IN THE MATTER OF ARBITRATION

BETWEEN

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

AND

STATE OF OHIO/
OHIO DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Before: Robert G. Stein
Case # 24-13-20080707-0043-02-01

Grievance:

Grievant: William Ferkin

Principal Advocate for the EMPLOYER:

Laura Frazier, LRM
Ohio Department of MRDD
Division of Human Resources
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Principal Advocate for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Collective Bargaining Agreement" or "Agreement") between the Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2 (herein "FOP" or "Union") and the State of Ohio/Department of Mental Retardation and Developmental Disabilities (herein "Employer" or "MRDD"). The Agreement is effective from July 1, 2006 through June 30, 2009 and includes the conduct that is the subject of the grievance. The parties directly selected Arbitrator Robert G. Stein to hear this case.

A hearing on the matter was held on December 17, 2008 at offices of the Office of Collective Bargaining in Columbus, Ohio. The parties mutually agreed to the hearing date and location and were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions on the issues of arbitrabilty and the merits of the case. The hearing was closed upon the parties' submission of briefs. Both parties have agreed to the arbitration of this matter pursuant to Article 20 of the Agreement.

ISSUE

Arbitrability

The Employer raised the following issues regarding arbitrability of this grievance:

Is the grievance arbitrable given the following: (1) Was it properly filed with the correct department? (2) Was it timely filed? (3) And is this issue within the scope and authority of the arbitrator to determine?

Merits

Is the Department of Mental Retardation and Developmental Disabilities (MRDD) performing Unit #2 Police Officer duties with non bargaining unit employees? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

See grievance

BACKGROUND

The backdrop for this dispute is the MRDD Cambridge Campus (hereinafter "Cambridge"), which prior to July 1, 2008 contained two facilities, one management Ohio Department of Mental Health (MH) and another operated by MRDD [1]. Cambridge contained buildings operated MH and MRDD as well as some buildings that were jointly shared by both MH and MRDD. MH and MRDD operated these facilities for several years.

[1] On July 1, 2008 MH closed its Cambridge facility, all MH employees were laid off and were afforded their rights to bump under the Collective Bargaining Agreement, See Joint Ex. 1

Prior to 1990 the two facilities entered into a formal shared service agreement which specifically included police officer services at Cambridge. In 1990 the MRDD facility at Cambridge removed the police services provision from the shared services agreement and in 1991 the MRDD facility created its own Police Department, which averaged two police officers for its facilities at Cambridge. According to the Employer,

> *"As the Police Department developed, the "Police Officer" duties started to diminish and became rare and infrequent. The role of the Police Officer over time evolved into an administrative position within the facility. Through the modifications and restructuring of the MR Cambridge facility to meet the needs of the residents who live there, the Department of MRDD determined that the need for a Police Department was not essential for the facility as the function of that department was no longer "Police Officer" work. The MRDD Cambridge Facility decided that through attrition the Police Department would be eliminated" (See Employer's Brief, p.3, 4)*

The MRDD Police Department was eliminated in February of 2003. From this date forward the Employer claims that MRDD at Cambridge operated without police services.[2] According to the Union, the MH police officers, without a shared services agreement between MH and MRDD for police serivices, continued to provide police services for both MH and MRDD Cambridge, including, performing door checks, performing finger printing, returning AWOL residents, and performing escorts on and off grounds. (See Union Brief, p. 8). The Union claims that when the MH facility closed

[2] In the words of the Employer, *"Any and all Police Officer services that were being performed at the Cambridge campus for MRDD ended in February 2003." (See Employer Brief, p. 4)*

at Cambridge, police services were then absorbed by administrative staff, maintenance, and outside agencies in violation of the Agreement.

SUMMARY OF THE UNION'S POSITION

Arbitrability

The Union argues the grievance is arbitrable based upon Articles 7 and 20 of the Agreement. The Union rejects the Employer's argument that the grievance is untimely due to the fact that grieving prospective harm violates the well established tenets of labor law. [3] The Union claims the Police Department at MH, which provided services to the entire Cambridge campus, including MRDD, was not eliminated until July 1, 2008 and the grievance was timely filed on July 7, 2008. The Union further asserts that in its grievance it is asking the arbitrator to determine whether a violation of the Agreement has occurred and that the remedy requested by the grievance *"has a rational nexus to the contract"* (See Union Brief, p. 4) The Union asserts it is simply asking the arbitrator to enforce the Collective Bargaining Agreement.

[3] See Article 20.05 which requires class action grievances to be filed within 20 days of the date on which any of the affected grievants knew or should have reasonably could have had knowledge of the event giving rise to the class grievance.

Merits

The Union argues that the admission by the Employer that it has outside agencies, state troopers, and local authorities perform duties that were previously performed by bargaining unit members is and of itself sufficient evidence to find in the favor of the FOP in this matter. The Union asserts that the Employer's need for police services did not disappear on July 1, 2008, but were moved to other classifications outside of the bargaining at the MRDD Cambridge facility. It cites Article 7.03 of the Agreement which states in pertinent part:

"Management shall not attempt to erode the bargaining unit, the rights bargaining unit employees or adversely affect the safety of employees."

The Union argues that in the instant matter the Employer is in violation of this provision and adds that in the past the Employer has on several occasions attempted to erode the bargaining unit. [4] The Union rejects the Employer's argument that there is no longer a need for police services at the MRDD facility at Cambridge as implausible in light of all other existing facilities. It cites the Union Ex. 5, which shows that all other MRDD facilities in the state of Ohio, with the lone exception of Cambridge, have FOP police officers assigned to them.

Based upon the above and the evidence and arguments provided in the hearing the Union argues the grievance should be granted.

[4] The Union cites Joint Ex. 9, the Arbitration Award by Harry Graham, as one example in support of this assertion.

SUMMARY OF THE EMPLOYER'S POSITION

Arbitrability

The Employer first argues that the grievance was improperly filed with the MRDD, rather than with MH, who was the employer of the police officers at Cambridge prior to July 1, 2008. If the bargaining unit employees believed that a violation of the Collective Bargaining Agreement occurred when MH closed, they should have filed a grievance with MH and not MRDD. The Employer also states the grievance is untimely if it was to be filed with MRDD and not MH. The Employer argues that when the Police Department at MRDD Cambridge was eliminated in 2003, the Union needed to file a grievance within the contractual time limits from the date of closing in February of that year. Finally, the Employer asserts that the remedy being requested by the Union, to hire a minimum of five (5) police officers is beyond the authority and scope of the arbitrator.

Based upon the above and the evidence provided in the hearing the Employer argues the grievance is not arbitrable.

Merits

The Employer argues the Union failed to present evidence of a shared service agreement between MH and MRDD. It argues that from February 2003 through July 1, 2008 the Union did not provided any

evidence of a shared service agreement for police services at the Cambridge campus. In support of its arguments the Employer cites the testimony of Cheri Stevens, Operations Director for the MRDD Cambridge.

Secondly, the Employer asserts that the testimony of Union witnesses was weak and unpersuasive in establishing any claim that police services transpired for MRDD Cambridge since 1990. Although, MH Cambridge Officer Thompson testified that although he responded to MRDD calls, he responded on his own and no one from MRDD Cambridge management asked him to respond. The Employer also points out that this happened only once and it was a incident where the employee affected wanted to have a state trooper called.

Ms. Stevens also testified that MH Cambridge police officers acted like "good neighbors" and would occasionally respond to calls at MRDD Cambridge, but were never requested to respond. Ms. Stevens, also pointed out that any employee within either MH or MRDD would respond to each others needs regardless of their classification. The Employer also argues that the Union also failed to provide and evidence or testimony that since July 1, 2008 non bargaining unit employees at MRDD Cambridge were performing police services in violation of the Agreement.

In summary, the Employer asserts the Union failed to present a prima facie case and that its allegations as to the Employer violating the Agreement remain unsubstantiated. The Union did not provide any

financial statements, legal agreements, documentation or witnesses to validate its allegations in this matter.

Based upon the above and the evidence provided in the hearing the Employer argues the grievance should be denied.

DISCUSSION

Arbitrability

The process of arbitration is intended to permit parties to have their employment issues resolved in a less formal manner than in the judicial system. Reliance upon procedural technicalities in determining a grievance, instead of addressing the substantive issues, does little to further the administration of the parties' Agreement. National policy in the United States favors the arbitration and resolution of existing and recognized disputes. The presumption of arbitrability is so strong that the U.S. Supreme Court has resolved that "doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.* 363 U.S. 574, 80 S.Ct. 1347 (1960). The presumption of arbitrability is particularly strong when the issue is a procedural one. *St. Vincent de Paul Residence*, 199 LA 1133 (Gregory 2004). Arbitrators have often determined that doubts as to the interpretation of a contractual time limitation should be resolved in favor of arbitration. *City of Rock Island (Ill.) and Am. Fed'n of State, County, and Mun. Employees (AFSCME), Council 31, Local 988*, 116

LA 1035 (Wolff 2002); *Hayes-Albion Corp.*, 73 LA 819-823 (1979); *Air Force Logistics Command*, 85 LA 1179, 1180 (1985); *Los Angeles Community College Dist. and Am. Fed'n of Teachers, College Guild, Local 1521*, 103 LA 1174 (Kaufman 1995).

In the instant matter the nature of the alleged violation is on going in nature, in that the Union is claiming that bargaining unit work is being performed by the other than bargaining unit employees on a regular basis. Therefore, alleged violations are being constantly committed rendering arguments of timeliness moot. In addition, without exploring the merits of this case there is insufficient evidence to render a decision on the Employer's assertion that the Union should have filed a grievance no later than February of 2003. Furthermore, given the initial identified asserts in this case the jurisdiction of the arbitrator appears to be properly limited to a determination of whether there has been a violation of the Collective Bargaining Agreement, which is well within the scope and authority of an arbitrator to determine.[5] Based upon the above, I find the grievance to be arbitrable.

Merits

The Agreement's "Management Rights" language, included in Article 6, clearly recognizes that the Employer has retained the right to

[5] See Article 20.08, Section 4 and 5

operate its work and business and direct its workforce. It has been recognized by arbitrators generally that the Employer retains its vested management rights so long as its exercise of those discretionary rights is in compliance with the Agreement's provisions and is not unreasonable, arbitrary, capricious, or motivated by improper means or reasons. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264*, 115 LA 190 (Landau 2001). Arbitrators generally have recognized that management has broad authority to control its methods of operations, provided that, by exercising its authority, it does not violate the collective or individual rights of the employees under a collective bargaining agreement. *PACE Locals 7-0087/96 and Kimberly Clark Corp.*, 01-1 Lab. Arb. Awards (CCH) P 3725 (Knott 2001). "If a management decision is taken in good faith, represents a reasonable business judgment, and does not result in subversion of the labor agreement, there is not a contract violation." *Teamsters, Local 117 and Bergen Brunswig Drug Co.*, 00-1 Lab. Arb. Awards (CCH) P 3385 (Axon 2000), citing to *Shenango Water Co.*, 53 LA 741, 744 (1969).

> It is generally recognized that the primary function of an arbitrator in construing a contract is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties' intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result.

NSS Enters., Inc. and Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 12, 114 LA 1458 (2000).

The arbitrator must apply contracts and collective bargaining agreements as they have been written and adopted by the parties' mutual consent to provide the groundwork for their on-going reciprocal relationship. Ohio courts have consistently noted that "[t]he overruling concern when constructing a contract is to ascertain and effectuate the intention of the parties." *Aultman Hosp. Ass'n and Cmty. Mut. Ins. Co.* (1989), 40 Ohio St.3d 51, 544 N.E.2d 244. The primary search is for a common meaning of the parties, rather than to impose upon them obligations contrary to their own understanding. *Graphic Communications Union Dist. Council No. 2 (Local 388) and Weyerhaeuser Co.*, 04-1 Lab. Arb. Awards (CCH) P 3843 (Snow 2003). An arbitrator's decision cannot be based upon competing equities or sympathies. Arbitrators cannot search for inferences and intentions which are not apparent and not supported by contractual language documenting any purported intention.

It is clear from the language contained in Article 7.03, and as reaffirmed by the Award of Arbitrator Graham in 1990, that while management has considerable latitude in operating its facilities and directing its workforce, as mutually agreed to by the parties in Article 6 of the Agreement, Article 7.03 clearly acts to modifies these rights in that *"Management may not attempt to erode the bargaining unit...."*

I do not agree with the Union's argument that in this case the periodic use of the State Highway patrol, which is required by Administrative Code to be the police agency for state agencies, violated the Agreement. However, it is clear, as argued by the Union, that the parties to the Agreement are the State of Ohio and the Fraternal Order of Police, Inc. (See Article 1).

The case presented by the Union was not a strong one, but in the aggregate it was an adequate one. After a careful review of the evidence and testimony, I find that there is sufficient proof that between February of 2003 and July 1, 2008 bargaining unit members were providing police officer services to MRDD Cambridge. Based upon the testimony of Union witnesses, police officers from MH Cambridge, even in absence of a shared services agreement, continued many of their duties that benefited MRDD Cambridge. The testimony of Officers Stoney and Thompson, while not detailed was nevertheless credible and sufficient in the context of all the evidence and testimony to substantiate that police services were regularly extended to MRDD Cambridge. And, while witnesses Stoney and Thompson did not provide many examples of notable incidents (arrests, attacks, etc.) this does negate the value of their testimony. Much police work entails endless hours of uneventful patrol and surveillance Stoney and Thompson testified to several duties performed for

MRDD Cambridge. Doors were checked, grounds were patrolled, AWOLs were returned, finger prints were taken, etc. (See Union Ex. 1)

Bolstering the testimony of Officers Stoney and Thompson was the testimony of Employer witness Cheri Stevens under cross-examination. Stevens testified that MH police officers had keys to MRDD buildings, did finger printing as late as August of 2008, and sometimes patrolled MRDD areas and checked MRDD buildings. Other duties, by the Employer's own admission were parceled out to administrators and other employees in violation of Article 7.03 of the Agreement. In the Employer's brief, the Employer asserts the following, "*The role of the Police Officer over time evolved into an administrative position within the facility.*"[6] The meaning of this phrase was not clear, even in the context of restructuring stated by the Employer. Cutting through the rhetoric, one can reasonably speculate that MRDD Cambridge police services were "evolved into administrative work."

While the Employer certainly has the right to reorganize and restructure its operations to best meet its mission, it is one thing to determine there is no need for police services and another to operate in a manner that continues these services in violation of Article 7.03. The statement by the Employer that, "*Any and all Police Officer services that were being performed on the Cambridge Campus for MRDD ended in*

[6] See Employer Brief, p. 3

February of 2003"[7] ignores the reality of a continuation of many police services by Police Officers from February 2003 until July 1, 2008. These services may never have been officially requested by MRDD Cambridge management, but this "good neighbor" approach had bargaining unit employees perform many police officer duties on behalf of MRDD, with no objection filed by MRDD or surprisingly by MH. The very existence of police officers on campus benefited MRDD, particularly when they were visible in and around MRDD buildings. Knowing that "good neighbors' who just happened to be professional police officers would respond to calls obviated a need by MRDD Cambridge management to take other measures to make sure they had necessary police services.

On July 1, 2008 the good neighbors moved and coupled with management's admission that the evolution of these services into administrative positions occurred earlier in the decade and were not abated after July 1, 2008, certainly raises the specter after July 1, 2008 finger printing, checking doors, patrolling grounds, and protecting visitors at MRDD Cambridge is being done by employees and non employees outside of the bargaining unit.

> An established principle in labor relations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances

[7] See Employer Brief p. 4

> surrounding the alleged conduct violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement

Am. Std., Paintsville, Ky. and United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH) P 3213 (Allen 2005).

After carefully reviewing all of the facts concerning this particular matter, all of the evidence included in the record, and all of the arguments submitted by the parties, the arbitrator here finds that the Union, as the grieving party in this non-disciplinary matter, has met its evidentiary burden of establishing by a preponderance of the evidence its claim that the Employer has violated the Agreement. *Kennedy v. Walcutt* (1928), 118 Ohio St. 442, 161 N.E. 336; *City of Cincinnati*, 60 LA 682 (Bell 1977).

The Employer claims in defense that it no longer needs police services at MRDD Cambridge and in essence never needed the "volunteer" MH provided services from February 2003 to July 1, 2008. Based upon the evidence submitted by the Union this would set MRDD Cambridge apart from all other MRDD facilities in the state of Ohio who have FOP assigned officers. However, as stated above the Employer has a right to operate its facilities if in good faith it desires to operate MRDD Cambridge with no on campus police protection it may do so. However, what it cannot do is to act in a manner that subverts its obligations under the Collective Bargaining Agreement and attempt to have non

bargaining employees perform the work of the bargaining unit in violation of Article 7.03.

AWARD

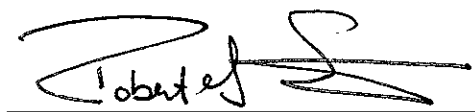
The grievance is sustained to the extent that the Union has proven that the Employer violated Article 7.03 prior to July 1, 2008. However, from the date of July 1, 2008 to the date of the grievance, July 7, 2008, there was insufficient evidence submitted into the record to sustain a finding that Article 7.03 continued to be violated.

The Agreement is between the State of Ohio and the FOP and the Employer is directed to comply with all of its provisions regardless of location. The Employer has the managerial right to determine whether it will have police officers assigned to the MRDD Cambridge facility. However, in operating the MRDD Cambridge facility the Employer must cease and desist from having any non bargaining unit employees or outside contractors perform bargaining unit police officer duties at MRDD Cambridge in violation of Article 7.03.

As provided for in Article 20 of this Agreement, the Union has the right to continually enforce the Agreement as stated in this Award.

The arbitrator shall maintain jurisdiction over the implementation of this Award until a successor labor agreement in negotiated.

Respectfully submitted to the parties this 20th day of March 2009.



Robert G. Stein, NAA Arbitrator