off employee shall have the right to displace an employee of another work site within the classification series within the agency bumping jurisdiction who has less seniority. The employee who exercises his/her bumping privilege shall enter the pay range of the classification at the rate closest to his/her current rate of pay.

C. The bumping procedure will be as follows:

1. When an employee is given notice of layoff in accordance with Section 29.01 above, that employee and all other employees within the similar classification series within the agency bumping jurisdiction shall be given a list showing the name, work site and location, and state seniority of all agency employees within their

agency bumping jurisdiction in the similar classification series within five (5) days.

2. Within five (5) days of receipt of the list above, the laid off employee may give notice to bump, in accordance with 29.01 A or B above. If the employee fails to notify his/her supervisor within that five (5) day period he/she wishes to exercise his/her bumping rights, he/she shall have no further bumping rights.
3. An employee who has been bumped in accordance with the above, shall have the right, within five (5) days to bump a less senior employee. Should the employee fail to exercise his/her bumping rights within this five (5) day period, he/she shall have no further bumping rights.
4. This procedure will continue until the employee bumped either chooses not to exercise bumping rights or has no one to bump.
5. In the event that the bumping process outlined above has not been completed, i.e., an employee bumped has chosen not to bump or an employee bumped has no one less senior to bump, after sixty (60) days (or thirty (30) days if the reason for layoff is lack of funds) the following procedure will apply:

a. An employee with less seniority within the agency bumping jurisdiction within the affected similar classification series will be given a bumping selection form that identifies potential options. Such employee will select options available to them and list them in the order of their priority. Employees will be given five (5) days to complete and return the forms. Copies of the forms will be sent by the Employer to the Union.

b. The agency will take the top option selected by each employee in declining seniority to determine the bumping placement of that employee. This process will be completed within five (5) days. All employees will then be notified of their placement following the bumping procedure.

6. The entire bumping process shall be completed within the ninety (90) day period (forty five (45) day period if the reason for layoff is lack of funds) notice period referred to in steps outlined in 29.01 above. No employee will change jobs during the steps outlined in 1-5 above. At the conclusion of

this process and at the conclusion of the ninety (90) day period (forty-five (45) day period if layoff is for lack of funds) required in 29.01, any employees required to change jobs as a result of the bumping process will change jobs.

The jurisdictions for purposes of layoff are outlined in Appendix B.

The Employer shall establish a list of similar classification series which employees may use for displacement purposes in the event of a layoff. The Union will be consulted before the establishment of the list and kept apprised of its progress and the results before implementation.

29.03 Recall

When it is determined by the agency to fill a vacancy or to recall employees in a classification series where the layoff occurred, the following procedure shall be adhered to.

The most senior laid off employee with the most state seniority from the classification series shall be recalled first. Employees shall be recalled provided they are presently qualified to perform the work in the job classification to which they are recalled without further training or certification. No promotions shall result from recall. Employees shall have recall rights for a period of two (2) years. Notification of recall shall be by certified mail to the employee's last known address. Employees shall maintain a current address on file with the appointing authority. Recall rights shall be within the agency and within recall jurisdictions as outlined in Appendix B. If the employee fails to notify the agency of his/her intent to report to work within seven (7) days of receipt and return to work within thirty (30) days, he/she shall forfeit recall rights.

29.04 Appeals

Grievances resulting from Layoff and Recall procedures shall be grievable directly to Step 3 of the Grievance Procedure.

***

(Joint Exhibit 1, Pgs. 61-65)

Case History

John Mytrysak, the Grievant, and bargaining unit member, was employed as a Pharmacist at Massillon Mental Health Center since August 5, 1991. Barbara Montlar was originally employed by Fallsview Mental Health Center on June 2, 1980. She was employed as a Pharmacist. Eventually, on February 2, 1986, Montlar was promoted to a Pharmacy Supervisor position. A position outside the bargaining unit and, as such, she was viewed as an exempt employee while holding the supervisor position.

Fallsview Mental Health Center was scheduled to be closed in early 1996. As a consequence of the layoff, Montlar's position was eliminated. She exercised displacement rights and selected the Grievant's position as a Pharmacist as her primary choice. She was, indeed, subsequently displaced into the position previously assigned to the Grievant.

The Grievant filed a grievance protesting the propriety of the layoff and subsequent displacement by an exempt employee. The parties were unable to settle the disputed matter during subsequent portions of the grievance procedure. Neither parties raised substantive nor procedural arbitrability issues. As such, the matter is properly before the Arbitrator.

The Merits of the Case

The Union's Position

The Union opined that exempt employees do not have the right under the Agreement (Joint Exhibit 1) to "bump" bargaining unit employees when they are laid off. It was argued that civil service provisions promulgated prior to the advent of collective bargaining do not provide supervisors with the right to impose themselves upon the bargaining unit by displacing bargaining unit members. A number of theories were offered in support of this premise.

Provisions contained in the Agreement (Joint Exhibit 1) clearly disclose the deficiency of the Employer's administrative action. Section 7.07 (E)(1) outlines the scope of an arbitrator's authority. Here, an arbitrator cannot impose on either party a limitation or obligation "not specifically required by the express language of the Agreement". Article 2 discusses coverage as it pertains to specific classifications and positions listed in Appendix A. Since Appendix A fails to specify this particular classification, an arbitrator would be violating Section 7.07 (E)(1) by grafting this classification, and any related displacement rights, onto the Agreement.

If the parties had intended to incorporate provisions of the Ohio Revised Code or the Administrative Code into Article 29, which deals with layoff and recall rights and responsibilities, they would have done so. The following provisions do contain specified references: Section 10.07, Section 15.01 and Section 21.04. By failing to incorporate such references, the true intent of the parties is clearly articulated. Article 29 is comprehensive in terms of articulating terms and conditions dealing with layoffs and related matters. Supervisors have no articulated rights under Article 29. The only

indirect reference to supervisors' rights under the Agreement (Joint Exhibit 1) is referenced in Section 28.1. This provision states that service in an exempt position shall not be credited as State Seniority.

The Employer's actions surrounding this particular layoff supports the Union's interpretation. Certain provisions should have been engaged by the Employer if it felt supervisory displacement of bargaining unit members' positions were, indeed, anticipated by Article 29. The Employer never held a meeting with the Union in accordance with Section 29.01. The original list of similar classification series used for displacement purposes did not include the classification of Pharmacy Supervisor. This requirement is contained in Section 29.06.

Applying statutory construction theories to ORC Section 4117.10(A) indicate the legislature never intended to provide "bumping" protections to supervisors outside the bargaining unit. ORC Section 4117.01 defines "public employees" and specifically excludes supervisors from the definition. This construction clearly prohibits the expansion of the definition to include the protection of supervisors.

The case law surrounding the application of ORC Section 4117.10(A) supports the Union's interpretation. As such, the Employer does not have the right to graft supervisory rights onto Article 29. The Union proposes a distinction in the case law regarding the grafting of rights as opposed to benefits via statute. Here, the pre-act right afforded Montlar by the ORC directly conflicts to rights held by the Grievant under Article 29. When a statutory right of this sort conflicts with a contractually based right, the latter should be applied because a conflict exists per ORC 4117.10(A).

A contract construction principle precludes the grafting of pre-act supervisory rights. Article 29, unlike other provisions negotiated by the parties, contains no reference to the ORC. The Employer, therefore, should be precluded from incorporating certain relevant code provisions onto Article 29.

Article 29 language should prevail, moreover, because the Article thoroughly covers the matter in dispute, and does not contain any reference to exempt employee rights when laid off. Article 29 comprehensively specifies the procedure and process to be employed. It should bind the parties even though it does not specify that the Code does not apply.

In support of the previously proposed theory, the Union compared the present dispute to a Federal preemption doctrine called "field preemption". This doctrine has been applied when the scheme of federal regulation is so pervasive as to leave no room for supplemental state regulation. Here, the Agreement comprehensively regulates the matter of employee layoff. As such, it "occupies the field" to such an extent that it leaves no room for super-contractual supervisory layoff rights enumerated in the Code. When a statutory right conflicts with a contractual right; the contractual right prevails. A bargaining unit member's contractual rights, more specifically, should never be eroded or lessened, in terms of import, by a statutory right offering a non-bargaining member super-contractual rights regarding layoff.

Reliance on a prior OCSEA decision by the Employer proved to be unpersuasive to the Union. The OCSEA Agreement and the one presently in dispute are quite different. The former contains language which states layoffs shall be made pursuant to a number of Ohio Revised Code Sections "except for the modifications enumerated in

this Article." The District 1199 Agreement (Joint Exhibit 1) covers every aspect of the layoff and recall procedure without any reference to the Code.

The Employer's Position

It is the Employer's position that the Agreement (Joint Exhibit 1) does not contain a specific bar preventing exempt employees from displacing into bargaining unit positions: The major focus of the Employer's argument rests in the requirements contained in Ohio Revised Code Section 4117.10(A) as they relate to contractually agreed to matters contained in Article 29.

The Employer opines that Ohio Revised Code Section 4117.10(A) serves as a preservation of benefit clause for all public employees where it preserves those subjects established in law about which the parties fail to make specification in their agreements. As such, it places a requirement upon employers to adhere to laws where an agreement, as a consequence of bargaining, makes no specification.

Since the parties never specified a bar in Article 29 dealing with the displacement rights of exempt employees to bump into the bargaining unit, the Employer is obligated to allow such displacements under Ohio Revised Code Section 124.321. In Section (A) of the previously specified statutory provision, it states that layoffs and abolishments shall be made "in accordance with Sections 124.321 to 124.327 of the Revised Code and rule of the director of Administrative Services." Ohio Revised Code Section 124.324 states that laid off or displaced employees may bump into successively lower classifications in the classification series. Ohio Revised Code Section 124.14(A) defines how each classification in the classification plan shall be

designated. It requires that each classification be assigned a five-digit number, with the first four digits denoting the classification series to which the classification is assigned.

In this instance, the Employer complied with the various statutory requirements, and other contractually based obligations. Montlar displaced into the bargaining unit in accordance with statutory requirements specified in Ohio Revised Code Section 124.321. The displacement protocol employed, moreover, was based on the first four digits of the classification to which she was assigned. The classification number assigned to Pharmacy Supervisor is 65415, while the classification number assigned to the classification of Pharmacist is 65411. After displacing into the bargaining unit, Montlar was able to subsequently displace the Grievant pursuant to a list created in accordance with Article 29, Section 2. Nothing in Article 29, Section 2 requires the Employer to include non-bargaining unit positions on the list of same and similar classifications for 1199 bargaining unit employees.

Article 28.1(A) does not establish a specific bar to an exempt employee's right to displace into the bargaining unit. The reference in this sentence to exempt employees and crediting of State Seniority simply applies to seniority accrual and does not refer to displacements by exempt employees. Also, Regan's attempt to provide parole evidence testimony regarding this provision is viewed as immaterial. The language itself is clear and unambiguous not requiring any clarification through introduction of bargaining history.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract language, statutory

requirements and relevant case law, it is this Arbitrator's opinion that the Employer did not violate the Agreement (Joint Exhibit 1) when it allowed an exempt employee to displace or "bump" a bargaining unit employee when he was laid off.

Ohio Revised Code Section 4117.10(A) states in pertinent part:

> An agreement between a public employer and an exclusive representative entered into pursuant to Chapter 4117 of the Revised Code governs the wages, hours and terms and conditions of public employment covered by the agreement...where no agreement exists or where the agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local ordinances pertaining to wages, hours, and terms and conditions of employment for public employees (Arbitrator's Emphasis).

The underlined portion has generated a great deal of litigation, which has engendered a number of legal principles binding on the Arbitrator and the parties. To prevail over a state or local law, the collective bargaining agreement must conflict with the law and the conflict must be direct.[2] When a bargaining agreement makes no specification about a matter pertaining to wages, hours, terms and conditions of employment, the parties are governed by all state or local laws or ordinances addressing such issues.[3] The statute, moreover, allows statutory law to supplement a collective bargaining agreement where the agreement does not address a matter. Only when the collective bargaining agreement contains specific provisions regarding a particular subject, the terms of the

[2] State ex rel. Canfield v. Frost, 53 Ohio St. 3d 13, 557 N.E. 2d 1206 (1990); Bashford v. Portsmouth, 53 Ohio St.3d 195, 556 N.E. 2d 477 (1990).
[3] State ex. rel. Clark v. Greater Cleveland Regional Transit Authority, 48 Ohio St. 3d, 19, 548 N.E. 2d 940 (1990); Sutton v. Cleveland Board of Ed. 908 F.2d 1339 (6th Cir. Ohio 1992); Reeves v. Union Township Bd. of Trustees, 55 Ohio App.3d 148, 563 N.E. 2d 370 (Clermont 1989).

collective bargaining agreement control all those matters specifically addressed in the Agreement.[4]

Application of these principles to the present matter clearly indicate the propriety of the Employer's administrative action. Here, the Agreement (Joint Exhibit 1) cannot prevail over Ohio Revised Code Section 124.321 because no conflict exists. The Agreement (Joint Exhibit 1) makes no specification, nor does it contain any (Arbitrator's emphasis) specific bar, precluding exempt employees from exercising displacement rights. A specification supporting the Union's theory cannot be found in Article 28-Seniority, Article 29-layoff and recall, nor any other provision.

The Union's reliance on a Section 28.1(A) reference to "State Seniority" as somehow providing a specification about the disputed matter is a bit misplaced. The language is clear and unambiguous and does not require parole evidence to clarify the parties intent. It deals with State Seniority credits for service in an exempt position. It does not deal with a specific provision regarding the particular subject matter in dispute.

Some of the theories proposed by the Union are, indeed, innovative but are not reflected in any of the case law surrounding this matter. The various decisions addressing the issue of whether a matter is "specifically" addressed in an agreement have not distinguished between benefits and other contractual rights. Also, the courts have not ascertained that a per se "conflict" exists when a person's statutory "right"

[4] State ex rel Clark v. Greater Cleveland Transit Authority, 48 Ohio St. 3d 19, 548 N.E. 2d (1990); State ex rel Rollins v. Cleveland Heights-University Heights Bd. of Ed., 40 Ohio St. 3d 123, 532 N.E. 2d 1289 (1988); State ex rel. Parson v. Fleming, No. 92AP-1057, 1993 W.L. 19664 (10th Dist. Ct. App. Franklin, 1-28-93). Leibson v. Ohio Dept. of Mental Retardation & Dev. Disabilities (Cuyahoga Cty, 1992); 84 Ohio App. 3d 751 (1992).

interferes with any person's rights under an Agreement. The notion of "field preemption" where an agreement thoroughly covers certain matters has not, yet, been accepted. What is necessarily for the terms of an agreement to control over a conflicting statute is that it contains specific provisions regarding a particular subject. This places a great burden on any union unless it negotiates some exclusionary language. Without this baseline circumstance, none of the proposed theories seem applicable or persuasive.

The Union proposed that Ohio Revised Code Section 4117.01(C) (10) does not provide any rights to supervisors since they do not fall within the definition of "public employee". Generally, this Arbitrator agrees with this premise but not when applying the requirements of Ohio Revised Code Section 4117.10(A). Even though we are dealing here with a pre-act statute, nothing in the record indicates that enactment of the Ohio Revised Code, nor any other statute, eliminated supervisory rights under Ohio Revised Code Section 124.321. As such, when an agreement is supplemented by a statute because it does not address a matter, it can serve as a vehicle to establish status as a public employee once all the protocols are finalized. An alternative interpretation appears non-sensical because it would render Ohio Revised Code Section 124.321 unenforceable. There is no controlling legal doctrine for an interpretation of this sort. Only a specification clearly and unambiguously negotiated by the parties can avoid the supplement dictated by Ohio Revised Code Section 4117.10(A).

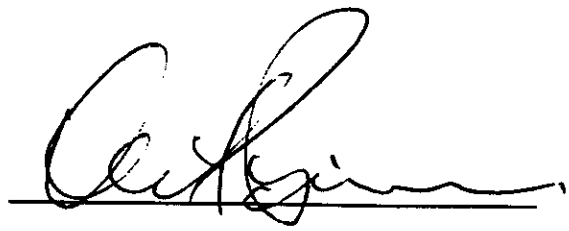
The Unions protestations dealing with article 29.02(6) do not support it's basic premise. The Employer's failure to list supervisors on it's list of similar classification

series is not viewed as strong evidence. Nothing in this provision requires a specification of this sort. The lack of specificity further supports the argument that Article 29 must be supplemented by a statutory provision dealing with supervisors bumping into the bargaining unit.

AWARD[5]

The Grievance is denied. The Arbitrator is sympathetic to the Union's concern, and appreciates the innovative theories provided by the Union's advocate. Here, Article 29 is not "specific" regarding the preclusion of exempt employees from displacing into a bargaining unit position as a result of a lay off. As such, ORC 4117.10(A) requires the grafting of ORC 124.321 into the Agreement since no agreement presently exists or the Agreement makes no specification regarding the disputed matter. An alternative ruling would fly in the face of the majority position regarding "specificity" regardless of the various ways courts have operationalized this construct.

April 7,1997



Dr. David M. Pincus, Arbitrator

[5] After further review, this Arbitrator decided to modify the preliminary Award issued on January 29, 1997. The change involves the elimination of the phrase "a ruling in the Unions favor would uphold a minority of court decisions which infer " specificity " by looking at the totality of any disputed matter. Further reading of the case law indicates to this Arbitrator that no minority opinion exists. Elimination of this phrase does not in anyway modify the underlying, critical principles in support of the preliminary Award and the Award articulated below.