ARBITRATION DECISION

September 29, 2011

In the Matter of:

State of Ohio,	)	
Department of Developmental Disabilities,	)	
Mount Vernon Developmental Center	)	
	)	Case Nos. 24-09-20101230-0087-05-02
and	)	24-09-20101230-0088-05-02
	)	
Fraternal Order of Police,	)	
Ohio Labor Council, Inc.	)	

APPEARANCES

For the State:

Melinda Armstrong, Labor Relations Administrator
Jessie R. Keyes, Labor Relations Specialist, OCB
Laura Frazier, Deputy Director of Human Resources
Alicia Conley, Personnel Manager
Christopher Brady, Labor Relations Officer 2
Sue Lindsey, Mental Health Administrator
Ernie Fischer, Superintendent
Thomas Mickley, Human Resources Administrator
Antwan Booker, Legal Intern

For the Union:

Paul Cox, Chief Counsel
Joel Barden, Staff Representative
Renee Engelbach, Paralegal
Rodney Fry, Grievant

Arbitrator:

Nels E. Nelson

BACKGROUND

The instant case involves the State of Ohio, Department of Developmental Disabilities and the Fraternal Order of Police, Ohio Labor Council, Inc. The state operates a number of residential facilities in Ohio for the developmentally disabled, including the Mount Vernon Developmental Center. The union represents employees in a number of agencies in a variety of classifications, including Police Officer 2.

The dispute involves two class action grievances filed by Rodney Fry. He was hired as a Police Officer 2 on October 26, 1998, at the Mount Vernon Developmental Center. At that time, there were five POs and a Sergeant at the center. In 2001, a memorandum of understanding was negotiated by the state and the union. It identified a number of PO positions that were to be abolished at the various developmental centers and provided for a reallocation of the remaining positions to reduce the impact of the reduction. Pursuant to the memorandum, Fry transferred to the Apple Creek Development Center on December 16, 2001.

On May 21, 2003, Herbert Gouge, a PO, filed a class action grievance protesting the posting of an Administrative Assistant 2 position at MVDC. The grievance charged that the description of the work to be performed included work which was currently being performed by POs. It alleged that the state's action violated Articles 7 and 35 of the collective bargaining agreement. The grievance requested the state to remove the description of bargaining unit work from the posting, to cease having bargaining unit work done by non-bargaining unit employees, and to hire sufficient POs to perform the work being performed by non-bargaining unit employees. The grievance, however, was not pursued by the union.

Fry transferred back to MVDC on February 18, 2006. At that time, there were two POs at the center. However, on June 30, 2009, Shawn Vance, one of the POs at MVDC, retired, leaving Fry as the only PO at the center.

On December 30, 2010, Fry filed two class action grievances. Grievance no. 24-09-20101230-0087-05-02 charges that the state eroded the bargaining unit in violation of Article 7, Section 7.03, by having AAs, Investigative Agents, and Residential Care Supervisors do bargaining unit work, including conducting unusual incident investigations, safety training, and fire drills and doing traffic and crowd control. The grievance requests the state to eliminate the AA 2s and IAs and to replace them with POs. At steps one and two of the grievance procedure, the state argued that the grievance was untimely and asserted that it was exercising its management right, pursuant to Article 6, to determine work assignments.

The second grievance is no. 24-09-20101230-0088-05-02. In that grievance, the union charges that the state violated Article 7, Section 7.01, by not providing notice of a change in the Class Plan and its intent not to fill Vance's position. The grievance requests the state to fill the PO position vacated by Vance. At steps one and two of the grievance procedure, the state claimed that the grievance was untimely and that it had not changed the Class Plan but had exercised its management right under Article 6 to determine the number of persons to be employed and to transfer work.

When the grievances were not resolved, they were appealed to arbitration. The Arbitrator was notified of his selection on April 26, 2011. The hearing was held on July 29, 2011, and post-hearing briefs were received on August 26, 2011.

ISSUES

The issues as framed by the Arbitrator are:

Case No. 24-09-20101230-0087-05-02:

1) Is the grievance timely?

2) Did the state violate Article 7, Section 7.03, of the collective bargaining agreement by attempting to erode the bargaining unit?

Case No. 24-09-20101230-0088-05-02:

1) Is the grievance timely?

2) Did the state violate Article 7, Section 7.01, of the collective bargaining agreement by not notifying the union of a change in the Class Plan or its intent not to fill the vacancy created by Shawn Vance's retirement?

3) Did the state violate the collective bargaining agreement by not filling the vacancy created by Shawn Vance's retirement?

RELEVANT CONTRACT PROVISIONS

Article 6; Article 7, Sections 7.01 and 7.03; Article 20, Section 20.05; and Article 35, Sections 35.01 and 35.02.

ARBITRABILITY

State Position - The state argues that the two grievances are untimely and not arbitrable. It points out that Article 20, Section 20.05, states that "class grievances shall be filed within twenty (20) days of the date on which any of the like affected grievants knew or reasonably could have had knowledge of the event giving rise to the class grievance." The state claims that "the Union had multiple opportunities to grieve and/or raise the specified issue of the grievances and failed to do so." (State Post-Hearing Brief, page 4)

The state contends that Case No. 24-09-20101230-0087-05-02 was not filed in a timely fashion. It states that "the PO-Specific duties claimed by the Grievant have been performed by AA 2s, RCSs, [Qualified Mental Retardation Professionals], nurses, etc. for at least ten years." (State Post-Hearing Brief, page 6) The state suggests that since Fry worked at MVDC from October 26, 1998, to December 15, 2001, and from February 18, 2006, to the present, he had ample opportunities to grieve prior to December 30, 2010.

The state maintains that an earlier grievance indicates that the union knew that the duties at issue in Case No. 24-09-20101230-0087-05-02 were being performed by AA 2s. It indicates that on May 21, 2003, the union filed a grievance protesting the posting of a job for an AA 2 claiming that the duties listed for the position were currently being performed by POs. The state reports that the union did not advance the grievance beyond the agency level.

The state argues that grievance Case No. 24-09-20101230-0088-05-02 is also untimely. It points out that the grievance requests it to fill the PO vacancy created by Vance's retirement on June 30, 2009. The state notes that Ernie Fischer, the Superintendent of MVDC, testified that at a labor-management meeting on September 2, 2010, he told Joel Barden, a Senior Staff Representative, the position was not going to be filled. It stresses that the union had 20 days from the date of the meeting to file a grievance but it waited 120 days.

The state dismisses Barden's claim that Fischer was not clear regarding the future of the PO position. It observes that Barden has more than 20 years of experience as a staff representative and is thoroughly familiar with the requirements of Article 20. It characterizes his testimony as "self-serving."

The state rejects the union's charge that it failed to provide notice of its intention not to fill Vance's position. It observes that Fischer testified that pursuant to Article 35, Section 35.02, the state was not required to give written notice because Vance retired and was not laid off.

The state offered two arbitration decisions in support of its position. It observes that in State of Ohio, Department of Rehabilitation and Correction vs. Ohio Civil Service Employees Association, Local 11, AFSCME; Joe Demarco, Grievant; Case No. 27-33-20030902-1040-01-03; September 5, 2005, this Arbitrator found a grievance to be untimely because it was filed 2½ years after the events giving rise to the dispute. The state also relies on State of Ohio, Department of Youth Services and Ohio Civil Service Employees Association, Local 11, AFSCME; Tanya Davis-Prysock, Grievant; Case No. 35-01-20071128-0076-01-03; July 1, 2009, where it claims Arbitrator Susan Grody Ruben ruled that "a continuing violation was not timely filed and that she was without authority to hear the merits of the grievance." (State Post-Hearing Brief, page 8)

The state concludes that the grievances were not filed in accord with Article 20, Section 20.05. It asks the Arbitrator to find that the grievances are not arbitrable.

Union Position – The union argues that the grievances are timely and should be decided on the merits. It states that Article 35 in conjunction with Articles 7 and 20 require the arbitration of the matter. The union stresses that the state cannot be allowed to ignore the plain language of the agreement.

The union contends that the courts have expressed a desire to have disputes such as the instant grievances resolved through arbitration. It claims that in United States Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), "the court held that

the existence of the arbitration clause in this agreement creates the presumption that the parties agreed to arbitrate all disputes between them." (Union Post-Hearing Brief, page 3) The union stresses that in its agreement with the state "there is no exclusionary language prohibiting the disputes at issue from the arbitration process." (Ibid.)

The union maintains that the continuing nature of the grievances make them timely. It points out that it filed a grievance in 2003 but explains that it did not pursue the grievance because it "determined that the grievance lacked merit at that time because there were many police officers employed at that time who were performing bargaining unit work as required by the contract." (Union Post-Hearing Brief, page 4)

The union argues that a grievance concerning the vacancy was not filed in June of 2009 because the state failed to provide notice that Vance's position was not going to be filled. The union acknowledges that the parties met in September of 2010 and that the state mentioned the possibility that her position would not be filled. It claims, however, that its representatives left the meeting believing that there would be further discussions. The union asserts that "it was not until the [arbitration] hearing on July 29, 2011 that the FOP actually heard Mr. Fischer say that the void left by Ms. Vance would not be filled." (Ibid.)

The union contends that in contrast to the arbitration decisions presented by the state, a single isolated incident cannot be identified in the instant case as triggering the grievances. It indicates that in a case decided by Arbitrator Rivera, she was able to pinpoint a specific date on which the contract violation occurred.[1] The union notes that

[1] The union appears to be referring to Ohio Civil Service Employees Association, Local 11, AFSCME and State of Ohio, Department of Youth Services; Tanya Davis-Prysock, Grievant; Case No. 35-01-20071128-0076-01-03; July 1, 2009, which was decided by Arbitrator Susan Grody Ruben.

in a case decided by this Arbitrator, the date the grievance arose was also readily apparent.[2]

The union questions the relevance of the other decisions offered by the state. It observes that the decisions relied on by the state are based on language in the Ohio Civil Service Employees Association's contract rather than its contract. The union indicates that the language in the contracts differs and cites as an example the fact that the OCSEA contract allows supervisors to do bargaining unit work in certain circumstances.

The union claims that the state has a history of violating Article 7. It refers to a case arising in 1990 at the Athens MRDD, when the state laid off six Police Officers and had supervisors and intermittent employees perform their work.[3] The union reports that Arbitrator Harry Graham held that the grievance was timely due to its continuing nature and ruled that the state had violated Article 7. It emphasizes that "in the present case the Employer is doing precisely the same thing that occurred in the case decided by Arbitrator Graham 21 years ago." (Union Post-Hearing Brief, pages 6-7)

The union suggests that the state's action does not qualify as a job abolishment. It indicates that under Section 134.321 of the Ohio Revised Code, job abolishment involves completely deleting a position rather than transferring the duties of a member of the bargaining unit to non-bargaining unit employees. The union claims that pursuant to Esselburne v. Ohio Dept. of Agriculture (1988), 49 Ohio App.3d 37, simply transferring

[2] State of Ohio. Department of Rehabilitation and Correction, Ohio State Penitentiary and Ohio Civil Service Employees Association, AFSCME Local 11, Joe Demarco, Grievant; Case No. 27-33-20030902-1040-01-03, September 5, 2005.

[3] The union is referring to Fraternal Order of Police, Ohio Labor Council and The State of Ohio, Department of Mental Health; Clyde McCuiston et al, Grievants; Case No. 23-08-9005-0422-05-02; December 21, 1990.

duties to non-bargaining unit employees "is equivalent to a subterfuge and is not permitted statutorily or by case law." (Union Post-Hearing Brief, page 7)

The union concludes that the grievances are arbitrable.

MERITS

Union Position – The union argues that a long list of arbitration decisions support its position. It points out that in Fraternal Order of Police, Ohio Labor Council and The State of Ohio, Department of Mental Health; Thomas Metcalf, Grievant; Case Nos. 23-03-940120-0402-05-02, 23-03-940228-0553-05-02, 23-03-940120-0426-05-02, 23-03-940228-0551-05-02, and 23-03-940228-0552-05-02; December 9, 1994, the state claimed to have abolished the positions of three Police Officers at the Athens Mental Health Center but Arbitrator Harry Graham ruled that the state failed to present evidence of a lack of work or economic efficiency as required by the Ohio Revised Code and Ohio Administrative Code. The union asserts that in the instant case, just as in the case before Arbitrator Graham, "the Employer talks about restructuring the facility and a decrease in clients … [but] unlike the Athens case, however, no evidence of a decrease was presented here." (Ibid.)

The union contends that the duties performed by POs cannot be transferred to other classifications. It reports that in Metcalf, the state created a new classification of Safety Officer whose duties duplicated those of the prior POs. The union cites In re Woods, 7 Ohio App.3d 226 (1982), in support of the proposition that "transferring the duties of employees from one classification to a different classification does not equate to a job abolishment." (Union Post-Hearing Brief, page 8)

The union also relies on Fraternal Order of Police, Ohio Labor Council, Inc. and State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities; William Ferkin, Grievant; Case No. 24-13-20080707-0043-02-01; March 20, 2009. It points out that in that case, Arbitrator Robert Stein found that bargaining unit work was being performed by non-bargaining unit employees on a regular basis. The union notes that after reviewing Articles 6 and 7, he held that 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." (Union Post-Hearing Brief, page 8)

The union maintains that at MVDC, the duties of the POs are being performed by non-bargaining unit employees. It indicates that the job description for POs states that they are responsible for patrolling the grounds; regulating traffic and parking; insuring safety; investigating crimes; and reporting safety hazards. The union complains that AA 2s, AA 3s, and a RCS are now performing the POs' duties.

The union argues that it offered evidence to support its claim that others are doing the POs' work. It points out that on February 2, 2011, an AA 2 completed a report for an automobile accident. (Union Exhibit 2) The union notes that a "multitude" of emails show other PO work that has been done by non-bargaining unit employees, including securing the grounds on September 11, 2010, September 12, 2010, and October 31, 2010, and checking doors on July 15, 2010, August 10, 2010, and September 16, 2010. (Union Exhibit 3) The union adds that the PO work being done by non-bargaining unit employees is not de minimis.

The union contends that the erosion of the bargaining unit must stop. It observes that when the state acknowledged that non-bargaining unit employees were doing work once done by the PO 2s, "in essence the Employer … admitted that they have not abolished the position held by P.O. 2 Vance but have instead transferred her duties to non bargaining unit employees thereby eroding the bargaining unit of the FOP." (Union Post-Hearing Brief, page 11)

The union maintains that the intent of Article 7 is clear. It states that the purpose of the provision is to provide job security for employees covered by the recognition clause of the contract. The union complains that "the duties being performed by the Administrative Assistants and various other non-bargaining employees fall under the description of Police Officer 2 and that is where the work belongs." (Ibid.)

The union argues that the state failed to comply with the contract requirement that layoffs must be made pursuant to Section 125.32 of the ORC and Section 123:1-41-03 of the OAC. It states that the cited section of the ORC permits the state to abolish a position for reorganization for efficient operation, lack of funds, or lack of work. The union claims that "the Employer failed to show that any of these situations existed at Mt. Vernon Developmental Center." (Ibid.)

The union concludes that the grievances should be granted. It asks the Arbitrator to "make the grievant whole by filling the required position with FOP bargaining unit members, awarding required back pay and benefits." (Union Post-Hearing Brief, page 13)

State Position - The state argues that it is not eroding the bargaining unit as charged in grievance no. 24-09-20101230-0087-05-02. It states that "the nature of its

business has changed … [and that] the work being done and who is performing that work drives the erosion argument." (State Post-Hearing Brief, page 9) The state claims that "one cannot look to the number of staff alone – duties must be evaluated." (Ibid.)

The state offers the testimony of Alicia Conley, a Personnel Manager with more than 20 years of experience. It points out that she observed that the Class Concept for PO 2 states that "the full performance level class works under general supervision & requires working knowledge of security & law enforcement procedures & techniques in order to protect lives & secure buildings and property." (Ibid.) The state notes that Conley explained that the Class Concept is included in the "Job Duties in Order of Importance" section of the Class Plan and in the first paragraph of the Position Description for a PO 2. It indicates that she emphasized that "the POs may not be the only classification to perform duties listed in the Class Concept." (Ibid.)

The state contends that the duties listed outside the first paragraph of the "Job Duties in Order of Importance" are not PO-specific. It states that Conley testified that they are "a framework suggesting duties for the creation of the PD." (Ibid.) The state indicates that she observed that the "duties listed in the PO and AA 2 PDs are consistent with their Class Plans and that the overlap is appropriate." (State Post-Hearing Brief, page 10)

The state suggests that Fry does not perform a significant amount of PO-specific work. It points out that he testified that he never made an arrest, issued a warrant, or wrote an official ticket; that he submitted only one unofficial accident report; and that he does not conduct criminal investigations. The state adds that Fry conceded that there is not a large amount of crime in the area.

The state maintains that training is not PO-specific work. It observes that Fischer verified that many classifications, including AA 2s, RCSs, QMRPs, and nurses, conduct training.

The state argues that most of the grievant's duties are not listed in the PD he acknowledged receiving on June 8, 2001. It reports that Fisher testified that "the Grievant's duties are more in line with those listed in the PDs of the AA 2s." (State Post-Hearing Brief, page 8)

The state challenges that union's claim that a "myriad of cases" support its position. It claims that the cases referred to by the union can be distinguished from the instant case. It acknowledges that in Fraternal Order of Police, Ohio Labor Council and the State of Ohio, Department of Mental Health; Clyde McCuiston et al, Grievants; Case No. 23-08-900516-0422-05-02; December 21, 1990, Arbitrator Graham ruled that it violated the contract by having Police Sergeants and intermittent POs do bargaining unit work following the retirement of two POs at the Athens facility. The state claims, however, that in the contrast to McCuiston, the instant case involves a decreasing client population and no intermittent POs or Sergeants. It adds that McCuiston "refers to evidence presented demonstrating intermittent POs and Sergeants were performing bargaining unit work [while] at MVDC there is one (1) PO and there is very minimal PO work for even him to perform." (State Post-Hearing Brief, page 12)

The state dismisses Metcalf where the issue was whether it satisfied the requirement for the layoff of PO 2s. It indicates that in that case, three FOP positions were abolished and their duties were transferred to a new position titled "Safety and Health Officer," which was held by the former Police Chief. The state indicates that in

contrast to the instant case, Metcalf dealt with abolishment and the direct transfer of bargaining unit duties to exempt staff. It states that in Metcalf the population increased and evidence was presented to show that PO-specific work increased.

The state discounts Ferkin. It points out that in that case, POs employed by the Department of Mental Health responded to situations at the nearby MRDD facility without being called by the facility. The state notes that the grievance arose when the mental health facility closed and the MRDD used non-bargaining unit employees to perform the work previously done by the Department of Mental Health's POs. It indicates:

> Ferkin is distinguishable in that employees of another agency were performing the duties as a courtesy. At MVDC, just as that which occurred at Cambridge Developmental Center, the PO position has, "evolved into an administrative position within the facility." Arbitrator Stein held that the Union met its burden of proof as far as showing the Employer violated the CBA for a certain period of time; however he also opined that the MRDD facility at Cambridge may operate its facility so long as it does not, "subvert its obligation 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." Therefore, it is possible for a DC to operate and manage its workforce without the aid of POs. (State Post-Hearing Brief, page 13)

The state argues that The State of Ohio and The Fraternal Order of Police, Ohio Labor Council, Inc.; Dennis Salisbury, Grievant; Case no. 24-07-20100824-0017-05-02; December 12, 2010, is not relevant in the instant case. It observes that the issue in Salisbury was whether the requirements for the layoff of a PO were met. The state claims that Salisbury is distinguishable from the instant case because it "addresses an abolishment and the transfer of that work, while the instant case (24-09-20101230-0087-05-02) addresses a consistent overlap of duties over a long span of time." (Ibid.)

The state contends that grievance no. 24-09-20101230-0088-05-02 has no merit. It reports that the grievance cites Article 7, Section 7.01, and charges that it failed to notify the union of a change in the Class Plan. The state responds that Conley testified that the last change to the PO Class Plan occurred on November 9, 2008, when the minimum qualifications were changed to make it easier for a PO 1 to be upgraded. It stresses that she indicated that the revision "did not change the duties within the Class Plan." (State Post-Hearing Brief, page 11)

The state concludes that the union has not met its burden of showing that it eroded the bargaining unit or that it changed the PO Class Plan. It asks the Arbitrator to deny the grievances in their entirety.

ANALYSIS – ARBITRABILITY

Case No. 24-09-20101230-0087-05-02 – The state argues that Case No. 24-09-20101230-0087-05-02 is untimely. It observes that Sue Lindsey, a Mental Health Administrator, and Fischer testified that for ten years AA 2s, RCSs, and other employees have performed the work the union claims belongs exclusively to the POs. The state indicates that the union filed a grievance on May 21, 2003, protesting a job posting for an AA 2 that listed some of the job duties it now claims belong to the POs but reports that the union dropped the grievance.

Despite these facts, the Arbitrator believes that the grievance is timely. First, in cases involving an erosion of the bargaining unit, it is likely to be difficult to identify a specific date when the alleged erosion of the bargaining unit occurred. It seems more likely that any erosion of the bargaining unit would have been based on changes in work assignments and duties that would have taken place over a significant period of time.

Second, the Arbitrator accepts the union's argument that the grievance is timely because it is a continuing grievance. Most grievances, such as a discharge case, reflect a single completed event even though there may be continuing consequences that flow from the single event. A continuing grievance is one where new contract violations occur over time, such as when an employee who was assigned the wrong rate continues to receive the incorrect amount of pay.

The Arbitrator believes that the instant case fits the definition of a continuing grievance. While bargaining unit work may have been transferred to non-bargaining unit employees when Vance retired or at some other specific time, a new contract violation occurs any time a non-bargaining unit member performs bargaining unit work. At that point in time, the time limits for filing a grievance begin to run.

This conclusion is strongly supported by McCuiston. In that case, two POs retired in June or July of 1989 and their work was subsequently done by Sergeants and intermittent employees. Arbitrator Graham held that the grievance filed in the spring of 1990 was timely. He stated:

> This dispute is of a continuing nature. That is, the alleged violation of the Agreement occurs each day. (Page 6)

Ferkin also supports the union's position. In that case, the union grieved when administrative staff at an MRDD provided police services that had previously been provided by POs from a nearby Department of Mental Health facility. Arbitrator Stein concluded that the case involved a continuing grievance. He stated that "violations are being constantly committed rendering the argument of timeliness moot." (Page 10)

The Arbitrator's decision is not inconsistent with the two decisions offered by the state. In Demarco, an employee grieved when he was not placed in a Storekeeper 1

position he had been awarded and the duties were performed by non-bargaining unit employees. This Arbitrator accepted the state's contention that the grievance was untimely because the grievant had been awarded the position on February 14, 2001, but did not grieve until August 25, 2003. However, in the contrast to the instant case, the grievance focused on a single employee and specific event. More importantly, the union never argued that the case involved a continuing grievance.

The conclusion in the instant case does not conflict with the decision in Davis-Prysock. In that case, a Criminal Justice Policy Specialist position was eliminated on December 13, 2006, and the duties were assigned to a non-bargaining unit AA 3 and no grievance was filed until November 28, 2007. Arbitrator Ruben ruled that the grievance was untimely but the thrust of the union's case was that it did not become aware of the events giving rise to the grievance until November 19, 2007, making the grievance timely. (Pages 6-7) In addition, she does not address continuing grievances in her decision.

Based on the above analysis, the Arbitrator concludes that the grievance is timely.

Case No. 24-09-20101230-0088-05-02 – The state argues that Case No. 24-09-20101230-0088-05-02 is untimely. It points out that Vance retired on June 30, 2009, and that Fischer testified that he told Barden at a labor-management meeting on September 2, 2010, that her position was not going to be filled. The state notes that the grievance was filed 120 days after the labor-management meeting and 549 days after Vance's retirement.

Notwithstanding these facts, the Arbitrator must conclude that the grievance is timely. First, he cannot determine when it became clear to the union that Vance's

position would not be filled. While the position did remain vacant for a considerable length of time, the status of the position appears to have been a subject of discussions between the state and the union.

Second, although Fischer testified that he told Barden on September 2, 2010, that Vance's position would not be filled, Barden disputed his testimony. He stated that he believed that further discussions would take place and that Fischer indicated that he would "hear back about the elimination of the position." The state could have eliminated any doubt about the union's knowledge about the status of Vance's position by providing formal notice to the union.

Based on this analysis, the Arbitrator must conclude that the grievance is arbitrable.

ANALYSIS – MERITS

Case No. 24-09-20101230-0087-05-02 – The union charges that the state eroded the bargaining unit in violation of Article 7, Section 7.03, by assigning duties that belong to POs to non-bargaining unit employees. In the grievance, it complains that AA 2s and RCSs are conducting unusual incident investigations, safety training, and fire drills and doing crowd and traffic control. (Joint Exhibit 2) At the hearing, the union submitted a number of emails indicating that non-bargaining unit employees have checked doors, done fire checks, put up parking signs and cones, and secured the grounds. (Union Exhibit 3) It also offered a Department of Administrative Services, Office of Risk Management, Employee Loss Notification form that was completed by an AA 2. (Union Exhibit 2)

The state denies violating Article 7, Section 7.03. It contends that the tasks being performed by the AA 2s are not PO-specific but are listed in the PDs for both the AAs and the POs. It further maintains that Fry does not perform a significant amount of PO-specific work. It notes that he acknowledged that he never made an arrest, issued a warrant, or wrote an official ticket; that he submitted only one unofficial accident report; and that he does not conduct criminal investigations.

The underlying cause of the dispute is the declining amount of work at MVDC. Fischer testified that the number of clients has decreased from 250 to 149, a 40% decline. He indicated that the reduction in the population has resulted in fewer visits to the center and generally a lower level of activity. Given that the population at MVDC is likely to continue to decline, the unions representing different classifications of employees must be careful to protect their bargaining units as the amount of work declines.

In the instant case, the union was unable to establish that the state violated the collective bargaining agreement. A comparison of the PDs for PO 2s and AA 2s reveals two things. (Joint Exhibits 6 and 8) First, PO-specific work includes preventing crimes and enforcing laws, regulating traffic, issuing traffic tickets, apprehending and arresting violators, serving warrants, and conducting criminal investigations. The record indicates that Fry does very little of this type of work.

Second, there is a significant overlap in the duties of the PO 2s and the AA 2s. Both groups monitor campus buildings, do fire drills and safety inspections, investigate unusual incidents, and complete reports regarding their investigations. These duties have been and can be performed by either classification. Thus, it would be inappropriate for the Arbitrator to grant the union's request to eliminate an AA 2 and replace that person

with a PO 2. The OCSEA, which represents the AA 2s, could then charge that the state is eroding its bargaining unit in violation of its contract.

The Arbitrator must reject the union's suggestion that overlapping duties do not matter. Such a position ignores the PDs for the AA 2s and the PO 2s and the fact that many duties have been shared by the two positions. He does agree with the union that if it shows that 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, the union was unable to establish that other classifications were doing work that belongs exclusively to the PO 2s.

The Arbitrator's conclusion is entirely consistent with the Arbitrators' decisions offered by the union. In McCuiston Arbitrator Graham ordered the state to hire two POs at the Athens Department of Mental Health facility to replace the two who had retired, leaving no POs at the facility. In contrast to the instant case, he found "the conclusion is inescapable that supervisors are performing work that is properly within the province of the bargaining unit." (Page 7) Arbitrator Graham also noted that there was no lack of work for POs because the number of residents at the facility had not decreased.

Metcalf can also be distinguished from the instant case. In that case, Arbitrator Graham reinstated three POs at the Athens Mental Health facility who had been laid off and whose positions had been abolished. His decision was predicated on his finding that the work for the POs had not declined and that it was being performed by a newly created non-bargaining unit "Safety and Health Officer." Arbitrator Graham held that "the state could not assign PO duties to another classification and then assert that … the need for the position has disappeared." (Page 12)

Ferkin involves a Department of Mental Health facility at Cambridge, which provided police services to the MRDD facility at the same location. In that case, when the Mental Health facility closed, police services were provided at the MRDD facility by non-bargaining unit employees. Arbitrator Stein concluded that by doing so, the state was eroding the bargaining unit. However, in his decision there was no discussion regarding overlapping duties and there is no indication what services were at issue or what classifications were providing them.

Salisbury also involves different facts and arguments than the instant case. In Salisbury the state abolished one of three PO 2 positions at the Gallipolis Developmental Center and the grievant was transferred to another location. Arbitrator Marvin Feldman held that "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." (Page 10) However, it is not clear what work was at issue and the state did not argue that the work in question was shared by the PO 2 classification and other classifications.

Based on this analysis, the Arbitrator must deny the grievance in case no. 24-09-20101230-0087-05-02.

Case No. 24-09-20101230-0088-05-02 – The union charges that the state failed to provide notice of its intent not to fill Vance's position and its change in the Class Plan for the PO series as required by Article 7, Section 7.01. The state responds that it did not violate this provision because it made no change in the Class Plan related to job duties.

The grievance appears to involve two issues. The first is the charge that the state failed to provide the union with notice of the change in the Class Plan. However, the state pointed out that it made no change in the series except to make it easier for employees to qualify for a PO 2 position.

The second question is whether the state violated the contract by failing to fill Vance's position. As indicated in the discussion of case no. 24-09-20101230-0087-05-02, the state was not required to fill the position.

Based on this analysis, the Arbitrator must deny the grievance in case no. 24-09-20101230-0088-05-02.

AWARD

Case No. 24-09-20101230-0087-05-02:

1) The grievance is timely.

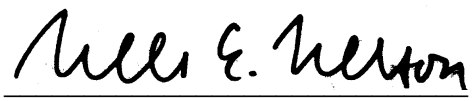
2) The state did not violate Article 7, Section 7.03, by attempting to erode the bargaining unit.

Case No. 24-09-20101230-0088-05-02:

1) The grievance is timely.

2) The state did not violate Article 7, Section 7.01, by failing to notify the union of a change in the Class Plan or its intent not to fill the vacancy created by Shawn Vance's retirement.

3) The state did not violate the contract by not filling the vacancy created by Shawn Vance's retirement.



Nels E. Nelson
Arbitrator

September 29, 2011
Russell Township
Geauga County, Ohio