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IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 33-00-(2007-07-08) -0137-01-05

The Ohio Civil Service Employees
Association, AFSCME Local 11

GRIEVANT: Mark Weikle, et al.

AND

The State of Ohio
Sandusky Ohio Veterans Home

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: October 7, 2008

APPEARANCES FOR THE PARTIES

Management:

Marissa Hartley, Office of Collective Bargaining, Management Advocate
Joseph Trejo, Office of Collective Bargaining
Donna Green, Labor Relations Officer

UNION:

Robert Robinson, Ohio Civil Services Employees Association, AFSCME Local
11, Union Advocate
Vanessa Brown, Chief Steward

PROCEDURAL HISTORY

Sandusky Ohio Veterans Home is hereinafter referred to as "Management". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Mark Weikle, et al. is hereinafter referred to as "Grievant".

Grievance No. 33-00-(2007-07-08)-0137-01-05 was submitted by the Union to Management in writing on August 9, 2008 pursuant to Article 25 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Management, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on August 6, 2008 at the Sandusky Ohio Veterans Home. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The hearing was closed on August 6, 2008. The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received the last brief on September 5, 2008.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties did not stipulate to an issue. The Union has framed the issue as follows:

Did management violate the 1994 Grievance Settlement regarding the use of resident workers or Article 1.05 or Appendix N (Pick A Post) of the collective bargaining agreement?

The State has framed the issue as follows:

Did management violate the contract article 1.05 (Bargaining Unit Work) by giving the Veterans Hall Kitchen cooking duties to the Ohio Veteran's Home Resident Workers?

After receiving the evidence and arguments presented, the Arbitrator has determined the issue to be:

Did management violate Article 1 (Bargaining Unit work) or Appendix N (Pick a Post Agreement) of the collective bargaining agreement or the 1994 Grievance Settlement when it gave the Veterans Hall Kitchen cooking duties to the Ohio Veterans Home Resident Workers and changed the work area of the union cooks to Secrest Kitchen? If so, what should the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

Article 1–Recognition

Section 1.05-Bargaining Unit Work

The employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units.

Article 5 – Management Rights

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Article 25- Grievance Procedure

Section 25.02 Grievance Steps, Step One (1) Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

Article 39 – Sub-contracting
Section 39.01 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, programmatic benefits or other related factors.

Appendix N – Work areas for Mental Health, Mental Retardation and
Developmental Disabilities, Department of Youth
Services and Ohio Veterans Home

A. Work Areas for Mental Health, Mental Retardation and
Developmental Disabilities, Department of Youth Services and Ohio
Veterans Home

“Work areas” for the purposes of this memorandum, shall be defined as the smallest subdivision of regular work assignment in the physical setting wherein an employee performs his/her assigned work on a regular basis. (Examples include, but are not limited to, a ward, unit, module, cottage or ½ a cottage, kitchen, laundry, building or facility.)

B. Selection of Work Area Process

Within thirty (30) days of the completion of the specified work area negotiations (as outlined in G), each institution shall post all the work area assignments (as defined in A above) for the positions identified in Appendix N. The postings shall include the classification, exact work area, the regularly scheduled days off pursuant to Article 13 and the shift.

D. Integrity of the Work Area

The Employer shall not change the make-up and basic nature of the work areas so as to subvert any rights guaranteed by this memorandum. If through, necessary reorganization of the institution, the nature of the work area changes, such changes shall be discussed in Institutional Labor/Management Committee meetings. If an agreement cannot be reached at such meetings, the proposed change shall be discussed at Department level Labor/Management Committee meetings. If an agreement cannot be reached, the Union may grieve such work area changes utilizing the applicable provisions outlined in Article 25.07 and Article 25.10 of the Collective Bargaining Agreement.

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Management operates a licensed nursing home for Veterans and a domiciliary for those Veterans who are able to function in an independent living situation, the Veterans Hall. Until August 9, 2007, Management staffed two kitchens: Secrest Kitchen provides services to the nursing home residents, and Veterans Hall Kitchen provides services to the domiciliary. On August 9, 2007, Management initiated the next phase in its reorganization. All food preparation and production by union cooks would take place at the Secrest Kitchen. The cooks were instructed to report to Secrest for work assignments, and they prepared meals on the standard menu, which would then be transported, to the Veterans Hall Kitchen. The stated mission of management was "to create a more cost-effective and labor-efficient department by concentrating on production and staffing in one central location rather than two separate locations." It is the opinion of Management that the benefits from reorganization included one, consistency in the quality of food products served to the residents, two, reallocation of resources, and three, optimization of equipment costs and usage. Also, on said date Management expanded the breakfast short order menu to lunch and dinner at the request of the residents. The grilled menu items included cheeseburgers, hamburgers, hot dogs and French fries. Prior to August 9, 2007, there was no established short order lunch and dinner menu.

The Ohio Veterans Home provides residents with the opportunity to participate in a therapeutic work program and to earn additional income. The therapeutic program positions are non-civil service and they are of a supportive nature. The program has been in effect since June 25, 1990. The Union has historically been supportive of the program. To facilitate fiscal control and aid budgetary management, the work hours are assigned per pay period by each department. Dietary is assigned two-hundred eighty-eight (288) work hours per pay period, and Dom (?) operations is assigned seven-hundred sixty-seven (767) work hours per pay period. Management determines the work assignments of the residents.

Historically, Sandusky Veterans Hall has had one resident cook, David McCoy, who has been working in Veterans Hall Kitchen for as long as anyone can remember. His duties initially started in the tank room but evolved to cooking made to order eggs at breakfast without objection by the Union. McCoy works five days a week for roughly five hours per day, and has been doing so for twenty-two years (22) years. On weekends, the union cooks would then cook the eggs to order. On one occasion, David McCoy was laid off. He was returned to his position when bargaining unit members were recalled to their positions. From June 1, 2007 through June 20, 2008, Mr. McCoy worked 1,417.6 hours.

With the expansion of the short order grill menu to lunch and dinner on August 9, 2007, Management hired additional resident cooks to provide for the preparation, cooking and clean up for the short order menu at lunch and dinner instead of utilizing the union cooks. Clifford Roschel, the resident cook for lunches, works approximately two to three hours per day. From August 5, 2007 through June 20, 2008, Mr. Roschel worked 1,336.9 hours.

With the reorganization of the kitchens, the residents are still served their meals in Veterans Hall Kitchen. The main menu items that are prepared

in Secrest are transported to Veterans Hall Kitchen, and the resident cooks prepare the short order grill menu. Management has learned that the quality of some food products cannot be maintained during the route from Secrest to Veterans Hall Kitchen. On occasion, if the main menu item is a grilled item, the resident cooks prepare said item at Veterans Hall Kitchen.

In 1994, the Union filed a grievance regarding the resident work program. The grievance alleged that the maintenance department had lost five positions, which have not been replaced, and the residents were being utilized to perform bargaining unit work. Based on contract language, Management shall not use resident workers to perform duties normally performed by members of the bargaining unit. The grievance was granted in Step 3 of the grievance procedure.

With the reorganization, no positions have been lost, and overtime is available. The post positions that were previously established in Veterans Hall kitchen were eliminated.

The job duties of the cook as assigned in the job classification are as follows: operates commercial/standard kitchen equipment to cook foods, mixes salad, makes dessert, dressings and breads, prepares hot and cold beverages and special menu foods, slices meat and cheese, makes sandwiches, assembles fruit plates and relish trays, and cleans and cuts vegetables and meats before cooking and mixing, sets up food lines, portions foods on serving lines, sets up trays and carts, packs food for delivery to dining areas and storage, cleans work areas, equipment and utensils. With the reorganization, certain cooking duties have been assigned to the resident cook. These duties include the operation of commercial standard/kitchen equipment, cooking foods and cleaning work area, equipment and utensils.

The Union filed its grievance on August 9, 2007 alleging a violation of Article 1.05 and Appendix N as a result of the resident cooks preparing the

eggs and grilled sandwiches. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

UNION

The Union contends that the grievance is timely and properly before the Arbitrator. The grievance was filed on the same date that the cooks were ordered to report to Secrest. The Union had agreed to the work duties of David McCoy, and said duties were supportive of the other cooks in the Veterans Hall Kitchen work area. When the cooks were relocated to the Secrest Kitchen, said duties were no longer support but independent in nature. In expanding the short order grill menu to lunch and dinner on August 9, 2007, eliminated a post position and the Union the opportunity for overtime.

The Union contends that Management's actions violate Appendix N (Pick a Post) of the contract. The cooks at Veterans Hall Kitchen had negotiated posts and work areas, which were eliminated as a result of this reorganization, but management kept resident cooks at Veterans Hall Kitchen.

The Union contends that Management's actions have caused a loss of potential overtime. The two residents, David McCoy and Clifford Roschel have worked approximately combined hours of 2503.70 since August 9, 2007 through June 20, 2008. These hours should have been available to union cooks.

The Union contends that Management's actions violate the 1994 Grievance Settlement. The 1994 Grievance Settlement found that the work performed by the resident workers should not erode duties normally performed by bargaining unit member. Management could not use resident workers to replace bargaining unit workers. In the instant case,

Management has created a new menu and assigned all responsibilities to the service of the short order menu to the non-bargaining unit members, the resident cooks.

The Union contends that Management's actions erode the bargaining unit. The resident cooks are performing bargaining unit cook responsibilities as assigned in the cook job classification. The resident cook position affects the overtime opportunities that maybe available to the union cooks.

The Union requests the Arbitrator grant Grievance No. 33-00-(2007-07-08) -0137-01-05, direct the Management to reassign three cooks to the Veterans Hall Kitchen, and allow the resident cooks to continue working in the Veterans Hall Kitchen. All union cooks from Veterans Hall Kitchen should be awarded to lost overtime opportunities equal to 150 hours overtime per cook.

MANAGEMENT

Management contends that the filing of the grievance by the Union was considerably untimely, as it was filed well outside the time contemplated in the collective bargaining agreement. The cause of action accrued fifteen years ago, when David McCoy, a resident worker, started cooking as a short order cook.

Management contends that short order grilling is not bargaining unit work. The duties related to the preparation of the standardized menu and special needs menus are the duties normally performed by the bargaining unit, and not short order grilling. David McCoy, a resident cook, has done the short-order grilling for over fifteen (15) years on a regular basis. The union cooks have only done short order grilling during his absence. The lunch and dinner short order grilling is only an extension of the cooking duties provided by David McCoy, and not work normally performed by the bargaining unit.

Management contends that the Union failed to show that there has been loss of bargaining unit cook positions.

Management contends that it is acting within the parameters of the contract per Article 39-Subcontracting. It is the position of Management that the Veterans Hall Kitchen cooking duties associated with the short order line to the Ohio Veteran's Home Resident Workers is permissible under the collective bargaining agreement. The collective bargaining agreement reserves the right of Management to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefit or other related factors. Management asserts that the reorganization provides for consistency in the quality of food products served to the residents by concentrating efforts on the production of one traditional meal with standardized recipes. The reorganization optimizes reallocation of resources. All preparation and production are done simultaneously. Less equipment and workspace are needed. One order guide is used to place all orders for food and product supply. All deliveries of food and supply products are made at one location. Optimization of equipment is achieved, and so forth. The Resident Incentive Therapy Program is an integral part of the operation of the domiciliary, and it allows the resident to maintain meaningful positions, which has been honored by both the Union and Management.

Management contends that the Union failed to meet its burden of proof to demonstrate a violation of the collective bargaining agreement.

Management requests the Arbitrator deny Grievance No. 33-00-(2007-07-08) -0137-01-05.

DISCUSSION

Management made a preliminary objection to the grievance. Management contends that the Union did not file the grievance in a timely manner. According to the Article 25 Section 25.02, all grievances must be

presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence-giving rise to the grievance not to exceed a total of thirty (30) days after the event. Management contends that David McCoy, a resident cook, at Veterans Hall Kitchen has been in that position for over fifteen (15) years, and the Union has never grieved his duties of cooking eggs to order for the other residents. Management therefore contends that the cause of action accrued almost fifteen (15) years ago, and no claim had been timely filed within the ten (10) days after the accrual date.

The Union disagrees. The Union acknowledges that David McCoy has been cooking eggs to order for over fifteen years as a resident worker. But, the position of Mr. McCoy only provided assistance to the union cooks that were stationed in the Veterans Hall Kitchen. When David McCoy was not available or scheduled to work on weekends, the union cooks made the eggs to order.

Management announced its intention to reassign the cook work area to the Secrest Kitchen in phases with the exception of using the facilities to accommodate the short order menus prepared by the resident cooks on July 25, 2007. In its memorandum to the Veterans Hall members on August 3, 2007, the administrator informed the veterans that a 5 or 7-day operation was being evaluated. The grill cooks could not work everyday; the short order line may not be available everyday at every meal. When David McCoy was not available or scheduled off on weekends prior to August 9, 2007, the union cooks made the eggs to order. The Union argues that his absence presented an opportunity for overtime for the union cooks. After August 9, 2007, the opportunity for overtime was non-existent because management stated intention is to utilize the service of the resident cooks or to eliminate the short order line for that particular date. The Union filed its grievance on August 9, 2007.

For the foregoing reasons the grievance is timely filed, and the Arbitrator shall proceed to the merits of the grievance.

The Union contends that Management's actions violate Appendix N (Pick a Post) of the contract. It is not disputed that the union cooks report to Secrest for their work assignment pursuant to the reorganization. The post positions at the Veterans Hall Kitchen have been eliminated. The resident cooks now make a short order line menu for breakfast, lunch and dinner.

Management argues that the change in work areas is not the subject of the grievance. The statement of facts of the Grievance filed herein states "Cooks bargaining unit position work is being done by two (2) residents. David McCoy is making eggs, and Cliff Roschel will grill sandwiches at lunch, and dinner (until someone else is found to do evening grilling). This grill cooking begins 8-9-07. Erosion of Bargaining Unit." Contract articles allegedly violated "1.05. Appendix N, But not limited to..." The grievance thus places management on notice of an alleged violation of Appendix N based upon the circumstances giving rise to the establishment of the short order line menu and staff.

Section D of Appendix N provides in pertinent part that "... if, through necessary reorganization of the institution, the nature of the work area change such changes shall be discussed in Institutional Labor Management Committee meeting. If an agreement cannot be reached at such meetings, the proposed change shall be discussed at Department Labor/Management Committee meetings. If an agreement cannot be reached the union may grieve such work area assignment..." These dietary changes were discussed in the Institutional Labor Management Committee meeting of July 25, 2007. The minutes do not reflect any real objections to the change in the work areas of the cooks. The union did question management about a new pick a post for the Secrest Kitchen with Management responding, "it will have to end up in a Pick a Post (at Secrest)." There was no evidence of any referral

of the issue to the Department Level Labor/Management Committee meeting for further bargaining. Thus, the Union did not preserve the issue at the Institutional Labor Management meeting, failed to raise the issue at the department level, and therefore cannot be raised in the first instance at arbitration.

It is the position of the Union that Management actions have caused a loss of potential overtime. Prior to August 9, 2007, there was one resident cook, David McCoy. When David McCoy was not available or not scheduled to work, the union cook made the eggs, thus creating an opportunity for overtime. There was no evidence introduced at the hearing that established that an opportunity for overtime actually arose and the union cook was denied the opportunity to work the overtime.

The Union did introduce wage verification for David McCoy and Clifford Roschel. From June 1, 2007 through June 20, 2008, Mr. McCoy worked 1,417.6 hours. From August 5, 2007 through June 20, 2008, Mr. Roschel worked 1,331.8 hours. The verification of hours worked by the residents in and of itself does not establish the opportunity for overtime. The Resident Incentive Therapy Program, which has been historically supported by the Union, provides two hundred and eighty eight 288 hours per pay period for resident workers in dietary resulting in projected annual hours of 7,488.00. Management, and not the Union, determines the resident workers' duties. When the Union agreed that the resident worker could assist in the dietary department that included cooking duties as well.

On November 29, 1994, a class action grievance was filed by the Union alleging that "Maintenance Department has lost five positions which have not been replaced as of this date. The trend is looking as if residents are being brought in to do bargaining unit work" in violation of the collective bargaining agreement. The grievance was granted at the Step Three Response with a finding that the use of resident workers at OVH has been a

long-standing practice and is necessary in the rehabilitation of some residents. However, the work performed by the resident workers should not erode duties normally performed by bargaining unit member." The Union argues that Management's actions violate the 1994 grievance settlement.

The situation giving rise to the 1994 Grievance settlement is distinguishable from the instant case. The 1994 Grievance alleged that five positions had not been replaced, and management was using resident workers to perform the work of laid off union members instead of recalling them to their positions. The settlement recognized that due to the supportive nature of the program, resident workers would be performing bargaining unit work. In the instant case, no one has been laid off and there is no evidence that overtime opportunities have been reduced due to the resident work program that was and is still supported by the Union. Consequently, the intent of the 1994 Grievance Settlement has not been violated.

Bargaining unit work represents work that is normally performed by the bargaining unit. The job classification for cook includes the operation of commercial standard/kitchen equipment, cooking foods and cleaning work area, equipment and utensils. In accordance with the classification, these duties are bargaining unit work. With the short order menu, the resident cooks and not the union cooks have been given the duties of operation of commercial standard/kitchen equipment, cooking foods and cleaning work area, equipment and utensils.

Management suggests that under some loose definition that short order grilling is not bargaining unit work (cooking). This short order menu for lunch and dinner is only an extension of short order eggs cooked by David McCoy, the resident short order breakfast cook. Mr. McCoy performed said services for five (5) days out of the seven (7) day week for over a

fifteen (15) year time period; therefore, the bargaining unit did not normally perform the work.

However, the resident cook duties were performed along side the union cooks, and union cooks did in fact cook the eggs when Mr. McCoy was not scheduled to work. This working relationship between the union cooks and the resident breakfast cook did not change the character of the work, but only augmented the goals of the Resident Incentive Work Program, which was historically supported by the Union.

As a general rule, reassignment of work outside the bargaining unit violates the collective bargaining agreement. This view is well established, and has been affirmed by Arbitrator Graham in Grievance No. G-86-1107 citing New Britain Machine Co, 8 LA 720, 722 (Wallen, Knaus, & Kosinki 1947. Arbitrator Wallen opined that:

Job security is an inherent element of the labor contract, apart of its very being. If wages is the heart of the labor agreement, job security may be considered to be its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies.

The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.

So, there does not have to be an actual layoff or displacement of workers to find that the integrity of the bargaining unit had been compromised. The reassignment of work outside the bargaining units may constitute a threat to job security.

Notwithstanding, Section 39.01 of the collective bargaining agreement provides for a subcontracting out of any work Management deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors. The economic and efficiency arguments were

outlined in Management's exhibit 5. A good manager can always articulate reasons to justify economic and efficiency reasons to subcontract out bargaining unit work, and Management has in fact supported the efficient reasons to support giving the Veterans Hall Kitchen cooking duties to the Ohio Veterans Home Resident Workers. Management presented evidence that the minimum wage rate paid to the resident worker versus the civil service employment package, and the general testimony of reduction in equipment cost and operations in operating one kitchen. The Union did not rebut the economic or efficient arguments of Management. Of more importance are the benefits of the Resident Incentive Therapy Program to the veterans. The goals of the program promote individual self worth; provide employment and earnings for the veterans, allow the veterans to become productive, etc. The program has been a long-standing program, which became effective on June 25, 1990, at the Veterans Home. The Union and Management have historically supported the program. The resident cooks offered testimony regarding the need and benefit of the programs.

There was insufficient evidence presented by the Union that the reason for giving the Veterans Hall Kitchen cooking duties to the Ohio Veterans Home Resident Workers and changing the work area of the union cooks to Secrest Kitchen was to erode the bargaining unit. It is undisputed that the residents requested the short order menu, and further recommended that resident cooks continue with the grilling. Apparently, Clifford Roschel, had been cooking at residents' events, and the residents enjoyed his meals. The residents in fact recommended Mr. Roschel to Management as a resident cook.

Members of the bargaining unit were not displaced. There were no layoffs. Members were not deprived of jobs that were normally available to them. It appears that the only change is the work assignment. There was no evidence of any deprivation of any economic benefit to membership. The

1994 settlement grievance has not been violated. No bad faith was established. Further, the short order grilling is de minimis in nature when compared to production quantity work performed by the union cooks as specified in the job classification. The subcontracting in these circumstances has little to no effect on the bargaining unit, and is permissible under Article 39.01.

The Arbitrator finds that management did not violate Article 1 (Bargaining Unit work) nor the 1994 Grievance Settlement by giving the Veterans Hall Kitchen cooking duties to the Ohio Veteran's Home Resident Workers and did not violate the collective bargaining agreement by changing the work area of the union cooks to Secrest Kitchen, and therefore Grievance no. **33-00-(2007-07-08) -0137-01-05.**, is denied.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance no. **33-00-(2007-07-08) -0137-01-05** is denied.

Dated: October 7, 2008

/s/ Meeta Bass Lyons

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio