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IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of **FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.** **and** **STATE OF OHIO, DEPARTMENT OF DEVELOPMENTAL DISABILITIES** **Case Nos. 24-14-20120507-0006-02-01 and 24-09-20120514-0010-05-02** **Grievants: William Ferkan, Rodney Fry, et al.**	**ARBITRATOR'S OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC. ("the FOP") and the STATE OF OHIO ("the State" or "the Department") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed there are no procedural or substantive impediments to a final and binding decision by the Arbitrator.

Hearing was held October 23, 2012 in Columbus, Ohio. Both Parties were represented by advocates who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both Parties submitted timely post-hearing briefs on or before November 30, 2012.

APPEARANCES:

On behalf of the FOP:

PAUL L. COX, Chief Counsel, FOP, OLC, Inc., 222 E. Town St., Columbus, OH 43215.

On behalf of the State:

MELINDA M. ARMSTRONG, Labor Relations Administrator, Ohio Department of Developmental Disabilities, 30 E. Broad St., 18th Fl., Columbus, OH 43215.

ISSUE

Did the State violate the Agreement when it implemented an abolishment of the Police Officer 2 positions at the Department of Developmental Disabilities? If so, what is the appropriate remedy?

RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

. . .

ARTICLE 6 – MANAGEMENT RIGHTS

The Labor Council 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.

Additionally, the Employer retains the rights to: …2) determine the number of persons required to be employed or laid off; …6) determine the work assignments of its employees; …12) transfer or subcontract work;….

ARTICLE 7 – UNION RECOGNITION AND SECURITY

7.01 Bargaining Unit

The Employer hereby recognizes the Fraternal Order of Police, Ohio Labor Council, Inc. as the sole and exclusive bargaining agent for the purpose of collective bargaining on all matters pertaining to wages, hours, terms and other conditions of employment for employees in the bargaining unit. The bargaining unit for which this recognition is accorded is defined in the Certification issued by the State Employment Relations Board on December 9, 1985 (Case No. 85-MF-12-4750). This Agreement includes all permanently appointed full and part-time employees employed in classifications and positions listed in Appendix A of this Agreement; and employees appointed as "Established Term" employees. The Employer shall notify the Employee Organization of any changes in the classification plan, which directly affects the classifications included in this unit, sixty (60) days prior to the effective date of the change or as soon as the changes became known to the Employer, whichever comes first.

…

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.

…

…

…

ARTICLE 35 – REDUCTION IN FORCE

35.01 Layoffs

Layoffs of employees in the bargaining unit may only be made pursuant to the Ohio Revised Code 124.321 et seq. and Administrative Rule 123:1-41-01 et seq. except as modified by this Article. In cases of any layoff, the parties commit to working together in an attempt to place laid off workers in appropriate

positions.

35.02 Guidelines

The Labor Council will be notified in writing of the targeted classifications/positions involved in the layoff. Bargaining unit seniority as defined in Article 34 shall be used to determine the order of layoff, recall, and reemployment. The use of retention points is hereby abolished. Performance evaluations will not be a factor in layoff.

35.03 Bumping or Displacement

Employees laid off or abolished shall be afforded their available bumping/displacement options.

…

…

35.07 Class Modernization

In reference to Appendix A of this Agreement in the event that any of the specifications for those classifications listed in Appendix A were modified by classification modernization, it is the intention of the State that those classifications will continue to be covered by the existing language of Article 35 and shall be treated as the same like classifications.

. . .

FACTS

On or about April 30, 2012, the State filed a rationale seeking to conduct a job abolishment for Police Officer 2 (PO 2)[1] and Security Officer 1[2] positions with the Department of Developmental Disabilities. The State, pursuant to ORC 124.321(D)(2), stated the reason for the job abolishment was "economy." The

[1] The record indicates PO 1s were POs in their first year of employment with the Department; the record does not indicate the State sought to abolish the PO 1 position, likely because all the POs at the Department were PO 2s.

[2] Security Officers are members of the OCSEA bargaining unit. This Opinion and Award directly addresses only the FOP grievances from the PO 2s.

State claims a cost savings in salary, benefits, and equipment. The layoff was effective June 15, 2012. Twenty-six PO 2s were affected by the job abolishment. Some of them accepted non-bargaining unit exempt Program Administrator (PA) positions with the Department. Ultimately, twelve PO 2s were laid off, two of whom were offered other positions within the Department, but declined.

The State maintains it has implemented a new business model at the Department, more in line with current needs. The model focuses on Major Unusual Incident Investigations (non-criminal investigations of abuse and neglect), Unusual Incident Investigations (non-criminal investigations of minor injuries), non-criminal administrative investigations, and other administrative tasks. The model includes a supervisor and one or two PAs at each of the Developmental Centers.

The two grievances share the same Statement of Grievance and a similar remedy:

> **Statement of Grievance**
> **On 4/30/12 the Department of Developmental Disabilities (DODD) announced it is abolishing all Police Officer positions at all DODD Developmental Centers. This action erodes the bargaining unit. The state's rationale of efficiency, cost savings and lack of work to be performed by law enforcement officers is incorrect. The state's proposed model to replace 26 Police Officers with 29 exempt administrative positions contradicts the "Rationale for Job Abolishment for Reasons of Economy" provided by the state. The rationale is also incorrect in the statements regarding the need for Police Officers at the Developmental Centers.**
>
> **Remedy Requested**
> **To maintain and/or restore the abolished positions, return all Police Officers to their positions and to make Police Officers whole for all time lost.**

The State's Second Step grievance response provides in pertinent part:

> **Management Position: The Employer filed rationale for reasons of economy. The Employer realizes a cost savings from salary and benefits as well as equipment, etc., by abolishing Police Officers 2, Security Officers 1 and Police Chiefs. This does not constitute erosion of the bargaining unit as no police-specific duties shall be performed and those administrative duties that remain are more in line with the Program Administrator 1 Classification. The only exception is the Columbus Developmental Center, due to its location, and the Ohio Department of Public Safety's FOP Unit is providing these services.**
>
> **Conclusion: The Union alleges the Employer is in need of a police force. As detailed in the rationale, the number of police officers has declined by 41% since 1997. The Columbus DC is the only DC which had an increase in police officers. As mentioned, the FOP Unit of the Department of Public Safety will provide police services at the Columbus DC.**
>
> **There is little to no criminal activity on DC grounds. Warrants are not issued, tickets are not issued and arrests are not made. As a whole, there is not a need for police-specific duties. Through the years the Police Officers have evolved into administrative positions. They are given numerous administrative tasks since there is little to no police work to be done. Many police officers conduct administrative investigations at the DCs but this is not a police-officer-specific duty.**
>
> **The rationale was filed in accordance with the Ohio Revised Code, Ohio Administrative Code and Article 35.01. The Union was notified pursuant to Article 35.02. No facility was closed as referenced in Article 35.06. As such, there is no contractual violation and the grievance is denied in its entirety.**

POSITIONS OF THE PARTIES

FOP Position

Did the State actually abolish the Police Officer 2 jobs? If the work the PO 2s were doing is still being done, no abolishment occurred.

The FOP and the State have been fighting the battle over layoffs and abolishments for almost 25 years. The State's arguments have been presented to several different arbitrators. With the exception of one, each of those arbitrators found in favor of the FOP on this issue. Even the one decision favoring the State contains language favorable to the FOP.

In 1990, Arbitrator Graham found the duties of the police officers were being performed by non-bargaining unit employees; he sustained the grievance.

In 1994, Arbitrator Graham found that in order to establish a job abolishment, the State must meet the tests found in the Ohio Revised Code and Administrative Code. The ORC and OAC permit job abolishments for lack of work and economic reasons. Just as in the instant case, the State did not present evidence to show lack of work or lack of funds. Rather, as it did in the instant case, the State relied upon restructuring the facility, a decrease in clients, and a decrease in revenue for its arguments. In the 1994 case, the State had created a new classification of safety officer. Those officers began performing tasks previously performed by members of the FOP bargaining unit. Arbitrator Graham pointed out the duties of investigations, preparing reports, and making recommendations to enhance safety at a facility are duties of a police officer. He held, "It cannot serve to justify a job abolishment to transfer tasks to a new

position and abolish the prior position under the guise of efficiency."

Transferring the duties of employees from one classification to different classifications does not equate to an abolishment. *See In re Appeal of Woods*, 7 OhioApp.3d 226 (1982). Transferring the duties of employees from one classification to different classifications outside the bargaining unit results in an erosion of the bargaining unit in violation of Article 7.

In 2009, Arbitrator Stein held the State cannot "act in a manner that subverts its obligations under the collective bargaining agreement and attempt to have non-bargaining unit employees perform the work of the bargaining unit in violation of Article 7.03." In the instant case, the work of the bargaining unit is being performed by persons outside the bargaining unit on a daily basis.

In 2010, in a decision that was confirmed by the Court of Common Pleas for Franklin County in 2012, Arbitrator Feldman found work had not been abolished but had been redistributed to other employees. He based this conclusion on language contained in the statement of rationale supplied by the State in which it admitted to redistributing bargaining-unit duties to other employees at the facility. Similarly in the instant case, the statement of rationale contains an admission by the State that "the majority of these duties are currently performed by a combination of staff." The rationale also states, "the Program Administrator is the most appropriate classification as it encompasses a broad range of duties and aligns current duties with the appropriate classification." It further states the roles of the police officer have "evolved into administrative positions in DCs." As occurred before Arbitrator Feldman, this statement amounts to a clear admission

by the State that it is violating Article 7. Arbitrator Feldman held:

> **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.**

The language of Article 7 is mandatory, not permissive. Protection for the members of the bargaining unit was specifically fought for by the inclusion of Article 7 in the Agreement, which forbids erosion of the bargaining unit.

In 2011, though Arbitrator Nelson denied the grievance, he found there was a significant overlap in the duties of police officers and administrative assistants at the Mount Vernon Developmental Center. "If…there are fewer PO 2s doing PO 2 work and other people are doing the work, this establishes a violation of Article 7, Section 7.03." In the instant case, it is clear the jobs once performed by the PO 2s are still being accomplished today. Their duties have been absorbed by other employees at the facility. Even in accordance with the Nelson Award, the State has violated Article 7.

Job security is the soul of a collective bargaining agreement. Transferring the duties of police officers to administrative personnel or other non-bargaining unit employees constitutes an erosion of the bargaining unit. Article 7 precludes the transfer of bargaining unit work to non-bargaining unit employees. Article 7 is rendered meaningless if the State is permitted to accomplish its purpose to erode the FOP bargaining unit.

The job description for PO 2s states they are responsible for patrolling the grounds, regulation of traffic and parking, safety, crimes investigation and

reporting safety hazards, etc.. These officers always have been responsible for Major Unusual Incidents (MUIs) and Unusual Incident (UIs). They have been responsible for door checks and fire safety, traffic control, investigations of employees, investigations of abuse and neglect and criminal activity for years.

Though Virginia Whisman, Deputy Director of Residential Resources for DODD, testified she knew of only 3-4 arrests at the facilities since 2007, she made it clear she was not talking about the many abuse cases that occur at mental health facilities, cases previously investigated by PO 2s. She admitted abuse investigations are now being handled by the PAs.

The State also argues the Ohio Highway Patrol ("OSP") has exclusive jurisdiction in these facilities. Ms. Whisman was unable to pinpoint where this mandate exists. There is no such statutory requirement. If such were the case, there would be no reason for ORC 5123.13 which permits the employment of police officers. The fact OSP can handle criminal cases at these facilities after a PO 2 completes an investigation is irrelevant. The presence of OSP does not negate the need for PO 2s, nor does it give the State the right to violate Article 7.

The State insists PO 2s are no longer necessary because other than at the Columbus location, no crimes occur at the facilities, so police are not needed. This is ridiculous. The fact some facilities may be in higher crime areas than others does not mean crime does not exist in lower crime areas. Dennis Salisbury, one of the Grievants, testified he had made two recent arrests in Gallipolis.

The Northeast Ohio Developmental Center also is located in a high crime area; the police at that facility have been eliminated. Ms. Whisman testified the State plans to "reevaluate keeping [the Columbus facility police] employees and that they will likely cancel that agreement." In other words, the criminal activity analysis is a ruse by which the State attempts to show cooperation with the FOP, while the State actually has no intention of keeping any members of the FOP bargaining unit. The State's intent is to further erode the unit.

The State also suggests that since there have been no police officers at Cambridge since 2007, there is no need for police officers there. What this actually proves is that the State believes it has a right to violate Article 7. The FOP does not agree police officers are not needed at Cambridge and in fact has fought to have those positions restored. Arbitrator Stein agreed in 2009 the State was violating the Agreement at Cambridge. The problem the FOP encountered at Cambridge was the closing of that facility in 2008; all employees there were laid off. That is not the case statewide or here. In the instant case, the State does not dispute the jobs will still be performed. The State has chosen to give those duties to administrative staff in violation of the Agreement.

Article 35 coincides with ORC 124.321 and OAC 123:1-41-01. By statute, the State was required to prove the layoff and/or abolishment of these employees was necessary. The State had to show more than it had made budget cuts; it had to prove there was a lack of funds or lack of work. The State did not produce evidence of a budget deficit. Nor can the State show these jobs were eliminated for reasons of economy because there is no financial need to eliminate the jobs.

The State simply wants to eliminate positions held by FOP employees.

In its statement of rationale for the job abolishment, the State says that an assessment for the reorganization for "efficiency and economy" began in 2001. The FOP has won two Article 7 and Article 35 arbitrations since that time.

Bargaining unit erosion must be evaluated not just by staff but by the duties performed by that staff. The jobs of the PO 2s are being performed today by PAs; the State does not dispute this. By admitting this point, the State has admitted to an Article 7 violation. The work being performed by non-bargaining unit employees is not de minimis; to the contrary, it is substantial and it belongs to the FOP bargaining unit.

The State acted in bad faith when it abolished the PO positions. In *Swepston v. Board of Tax Appeals*, 89 Ohio App.3d 629, 637 (1993), the court found the State acted in bad faith because it failed to present "substantial, reliable and probative evidence" that the job abolishment was "done for reasons of efficiency and economy pursuant to a legitimate reorganization." Similarly in the instant case, the State provided no evidence the job abolishments were the result of serious financial constraints. The *Swepston* court cited OAC 124-7-01(A) which provides "job abolishments and layoffs shall be disaffirmed if the action is taken in bad faith." *Id.* at 635. It clearly is an act of bad faith for the State to ignore the clear language of the Agreement.

During the 25 years the FOP has been arguing with the State concerning these issues, the FOP bargaining unit has steadily decreased. The State has previously argued it has either abolished positions or that decreases occurred

due to lack of work or lack of funds. It also has insisted the number of clients has decreased, making a police presence not needed in every instance. Each time, the FOP has shown the work of the bargaining unit employees is still being performed by non-bargaining unit employees.

This time, the State insists its cuts were made for "reasons of economy." It again argues about a decrease in clients and says the Department is reorganizing. These are not novel arguments. For 25 years, the State has failed to show a viable reason for the elimination of PO 2s. The arguments it makes in the instant case have not changed from those it has made since 1988.

Article 7 requires no interpretation. The intent was to provide job security to the bargaining unit. The work now being performed by PAs and other non-bargaining unit employees was being performed by PO 2s; that is where the work belongs. The State has not presented evidence to show a lack of work or lack of funds existed. The State is simply trying to erode the FOP bargaining unit as it has been trying to do for 25 years.

<u>State Position</u>

The State did not erode the bargaining unit. The duties at issue are not PO-specific; the duties may be performed by other classifications.

The business of the Developmental Centers has slowly changed. Downsizing occurred and continues. The large institutional design with a high volume of visitors is now outdated. Since July 2000, the client population has

decreased by 42%. Since 1997, the police/security force of the Department has decreased by 41%. Natural attrition of staff has taken place where possible. The core PO 2 duties were so minimal or obsolete that the PO 2s were given other, cross-duties to perform during their shifts.

Ms. Whisman testified as to the importance of non-criminal investigations into client abuse and neglect. These investigations are administrative, not criminal in nature. As such, the investigations are not exclusive to the PO classifications. As the Department downsizes, the remaining classifications absorb duties as appropriate. The Department has been and continues to phase out specialized classifications.

Alicia Conley, Personnel Manager, testified about Classification Specifications, also known as Class Plans, which list a Purpose, Job Title(s), Class Concepts, and Job Duties. The Class Plan is not related to the number of staff. A Class Concept must be performed at least 20% of the position's time. The PO 2 Class Concept is "The full performance level class works under the general supervision & requires working knowledge of security & law enforcement procedures & techniques in order to protect lives & secure buildings and property." POs may not be the only classifications to perform duties listed in the Class Concept.

Ms. Conley further testified the PO 2 duties listed other than the first paragraph of the "Job Duties in Order of Importance" are not PO-specific. Duties listed in the PO 2 and PA 1 Position Descriptions are consistent with their Class Plans and the overlap is appropriate.

On cross-examination, Grievant William Ferkin was asked about PO-specific duties. He testified he never made an arrest, issued warrants, or wrote official tickets at the Warrensville Developmental Center. He stated he does not conduct criminal investigations; the State Highway Patrol does. He testified 99% of his time was spent conducting non-criminal administrative investigations rather than conducting PO-specific work.

Mr. Salisbury also was asked about PO-specific duties. He testified he made two arrests at Gallipolis since his return from Columbus in February 2011, but presented no corroborating documentary evidence. He stated he wrote tickets when he had time, but had no corroborating documentary evidence. He stated 95-100% of his time was spent conducting non-criminal investigations.

Ms. Whisman testified PO 2s were given administrative work because there was little or no PO work to be done. Mr. Ferkin and Mr. Salisbury did not meet the 20% Class Concept requirement to be a PO; they acted more like PAs than POs.

Ms. Whisman also testified the State Highway Patrol conducts all criminal investigations. ORC 5123.61 Reporting abuse, neglect and other major unusual incidents (G)(2) provides:

> **On receipt of a report under this section that includes an allegation of action or inaction that may constitute a crime under federal law or the law of this state, the department of developmental disabilities shall notify the law enforcement agency.**

ORC 5123.61(A)(1) defines law enforcement agency as "the state highway patrol, the police department of a municipal corporation, or a county sheriff." Therefore, the State must refer these issues to non-Department law enforcement. Moreover,

under ORC 5123.13, the Department is not required to have a special police force. The State Highway Patrol has been conducting the criminal investigations and has statutory authority to do so. It would be an added cost to the Department to retain a special police force for investigations it has no authority to conduct.

The State complied with Article 35, ORC 124.321, and OAC 123:1-41-01 in implementing the June 15, 2012 job abolishments. The State filed a Job Abolishment Rationale and properly notified affected employees. The State implemented the job abolishment for reasons of economy. As required by statute, the State realized a savings with respect to salaries, benefits, and equipment. The conservative estimate of savings in FY 13 is $875,926, FY 14 is $1,415,086, and for FY 15 is $1,465,645. Ms. Whisman testified the Department received an 8.3% budget reduction in its General Revenue Fund from FY 11 to FY 12.

These are abolishments. This is a permanent deletion of positions from the State's Table of Organization. This is a permanent abolishment of PO 2 positions and PO-specific duties. This does not mean that all duties the POs performed must also be abolished. Non-criminal investigations are not abolished, training is not abolished, safety drills are not abolished, etc.. These are not PO-specific duties.

Overlapping duties, which are appropriate for the remaining classification(s), continue. PO-specific duties are abolished. No Department employee is making arrests, issuing tickets, issuing warrants, and/or protecting lives and securing buildings and property in the scope of the PO classification.

Columbus is the only exception. Due to its location in a high crime area with occasional outside traffic, there is still a need for limited PO-specific duties. The States uses and compensates the POs in the FOP unit of the Ohio Department of Public Safety for PO-specific duties at the Columbus facility. The Union stated at the hearing these services cannot be transferred to Public Safety's FOP unit. The State discounts this idea. This is bargaining unit work and is being performed by bargaining unit employees. These are exactly the staff that should be performing the PO-specific duties.

In Arbitrator Graham's 1990 case, the issue was whether the State violated the Agreement when it did not fill PO positions. In that case, no POs were employed after two retirements; however, there were two intermittent POs and two police sergeants. Arbitrator Graham noted the facility had not changed since the retirements and ruled non-bargaining unit members were conducting bargaining unit work. In the instant case, the Department has a decreasing population, no intermittent POs, no sergeants, and no police chiefs. The Department has no PO work being performed. Indeed, there was little to no PO work for POs to perform when they were employed by the Department.

Arbitrator Graham's 1994 case ruled on the issue of whether the State satisfied the requirements for the layoffs of PO 2s. The State had essentially abolished three FOP positions and transferred their exact duties to a newly created exempt position, Safety and Health Officer, held by the former police chief. In Arbitrator Graham's 1994 case, the record demonstrated work levels had

increased. That is not the case in the instant matter, as the Department's client population is in decline.

In 2009, Arbitrator Stein dealt with the issue of whether the State was performing bargaining unit work with non-bargaining employees. In that case, the Departments of Mental Health (MH) and Mental Retardation and Developmental Disabilities (MRDD) in Cambridge were situated across from each other. The POs were employed by MH and would respond to MRDD situations on their own, not called by MRDD. When MH closed its facility, a grievance was filed with MRDD to force it to hire POs. Arbitrator Stein held the Union met its burden of proof insofar as showing the State violated the Agreement for a certain period of time. However, he also opined the MRDD facility may operate its facility so long as it does not "subvert[ ] its obligations under the Collective Bargaining Agreement and attempt to have non bargaining unit employees perform the work of the bargaining unit in violation of Article 7.03." Arbitrator Stein's opinion did not detail the specific duties in question or the classifications performing the duties at issue. But the opinion demonstrates it is possible for a Center to operate and manage its workforce without POs. The Cambridge Center has not had a police force since approximately 2003.

In 2010, Arbitrator Feldman dealt with the issue of whether the State satisfied the requirements for the layoff of one PO 2. He held there was ample evidence PO work was redistributed to non-bargaining unit employees. Arbitrator Feldman's case is distinguishable from the instant case because Arbitrator Feldman's case did not fully address an evaluation of duties. A PO must perform

PO-specific duties at least 20% of the time to be properly classified as a PO. The Grievants testified 95-100% of their time is spent doing non-PO-specific work. Since the abolishment, there has been no PO-specific work being performed. There is no record evidence to the contrary.

In 2011, Arbitrator Nelson dealt with the issue of whether the State was performing bargaining unit work with non-bargaining employees. In that case, PO 2s, exempt Administrative Assistants 2 (now called Program Administrators), and other miscellaneous classifications had been performing overlapping duties for years. The duties at issue were non-criminal investigations, safety drills, training, and traffic/crowd control. The Union argued these duties were PO-specific and/or if the overall number of POs declined and there was work for them to do, the State was required to maintain the PO classification for non-PO-specific duties. Arbitrator Nelson found the Grievant did very little PO-specific work – e.g., arrests, issuance of warrants, and issuance of tickets. He found there was a significant overlap of duties between the POs and the Administrative Assistants. He held the Union "was unable to establish that other classifications were doing work that belongs exclusively to the PO 2s."

In *In re Appeal of Woods*, the exact same bargaining unit duties of two positions were transferred to one new non-bargaining unit position with a new title. Both bargaining unit employees were laid off. The court held the position had not been abolished and that the bargaining unit employees should have been given the opportunity to displace into the new position. This is not the same situation as the instant grievances.

In *Esselburne v. Ohio Department of Agriculture*, 49 Ohio App.3d 37, 41-42 (1988), the court held the appointing authority may not "simply transfer the duties of a classified employee to an unclassified employee; rather, the unclassified employee may perform duties of the classified employee but nevertheless encompass certain of the latter's duties." In that case, all of the classified attorney-specific work had been transferred to an unclassified attorney. The opinion does not indicate there was any record evidence regarding appropriate classifications or overlapping duties. *Esselburne* is distinguishable because in the instant case, no PO-specific work has been transferred to non-POs.

The duties to which the Grievants cling are not PO-specific duties. The Class Plans demonstrate other classifications may perform the contested duties. Simply because a duty is in one's position description does not mean that employee exclusively owns those duties. If that were the case, only one class could answer the phone or greet visitors. That is not a sound business practice, it does not make sense, and it is not cost effective.

The Union contends if there are any remaining duties from what PO 2s were doing prior to the abolishment, the abolishment is not proper and the PO Classification should remain. The Union says overlapping duties are irrelevant if the number of POs decreases. The State wholly disagrees.

The Union has not met its burden of proof. It failed to demonstrate there are other staff and/or classification(s) performing exclusively PO-specific work. It failed to show the State did not meet the prongs for a job abolishment for reasons of economy.

With budgetary constraints and population reductions, additional staff will not be hired. Current staffing will absorb the existing and declining workload. The State did not attempt nor has it eroded the bargaining unit. The State properly implemented the June 15, 2012 Job Abolishment. The Department requests the grievances be denied in their entirety.

ARBITRATOR'S OPINION

Job abolishment and bargaining unit erosion issues have a long history between these Parties. The application of Article 7.03, and to a lesser extent Article 35, has been arbitrated several times.

In the instant set of facts, the question is: if the State eliminates a bargaining unit job classification, and some of that classification's duties remain performed by non-bargaining unit personnel, has the State eroded the bargaining unit and thereby violated Article 7.03? Here, the State filed on April 30, 2012 a Rationale for Job Abolishment for Reasons of Economy for Police Officer 2 at the Department of Developmental Disabilities. For a number of years, PO 2s had been spending much of their time investigating Major Unusual Incidents. After the job abolishment, MUI investigations are being performed largely by non-bargaining unit, exempt Program Administrators.

The crux of the Union's point of view is that because the MUI investigations formerly performed by bargaining unit PO 2s are now performed by non-bargaining unit PAs, the State has violated Article 7's prohibition on eroding the bargaining unit.

The crux of the State's point of view is that because MUI investigations are not PO-specific work, the State has legitimately abolished the PO 2 position and given that work to PAs. As the State set out as the first paragraph of the Conclusion section of its Post-hearing Brief:

> **The duties to which the Grievants cling are not PO-Specific Duties. The Class Plans explicitly demonstrate other classifications may perform the contested duties. Simply because a duty is in one's position description does not mean he/she exclusively owns these duties. If that were the case, only one class could answer the phone or greet visitors. That is not a sound business practice, it does not make sense, and it is not cost effective.**

State's Post-hearing Brief at p. 14.

First, it must be noted that an arbitrator's task is not to determine what is a "sound business practice" or what is "cost effective." Indeed, it is not even an arbitrator's job to figure out what generally "makes sense." Rather, it is an arbitrator's task to apply the parties' collective bargaining agreement to the facts at hand.

Here, the controlling language is Article 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.**

The two instant grievances center on whether the job abolishment of PO 2s eroded the bargaining unit.[3]

[3] Neither Party addressed at the hearing or in their Post-Hearing Briefs the "attempt" language in Article 7.03 – i.e., did the State "attempt to erode the bargaining unit" when it abolished the PO 2s? The arbitration decisions submitted by the Parties do not explicitly address the "attempt" language either. One might think "attempt" implies intent, i.e., a difference between *attempting to erode* a bargaining unit and *eroding* a bargaining unit.

Former FOP negotiator Joel Barden testified, however:

Second, the State relies heavily on its proposition, as testified to by Personnel Services Manager Alicia Conley, that for a job classification to be legitimate, the job holder must perform at least 20% of their weekly duties on tasks specific to the job classification. Here, that means the PO 2s would have needed to be spending at least eight hours per week on duties that could be performed only by police officers. The record shows that 20% "rule" was not being met.

The source of the 20% "rule" is not explicit in the record. One source is OAC 123:1-7, which provides in pertinent part:

> **Each classification title listed in this rule shall have a corresponding classification specification that sets forth the class concept and minimum qualifications. The class concept shall set forth the mandatory duties that must be satisfied at least twenty per cent of the time, unless otherwise stated in the class concept.**

Thus, the 20% rule is more a rule of classification construction – mandatory duties must be performed at least 20% of the time, rather than a rule of classification substance – mandatory duties must be specific to that

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> The State has regularly, recognizing Article 7.03 as very strong bargaining unit protection language, attempted to alter or delete it. They've offered OCSEA language, which we declined. It's been upheld through fact-findings throughout the 18 years I've negotiated the contract.

The OSCEA language is:

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

Article 1, State of Ohio/OCSEA Contract, 2012-2015, (italics added).

Accordingly, the FOP's Article 7.03 burden of proof is less than having to demonstrate the State abolished the PO 2 position for the purpose of eroding the bargaining unit. Put another way, the FOP does not have to prove the State intended to erode the bargaining unit when it abolished the PO 2 position.

classification.

None of the arbitration decisions submitted by the Parties expressly addresses the 20% issue. Rather, those decisions turn largely on their specific record facts (as arbitration decisions should).

The question for the Arbitrator becomes whether the 20% rule supersedes Article 7.03. The Arbitrator finds it does not. The 20% rule is from the unilaterally State-promulgated Ohio Administrative Code. In contrast, Article 7.03 obviously was bilaterally negotiated by the Parties.

Given the mandatory language of Article 7.03 – that the State shall not erode the FOP bargaining unit – the State was under an obligation to attempt to achieve its business goals without violating the Agreement. Accordingly, the State could have reworked the PO 2 job specifications to accurately reflect the fact the PO 2s were spending the majority of their time conducting MUI investigations, rather than transferring those investigations to non-bargaining unit exempt Program Administrators. By doing so, the State would have been in compliance with the Parties' Article 7.03 rule as well as the State's own 20% rule. Instead, the State chose to pursue its goals without sufficient respect to Article 7.03. The abolishment of the PO 2 position eroded the bargaining unit because it eliminated a job classification from the bargaining unit and transferred the duties performed by the PO 2s to a non-bargaining unit exempt position.

AWARD

For the reasons set out above, the grievances are granted.

The State is hereby ordered to restore the PO 2 position to the Department of Developmental Disabilities, offer reinstatement to those jobs to all individuals who left the PO 2 position at the Department as a result of the abolishment, and to make all such individuals whole, including lost wages and benefits.

The Arbitrator shall retain jurisdiction through April 30, 2013 as to implementation of the remedy only.

DATED: January 24, 2013

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator