

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 24-07-20100824-0017-05-02
GRIEVANT: DENNIS SALISBURY

THE STATE OF OHIO

The Employer

and

THE FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

The Union

OPINION AND AWARD

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LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES

For the Employer:

Laura Frazier, Advocate
Antoinette Wallace, Co-Chair
Marissa Hartley, OCB, 2nd Chair
Colleen O'Connor, GDC HR Director/Managment Representative
Tim Rowe, Observer
Kevin Davis, Superintendent
Esther Dawn Hart, Mental Health Admin. 3

For the Union:

Paul Cox, Chief Counsel
Joel Barden, Staff Representative
Dennis Salisbury, Grievant
Renee Engelbach, Paralegal
Bill Ferkan, Witness
Chris Withee, Witness

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on November 23, 2010, at the conference facility of the employer in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and separated and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

The following grievance was filed concerning the matter at hand:

“The State is effectuating a reduction in force of the Police Department at Gallipolis Developmental Center by abolishing the position currently occupied by PO II, Dennis Salisbury, contrary to Article 35 Section 1; Article 7 Section 3, this results in an erosion of the bargaining unit.”

To that, a Step 2 answer was filed. That answer stated the following:

“The parties met on 08/23/10 to discuss the grievance. FOP representative, Joel Barden was present and represented the Grievant. Colleen O’Conner, Human Resources Manager, represented the center. Antoinette Wallace

was the Hearing Officer. There were no procedural issues, therefore the meeting was properly constituted.

Issue: Article 35, Section 1; Article 7, Section 3.

Union Position: The Union contends that the Grievant was laid off and his duties were redistributed to other staff outside of the bargaining unit.

Management Position: Management stated there was no contract violation with regards to the layoff process.

Discussion/Conclusion: The union stated several violations it believed management committed related to the layoff of the Grievant. The Union offered that while management stated the layoff was for reasons of efficiency, it violated Article 7.03 by redistributing the duties to other staff that were outside of the FOP bargaining unit. The Union also cited the violation of 35.01 because management did not follow the Ohio Revised Code 124.321 and Administrative Rule 123:1-41-01. In addition, the Union cited several arbitration cases regarding duties being transferred to a newly created position and lack of work. The Union concluded by giving examples of the Facility calling the Gallipolis Police Department or the Ohio Highway Patrol to completed(sic) FOP duties. Management stated that the layoff was pursuant to the Ohio Revised Code 124.321 and Administrative Rule 123:1-41-01. In addition, Management contends that the duties were redistributed to the remaining FOP Police Officers and that the FOP Police Officers worked collaboratively with the Gallipolis Police Department and the Ohio Highway Patrol. Based on the information provided, the grievance is denied."

From the evidence it appears that the grievant was a police officer at the Gallipolis, Ohio Developmental Center. He was one of three members of the bargaining unit and amongst his duties was to provide coverage of the grounds seven days a week, twenty-four hours a day. The grievant's position was abolished and the rationale for the job abolishment as rendered by the employer revealed the following:

“SUPERVISORY STAFF, ADMINISTRATIVE STAFF, OPERATIONAL STAFF

The decrease in the resident census, reduction in staff and closure of buildings has also created an overlap of duties with supervisory staff, administrative services, and operational services that are provided to the facility. While the decision to abolish the positions is difficult, it is the logical conclusion based on the need to seek efficiencies within the current economic climate. The reduction of supervisory staff, administrative services, and operational services will create a positive efficient result within the facility. The duties that are assigned to the other staff involved will be adequately redistributed and incorporated into the remaining positions of the facility.”

In a letter from the Director of the facility to a state representative who made inquiry into this matter, the following language was noted:

“Dear Representative Evans:

Governor Strickland asked me to respond to your letter of April 29, 2010, regarding layoffs at the Gallipolis Developmental Center (GDC).

As a result of the biennial budget passed in July 2009, GDC is one of six developmental centers expected to reduce census by June 30, 2011. The biennial budget provides GDC with funding to operate with 48 fewer residents. Since July 2009, staff at GDC have transitioned, 35 individuals, by their own choice, to various homes throughout the community. The Ohio Department of Developmental Disabilities (DODD) will be closing Building 42 by June/July of 2010.

As a result, we will be reducing the number of staff we have working at the facility. There are currently 484 staff at GDC. Some staff at GDC received layoff notices on April 12, 2010. We have anticipated that there will be 36 layoffs from GDC staff positions; however, by offering a two-year Early Retirement Incentive Program for GDC staff only, we hope

enough staff will take this option to minimize the impact on the number of people laid off. Mark Seifarth, Legislative Liaison for DODD, explained the details of this ERIP in an email to your legislative aide April 22, 2010.

GDC Police Officer Dennis Salisbury, has, in fact, been notified of our intention to lay him off effective July 16, 2010. As we evaluated our needs and our budget reduction goals, we determined that it was not necessary to have a Police Officer on third shift. Fortunately, GDC is in a low crime area and we have supervisors on shift 24 hours/7 days a week who can quickly access local police support should it be needed. While we empathize with Mr. Salisbury's situation, layoffs can not be avoided in the economic climate.

The Department places a high value on the dedicated employees of our Developmental Centers. These situations are never easy, but we are doing everything we can to be honest with employees and notify them of potential impacts as soon as possible. We appreciate the continued support from, and collaboration with, our many partners in service to Ohioans with developmental disabilities, all of whom are similarly challenged by the current economic environment. Please do not hesitate to contact me with any questions or concerns as we transition during this difficult time.

Sincerely,
/s/ John L. Martin
Director"

Now it is noted from that letter, as well as the rationale document, that the facility would be governed by supervisors who can quickly access local police support should it be needed. The grievant was transferred to the Columbus Ohio developmental center and incurred expense in driving from his home duty station to Columbus.

There was evidence placed into the record to show that others at the facility had been doing

the duties, to some degree, of the grievant in this particular matter. As a matter of fact, argued the union, the duties of the grievant were never abolished but rather directed to others at the facility who were not members of the bargaining unit. The Gallipolis Police Department balked at accomplishing the workload that a third member of the security staff of the GDC should have been accomplishing. The Gallipolis Police Chief noted that activity of the staff caused the most dangerous situation when they were confronting potential criminals and had not received any training whatsoever in that regard.

The evidence was clear that the workload of the grievant in this particular matter was being accomplished by others at the facility who were not in the bargaining unit of the grievant. The contract involved in this particular matter, in pertinent part, states as follows at Section 7.03:

“7.03 Bargaining Unit Work

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

Also placed into the record were several decisions of arbitrators who were involved in similar statements of facts, all of whom found in favor of the union. The parties are specifically directed to Case No. 23-08-900516-0422-05-02 in which the following was stated:

“To the extent that intermittent employees are at work, they too are performing work properly within the province of bargaining unit personnel. If the State can employ intermittent employees in lieu of bargaining unit

members it calls for no stretch of the imagination to conceive of a situation where the bargaining unit might well disappear. If the State seeks to layoff people it may do so, provided that the proper procedures specified in the Agreement are followed. It may not have duties that are properly performed by bargaining unit members performed by people who do not belong to the bargaining unit.”

The parties are also directed to a bevy of cases, the lead case being 23-03-940120-0402-0502 in which the following was stated:

“In this situation the findings of the Court of Appeals in In re Appeal of Woods 7 Ohio App. 3d 226 (1982) bear recitation. In Woods the Court noted:

A job is not abolished under circumstances where the appointing authority simply transfers that job’s duties to a new employee to perform. State, ex rel Stine v. McCaw (1940), 137 Ohio St. 13 [17 O.O. 303]. What the evidence does support is the conclusion that the jobs of Woods and Hornsby were merged or consolidated into one position in which the same duties were to be performed under slightly different conditions and that the duties of that merged position were handed to a recently hired employee, and the merged position was given a new title. The result was that one position was abolished.”

Another such case was found at Case No. 24-13-20080707-0043-02-01 in which the following was stated:

“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(sic) 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 not 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)”

Thus, in this particular case, there is ample evidence that supervisory personnel did accomplish some of the work that the police were accomplishing at the facility prior to the alleged abolishment of the position at the GDC. Work that is allegedly abolished is never accomplished again. It does not mean that the work may be passed around to others at the facility because that is not abolishment of the workload.

It was upon these facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

There is clear evidence that the work that was accomplished by the grievant herein at the GDC was being accomplished by others at the GDC. As a matter of fact, the rationale for job abolishment reiterates in the cited section that, “Duties that are assigned to other staff involved will be adequately redistributed and incorporated into the remaining positions in the facility.” Now that

language not only attempts to abolish the workload of the grievant and his classification but contemplates that others in other classifications will be accomplishing the workload. That is hardly an abolishment of a workload. When work is redistributed to others, that is exactly what occurs. It is a redistribution.

Furthermore, there is a cited section of a letter written by the director in which it is stated that supervisors on shift can quickly access local police. So, not only was the work redistributed, but it was contemplated. That is not an abolishment of the workload.

The contract mandates that management shall not attempt to erode the bargaining unit. Using others to accomplish the workload of the transferred grievant is an attempt to erode the bargaining unit and, as such, cannot be tolerated under the terms of the written agreement by and between the parties. There is ample evidence that the work of the bargaining unit work was given to others and, as such, the grievance must be granted.

There is an issue of award in this particular case. The award must be based upon the case of *Stotts v. Ohio Department of Transportation* (1987) in which not only is the grievant transferred back to his facility at Gallipolis, but should also be paid for travel time at the rate of time and a half over 40 hours per week and a calculation should be made as to the number of hours and the rate per mile allowed by the State of Ohio.

IV. AWARD

Grievance granted to the extent ordered in the body of this document. Grievant is to be transferred back to his prior employment, be paid mileage at the state rate for trips he made to his reassignment and time and a half for hours over 40 during the improper transfer. The arbitrator shall retain jurisdiction for 60 days to resolve any payment problems.



Marvin J. Feldman, Arbitrator

Made and entered
this 12th day
of December 2010.