

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN**

**OHIO DEPARTMENT OF NATURAL RESOURCES
-AND-
FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.**

APPEARANCES

FOR ODNR

Kandie L. Carson, Labor Relations Officer 3
Cynthia S. Hendrickson, Office Assistant 3
Nathan Jester, District Forest Manager
James W. Knight, Labor Relations Specialist (OCB)
Richard A. Maier, FEPP/UFA Program Administrator
Douglas G. Maxfield, District Forest Manager
Donald E. Schmenk, Forest Manager 2

FOR FOP

Douglas Behringer, General Counsel
Paul L. Cox, Chief Counsel
Renee Engelbach, Paralegal
Brenda Goheen, Staff Representative
James Matt Pfarr, Grievant
Brian Stamp, Grievant

CASE-SPECIFIC DATA

HEARING HELD

March 13, 2014

CASE DECIDED

July 7, 2014

SUBJECT

Rights to Perform Bargaining-Unit Work

DECISION

Grievance Sustained In Part and Denied In Part

1 **THE FACTS**
2 **I. INTRODUCTION**

3 This is a contractual dispute between the Ohio Department of Natural Resources (“ODNR” or
4 “Agency”) and the Fraternal Order of Police, Ohio Labor Council, Inc. (“FOP” or “Union”)¹ representing
5 Philpot, et al [“Grievant(s)”].

6 **A. HISTORICAL PERSPECTIVE**
7

8 In this dispute the Union alleges that ODNR is eroding the bargaining-unit by impermissibly
9 allowing non-bargaining-unit employees to perform bargaining-unit work. However, the pith of the
10 dispute is substantially narrower because the Parties mutually acknowledge two essential facts: (1) The
11 contested duties in this dispute constitute bargaining-unit duties, to which the Union has an undoubted
12 right; and (2) The Union never held an *exclusive* right to perform the contested job duties in this dispute.
13 Thus, the dispute essentially addresses the *degree/extent* to which non-bargaining-unit employees may
14 perform bargaining-unit work.

15 ODNR’s contention that non-bargaining-unit employees may perform the contested bargaining-
16 unit duties is couched in past job performances and formal job descriptions. While conceding that non-
17 bargaining-unit employees have some history of performing bargaining unit work, the Union insists that
18 ODNR has overstepped those bounds by virtually, if not wholly, precluding bargaining-unit employees
19 from performing bargaining-unit work, and, thereby violating Article 7 of the Collective-bargaining
20 Agreement and misinterpreting a mutually-agreed-upon Memorandum. For all time periods relevant to
21 this dispute, Forest Officers have been bargaining-unit employees.

22 **B. SHARING BARGAINING-UNIT WORK BEFORE 2012**

23 Before November 2012, ODNR’s Unit 2 Forestry Division Law Enforcement Personnel (“Forest
24 Officers”) performed *virtually* all of the following bargaining-unit work: (1) Wildfire investigations, (2)
25 Fire reports, (3) Federal Excess Personal Property Program (FEPP) inspections and inventory, and (4)
26 Fire department training. Indeed, ODNR tacitly concedes that the foregoing duties *as bargaining-unit*

¹ Hereinafter referenced as, “The Parties.”

1 *work*.² Even so, Forest Officers never held *exclusive* rights to these duties. Non-bargaining-unit
2 employees historically performed a fraction of the foregoing bargaining-unit work, a fact that FOP
3 guardedly acknowledges.³ The FOP acknowledges that before 2012 and for short (non-precedential)
4 periods non-bargaining-unit employees performed the foregoing duties, which constituted no more than
5 **20 percent** of non-bargaining-unit employees' overall duties. Also, in this regard, the Union declared that
6 bargaining-unit employees performed 99 to 100 percent of bargaining-unit work.⁴

7 Another factor in this dispute is that ODNR computerized the production of wildfire reports in
8 2009. Some manual reporting continued,⁵ and the computerized versions of the wildfire reports were not
9 substantially dissimilar to the manual reports.

10 C. TRANSFERRING/RECLASSIFYING FOREST OFFICERS

11 On October 24, 2012, ODNR eliminated all Forest Officer positions. Ultimately, ODNR and
12 FOP agreed to transfer Forest Officers to the Division of Parks and Recreation and to reclassify them as
13 Park Officers. On October 24, 2012, the Parties executed a handwritten agreement, in which Forest
14 Officers voluntarily agreed to assume Park Officers' positions and duties.⁶ On November 15, 2012, the
15 Parties executed a formal memorandum, reflecting that agreement ("Memorandum").⁷ That agreement
16 was to remain in force until May 14, 2013.⁸ Also, ODNR commissioned the reclassified Forest Officers
17 as Fire Wardens who would retain responsibilities for *fire investigations* under Sections 1503.09 and
18 1503.11.⁹ Throughout the meetings leading up to the Forest Officers' transfer, FOP's central concern was
19 **long-term preservation of bargaining-unit work**, even if some Forest Officers left the bargaining unit.

20 On August 27, 2012, Ms. Brenda Goheen, Staff Representative, met with Management to discuss,

² See the testimonies of: Messrs. Donald Schmenk (Forest Manager 2), Douglas Maxfield (District Forest Manager), and Rick Maier (FEPP/VFA Program Administrator).

³ FOP's Post-hearing Brief, at 7.

⁴ *Id.*

⁵ See Union Exhibit 6, at 3 for example of a computerized Wildfire Report.

⁶ ODNR FEPP Exhibit DD.

⁷ ODNR FEPP Exhibit CC.

⁸ *Id.*

⁹ ODNR Fire Exhibit K, at 0001 and 0003.

1 inter alia, “the future direction of the Division of Forestry’s Law Enforcement Program,” and “the transfer
2 of all Forest Officers to the Division of Parks and Recreation.”¹⁰ Ms. Goheen left that meeting with the
3 distinct understanding that there would be a “50/50 sharing” of duties between Forest Officers and Park
4 Officers and that Forest Officers would “continue to conduct fire investigations.”¹¹

5 **D. CONTESTED BARGAINING-UNIT WORK AFTER 2012 TRANSFER**

6 **1. WILDFIRE REPORTS**

7 Before 2012, Forest Officers performed virtually all wildfire reports.¹² After the 2012 transfer,
8 however, ODNR assigned all or virtually all wildfire reports to non-bargaining-unit employees. First, a
9 computerized compilation of wildfire reports from 2010 through 2012 reveals that Forest Officers
10 performed essentially no wildfire reports after 2012.¹³ The first five pages of that document demonstrate
11 that Forest Officers completed virtually all wildfire reports. In contrast, pages 6 through 10 show that
12 bargaining-unit employees completed virtually no fire reports.¹⁴

13 Second, Mr. Matthew Pfarr credibly testified with supporting documents that until 2011, he
14 performed numerous wildfire reports but, thereafter (in 2012), he performed none.¹⁵ Third, Ms.
15 Hendrickson admitted, during cross-examination, that she only began to process wildfire reports after
16 they were computerized. Fourth, during cross-examination, Mr. Donald Schmenk, Maumee Forest
17 Manager 2, acknowledged that before their transfer, Forest Officers performed *most* fire reports, though
18 office assistants and Management did some. Also, under cross-examination, Mr. Gregory Maxfield,
19 Northern District Forest Manager, essentially echoed Mr. Schmenk’s testimony that, before 2012,
20 bargaining-unit employees completed *most* fire reports, and Management did some. After 2012, Forest
21 Officers ceased processing those reports. In short, throughout the arbitral record, credible testimony and
22 un rebutted documentary evidence reveal that, as a group, Forest Officers completed precious few wildfire

¹⁰ Union Exhibit 2; Ms. Goheen's un rebutted testimony.

¹¹ Union Exhibit 3.

¹² See, e.g., Union Exhibits 13-15, 17-18.

¹³ Union Exhibit 11.

¹⁴ *Id.*

¹⁵ Union Exhibit 12.

reports after 2012.¹⁶

2. FEPP INSPECTIONS

Post-2012 FEPP inspections mirror the foregoing trend—non-bargaining-unit employees’ performing all or virtually all post-2012 FEPP inspections.¹⁷ Preponderant evidence in the arbitral record as a whole reveals that from 2009 through January of 2012, Forest Officer Brian Stamp performed FEPP inspections virtually every month.¹⁸ After the transfer, ODNR assigned those duties to non-bargaining-unit employees.¹⁹ Indeed, Mr. Schmenk admitted, under cross-examination, that he only began to perform FEPP inspections after the 2012 transfer of Forest Officers. Mr. Nathan Jester also testified that after Forest Officers’ transferred, only non-bargaining-unit employees completed FEPP reports. Before 2010, ODNR required employees to be both qualified and certified to complete FEPP inspections. After 2010, however, certification sufficed to perform those tasks.

E. Ms. Goheen’s Inquiry Re Bargaining-Unit Work

Sometime after Forest Officers transferred, Ms. Brenda Goheen, Staff Representative, became concerned about preserving bargaining-unit work. Accordingly, on January 26, 2013, she emailed Ms. Jackie Sebastian, Labor Relations Officer 3, to determine whether the person who ODNR eventually hired as a Forest Manager 1 would perform Forest Officers’ duties. Set forth below is the essence of Ms. Goheen’s inquiry:

I have concerns that this position may be intended to do the duties of the bargaining unit. It was our understanding that the Forest Officers who were transitioned to the parks would retain these duties. In other words we were agreeing to a relocation of these Officers with the *understanding* that *all duties* they previously performed would remain in the bargaining unit and continue to be performed by them.²⁰ Ms. Sebastian sent Ms. Goheen the Forest Manager 1 position description but never answered whether the person who eventually becomes Forest Manager 1 would perform bargaining-unit work.²¹

¹⁶ See, e.g., Union Exhibits 11, 13-15, 17, and 18.

¹⁷ Although FEPP reports are not the subject of the Grievance in this dispute, ODNR’s post 2012 refusal to assign those reports to Forest Officers evidences the general trend of assigning most, if not all of this bargaining-unit work to non-bargaining-unit employees. In that respect, then the paucity of FEPP duties assigned to Forest Officers tends to corroborate the demonstrated trend in the assignment of wildfire reports.

¹⁸ See Union Exhibits 19-22.

¹⁹ Union Exhibit 23.

²⁰ Union Exhibit 4, at 2.

²¹ Union Exhibit 4, at 1

F. WILDFIRE (MARCH 9, 2013)

The event that triggered the instant dispute was a wildfire that occurred on March 9, 2013 (“Wildfire”) when a private homeowner lost control of a fire while burning two cardboard boxes, at 10587 County Road 4, Swanton, Ohio 43558. The fire consumed approximately 1.2 acres of forest/woodland, including some adjoining private property. The Swanton County Fire Department (“Fire Department”) extinguished the blaze, and the Swanton Deputy Fire Chief submitted his handwritten fire report on March 11, 2013.²² Forest Manager Schmenk elected not to investigate the fire, which, in his judgment, did not meet the criteria for an investigation.

The Division of Forestry has an on-line fire reporting system that allows fire departments to forward fire reports to that Division. Other sources of information include paper reports as well as personal contact with the fire departments, private landowners, and other entities.

In the instant case, Ms. Cynthia Hendrickson, Office Assistant 3, typed the Fire Chief’s handwritten fire report into ODNR’s computer system, which then generated an *invoice* for review, approval, and, ultimately, submission to the Fire Department for payment,²³ pursuant to ORC §1503.141.14. Based on her job description, as an Office Assistant 3, Ms. Hendrickson spent approximately 20 percent of her working hours processing . . . “fire reports.” In addition, she: Types complex technical material (i.e., documents requiring use of legal, scientific, medical, statistical or foreign language terminology) from notes, written copy. . . (M)aintains records & files . . . processes fire reports, prepares transmittals; submits invoices for payments . . . maintains files for equipment inventory, payroll processing, periodic reports, & service forestry if needed.²⁴ Clearly, Ms. Hendrickson’s job description contemplates digitizing submissions like the Fire Chief’s handwritten report.²⁵

²² ODNR Fire Exhibit B.

²³ **ODNR** Fire B: 0003.

²⁴ Fire Manual, Exhibit E, 0002

²⁵ *Id.*

1 **G. UNION’S RESPONSE TO ODNR’S HANDLING OF THE WILDFIRE**

2 The Union grieved the following circumstances surrounding the wildfire: (1) ODNR never
3 investigated the wildfire; (2) The Swanton County Fire Department extinguished the wildfire; (3) The
4 Swanton County Deputy Fire Chief drafted a handwritten fire report; and (4) Ms. Hendrickson typed the
5 Deputy Fire Chief’s handwritten report. Grievance No. 25-06-20130401-0001-05-02 (Grievance No.
6 0001) claims that the Forest Manager erroneously failed to investigate the wildfire and that Ms.
7 Hendrickson impermissibly processed the handwritten fire report, which the Union views as bargaining-
8 unit work.²⁶ Grievance No. 25-06-20130401-0002-05-02 (Grievance No. 0002) alleges that Forest
9 Manager Schmenk eroded bargaining-unit work by completing an FEPP report.²⁷

10 **H. PROCEDURAL HISTORY**

11 ODNR ultimately denied both Grievances, and the Union appealed the dispute to arbitration. The
12 Parties selected the Undersigned to hear the matter. On March 13, 2014, the Undersigned conducted an
13 arbitral hearing at the Office of Collective Bargaining in Columbus Ohio. At the outset of those
14 proceedings, the Parties agreed that the instant dispute was properly before the Undersigned. During the
15 arbitral hearing, the Parties’ advocates made opening statements and introduced documentary and
16 testimonial evidence to support their positions in this dispute. All documentary evidence was available
17 for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-
18 examination. The Grievant(s) were present throughout the proceedings. At the close of the hearing, the
19 Parties agreed to submit Post-hearing Briefs. Upon receipt of those Briefs, the Undersigned closed the
20 record on this dispute.

21 **III. THE ISSUE**

22 The Parties did not agree upon an issue. In its Post-hearing Brief, ODNR submitted the following
23 issues:

24 I. Fire Investigation Issues:

²⁶ Fire Manual, ODNR Exhibit A, 0001; Joint Exhibit 1.

²⁷ ODNR Post-hearing Brief, at 2; Joint Exhibit 2.

- a. Did the March 11, 2013 fire report involving 10587 County Road 4, Swanton, Ohio 43558 mandate a compulsory fire investigation?
- b. Is entering a fire report invoice for payment the exclusive purview of Forest Officers?
- c. Is the investigation of wildfires the exclusive purview of Forest Officers?

Are annual ODNR Federal Excess Personal Property Program ("FEPP") inspections the exclusive purview of Forest Officers?

FOP articulated the issue as follows: "Did the Employer violate the collective bargaining agreement by eroding the FOP, OLCI bargaining unit? If so what shall the remedy be?"

Because the Parties could not agree upon an issue, the Undersigned articulates the issue as follows: Whether ODNR violated either the Collective-bargaining Agreement by allowing non-bargaining-unit employees to perform bargaining-unit work—job duties that bargaining-unit employees traditionally performed.

IV. RELEVANT CONTRACTUAL AND REGULATORY PROVISION

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:

* * * *

5. Make any and all rules and regulations;
6. Determine the work assignments of its employees;

* * * *

8. Determine the type of equipment used and the sequences of work processes;
9. Determine the making of technological alterations by revising the process or equipment, or both;
10. Determine work standards and the quality and quantity of work to be produced;

* * * *

13. Establish, expand, transfer and/or consolidate, work processes and facilities;
14. Consolidate, merge, or otherwise transfer any or all of its facilities, property, processes or work with or to any other municipality or entity or effect or change in any respect the legal status, management or responsibility of such property, facilities, processes or work;
15. Terminate or eliminate all or any part of its work or facilities.

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.

* * * *

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.

Chapter 5
WILDFIRE REPORT & INVESTIGATION
FIRE MANAGEMENT MANUAL
Division of Forestry²⁸
March 1, 2000

Fire Manual

* * * *

D. Investigative Assignments

The Division of Forestry has an on-line fire reporting system that allows fire departments to provide fire reports to the Division on-line. Information may also be received through, (sic) paper reports, personal contact with the fire departments, private landowners, and other entities.²⁹

* * * *

B. Investigation Criteria

Investigation and verification of alleged wildland fires . . . and other kindled fires is desired to check accuracy of data and to determine appropriate enforcement. Efficiency and the effective use of staff time must be considered when assigning investigations. It is the policy of the Division that enforcement actions are performed by commissioned and trained officers and are the result of a formal investigation. The District Forest Manager . . . Will determine which fires are the most appropriate for formal investigation. . . . The following criteria may be utilized in determining appropriate investigation assignments:

1. ODNR land is involved.
2. Enforcement action is being required/requested.
3. Death or severe injury (requiring hospital visit).
4. Exceptional property loss.
5. Fire size greater than 25 acres.
6. Unusual characteristic or condition.
7. Division assists in fire suppression.
8. Federal or U.S. Forest Service land involved.³⁰

Districts may establish additional criteria for investigation or verification of report information which may include but not be limited to the following:

* * * *

5. Recurring problem or pattern with report information (such as cause unknown).

* * * *

7. Multiple landowners involved.³¹

²⁸ Fire Manual, ODNR Exhibit I0007-I0008 (emphasis added).

²⁹ ODNR Exhibit 1(Fire Manual), at 0009 (Hereinafter referenced as "Fire Manual").

³⁰ Fire Manual, ODNR Exhibit 10008

**Memorandum of Understanding Between the Ohio Department of Natural Resources And
The Fraternal Order of Police, Ohio Labor Council Inc. Unit 2**

The parties are seeking to place Park Officers and Forest Officers into a single new classification under the Division of Parks and Recreation. . . . Until such time [as] the new classification can be utilized, the parties wish to enter into an interim agreement to integrate Forest Officers into the Division of Parks and Recreation.

The parties agreed to the following:

* * * *

2. Forest Officers may be assigned to perform the job duties of a Park Officer. To the extent that a conflict with the Ohio Revised Code is not created, Park Officers may be assigned to perform the job duties of a Forest Officer. These assignments or the performance of the duties as described shall not constitute a violation of the FOP Agreement.

* * * *

4. This agreement will be in full force and effect for a one hundred and eighty day (180) period following the date of execution, with a sunset date of 5/14/2013, unless extended by mutual agreement between the parties.³²

Position Description (Forest Manager)

Forest Manager “Establishes, maintains, & supervises complete fire control program including prevention, suppression, & investigation of wildfires; supervises area fire control activities, enlists cooperation of local fire departments for forest fire control; (and) supervises law enforcement activities.”³³

V. SUMMARIES OF THE PARTIES’ ARGUMENTS

A. SUMMARY OF FOP’S ARGUMENTS

1. ODNR does not contend that Forest Officers’ work is somehow unnecessary. Nevertheless, the Agency transferred Forest Officers’ duties to other employees.
2. The Parties agreed that, despite the transfer, Forest Officers would retain their forestry duties.
3. Article 7 precludes the transfer of bargaining-unit work to non-bargaining unit employees. Shifting bargaining-unit work to non-bargaining-unit employees effectively nullifies Article 7.
4. Prior to November 2012, Forest Officers were responsible for all fire reports, fire department training, FEPP field inspections and inventory. Non-bargaining-unit employees performed insubstantial amounts of the work (less than 20 percent of the duties)³⁴ at issue.
5. Throughout discussions of the transfer, FOP’s understanding was that Forest Officers’ duties would transfer with them.
6. Bullet point 2 of the November 15 Memorandum captures the sum and substance of the Parties’ intent about sharing bargaining-unit work: “Forest Officers may be assigned to perform the job duties of a Park Officer and that Park Officers may be assigned to perform the duties of a Forest Officer.” Park Officers and Forest Officers are bargaining-unit members. FOP never agreed to non-bargaining-unit employees performing bargaining-unit work.

³¹ Fire Manual, ODNR Exhibit 10008.

³² FEPP VOL. 2, ODNR FEPP EXHIBIT CC.

³³ ODNR Fire Exhibit F, 0001; ODNR Exhibit J, 0010 bullet point 2.

³⁴ Observe, however, that page 9 of FOP’s Post-hearing Brief claims that bargaining-unit work amounted to “far less than” 10 percent of non-bargaining-unit employees’ duties.

7. During an August 2012 meeting, the Parties agreed to a 50/50 split of Forest Officers' *new duties* upon the transfer, i.e., fifty percent forestry duties and fifty percent park duties.³⁵ Duties of Forest Officers and Park Officers naturally overlap.
8. The following events manifestly erode bargaining-unit work under Article 7: (1) Before 2012, bargain-unit employees performed bargaining-unit work; (2) That work still exists after 2012, and (3) Non-bargaining-unit employees are performing that work to the *exclusion* of bargaining-unit employees.
9. The March 9 wildfire warranted investigation because it crossed property lines.

B. SUMMARY OF ODNR'S ARGUMENTS

1. ODNR followed:
 - a. Article 6 of the Contract.
 - b. The Memorandum.
 - c. Job descriptions, classification specifications, manuals, and the Parties' past practice.
2. The wildfire, in this case, did satisfy clear investigatory criteria, and, therefore, did not warrant investigation. Thus, the Forest Manager properly exercised his contractual discretion not to investigate.
 - a. Ms. Hendrickson's transcription of the information in the handwritten fire report merely digitized it. The computer digitized an invoice and an Officer's fire investigation report. Ms. Hendrickson neither prepared nor entered a fire investigation report, "report review," "fire investigation," or "invoice review and approval."
3. Although Forest Officers were entitled to complete Form 4412 fire reports (fire report invoices for payment), they were never *exclusively* entitled to do so.
 - a. Forest Officers were never *solely responsible* for handwritten fire reports and transcription of paper reports into the automated system.
 - b. The Collective-bargaining Agreement explicitly permits implementation of automated processes such as those referenced in the 2013 revised Fire Manual.
 - c. The Fire Manual allows both the Division and cooperating fire departments to report wildfires on Form 4412. That information is then computerized and compiled. Historically, local fire departments have completed the Form 4412 Fire Reports.
 - d. Local fire departments are *required* to complete Form 4412. The Swanton Fire Department Deputy Chief's Fire Report complied with the Fire Manual's requirements for Form 4412 fire reports.
 - e. Ms. Hendrickson is an Office Assistant 3, whose job description includes transcribing handwritten fire reports. In this case, she merely transcribed information from the handwritten fire report into the computer, which used that data to generate an invoice request for payment. Accordingly, Ms. Hendrickson neither performed bargaining-unit work nor offended the Collective-bargaining Agreement.
4. Forest Officers are not *exclusively* entitled to perform ODNR Federal Excess Personal Property Program ("FEPP") inspections.
5. Forest Officers are not exclusively responsible for investigating wildfires.
6. ODNR acted in good faith throughout the transitional period in question, and good faith is a critical element in the resolution of contractual disputes.

VI. EVIDENTIARY PRELIMINARIES

Because this is a contractual dispute, FOP has the burden of proof/persuasion. Consequently, FOP

³⁵ Union Exhibit 3.

1 must establish its allegations by *preponderant evidence* in the arbitral record as a whole. Doubts about
2 those allegations will be resolved against FOP. Similarly, ODNR shoulders the burden of persuasion
3 regarding its allegations and affirmative defenses, doubts about which shall be resolved against ODNR.

4 **VII. ANALYSIS AND DISCUSSION**
A. PROPRIETY OF NOT INVESTIGATING THE MARCH 9 WILDFIRE

5 Grievance 0001 alleged, inter alia, that Forest Manager Schmenk was duty-bound to investigate the
6 wildfire specifically because it “burned across a property line” (“multiple property criterion”). ODNR
7 offers two counter arguments. First, the Agency cites Chapter 5 of the Fire Manual, which lists
8 preconditions to wildfire investigations, arguing that the wildfire satisfied none of the Chapter 5 criteria.
9 Second, ODNR cites sundry provisions from the Management Rights Clause of the Collective-bargaining
10 Agreement, which ODNR interprets as authorizing the Forest Manager to forgo an investigation of the
11 wildfire.

12 For the reasons set forth below, ODNR prevails on whether the wildfire warranted an investigation.
13 First, as noted above the Union bears the burden of persuasion regarding its interim allegations of as well
14 as the ultimate proof that ODNR violated the Collective-bargaining Agreement, and the Arbitrator
15 resolves doubts about these matters against the Union. Second, the Union stresses the “multiple property
16 criterion,” but nothing in the arbitral record establishes that criterion as either a well-established past
17 practice or an otherwise *pivotal* factor in investigatory decisions. Even if the Union did not have the
18 burden of persuasion on this issue, ODNR still would prevail given Chapter 5’s formal list of
19 considerations for investigating wildfires. To overcome these factors, the Union would need to adduce
20 preponderant evidence in the arbitral record as a whole that the Parties either explicitly or implicitly
21 adopted the “multiple property criterion” as an outcome-determinative factor whose presence mandates
22 wildfire investigations.

23 Third, the Management Rights Clause of the Collective-bargaining Agreement supports ODNR in

1 this instance. For example, Section 10 of the Management Rights Provision authorizes Management to:
2 “Determine work standards and the quality and quantity of work to be produced.” Even absent the above-
3 referenced factors in Chapter 5, the cited Management Rights provisions would likely entitle ODNR to
4 prevail, unless the Union demonstrated a well-established past practice of relying on the “multiple
5 property criterion” as a pivotal consideration in wildfire investigatory decisions. Such a past practice
6 would have obliged ODNR to cite a specific Management Rights provision(s) that trumped conflict
7 impact practices that were clear and well-established. However, as set forth above, preponderant
8 evidence in the arbitral record does not demonstrate the existence of such a past practice. Consequently
9 the Arbitrator holds that evidence in the arbitral record does not establish that the Forest Manager’s
10 decision not to investigate the wildfire either violated the Collective-bargaining Agreement or was
11 otherwise erroneous.

12 **B. IMPROPER EROSION OF BARGAINING-UNIT WORK**

13 **1. WHETHER WILDFIRE REPORTS CONSTITUTE BARGAINING-UNIT WORK**

14 Here, the Union contends that ODNR violated Article 7 of the Collective-bargaining Agreement by
15 enlisting non-bargaining-unit employees to complete the report for the wildfire. According to the Union,
16 wildfire reports are bargaining-unit work. Indeed, the Union adduces preponderant evidence that wildfire
17 reports constitute bargaining-unit work, which bargaining-unit employees customarily performed until the
18 2012 transfer of Forest Officers. First, Ms. Goheen and Mr. Pfarr offered credible, unrefuted testimony
19 corroborating these points. Second, the Union introduced substantial documentation to bolster that
20 testimony. Third, during cross-examination, ODNR’s witnesses conceded that wildfire reports were
21 bargaining-unit work, which union employees customarily performed before ODNR transferred Forest
22 Offices in 2012. ODNR does not deny that wildfire reports constitute bargaining unit work.
23 Consequently, the Undersigned holds that completion of wildfire reports is bargaining-unit work.

24 **2. SHARED NATURE OF BARGAINING-UNIT WORK**

25 The gist of this dispute is not whether wildfire reports constitute bargaining-unit work. Clearly

1 they do; nor is the issue whether non-bargaining-unit employees may perform bargaining-unit work;
2 clearly they may. Instead, the issue is whether the amount or percentage of bargaining-unit work that
3 non-bargaining-unit employees performed after the 2012 transfer violated either Section 7.01 or 7.03 of
4 the Contract or violated the Memorandum. Having established that completion of wildfire reports
5 constitutes bargaining-unit work, the Union further contends that ODNR violated Article 7.01 and 7.03
6 by: (1) allowing the Swanton Fire Department to handle the wildfire, and (2) allowing Ms. Hendrickson
7 to complete the Deputy Fire Chief's handwritten summary of that fire. In the same breath, the Union
8 *concedes* that, before 2012, non-bargaining-unit employees performed bargaining-unit work. However,
9 the Union insists that such work by non-bargaining-unit employees constituted *less than 20 percent* of
10 those employees' overall workload. Finally, the Union contends that bargaining-unit employees
11 completed 99 percent of pre-2012 wildfire reports.³⁶ ODNR does not explicitly challenge this position,
12 nor does evidence in the arbitral record rebut it. Therefore the Arbitrator accepts these declarations as
13 established facts.

14 The pith of ODNR's response does not *categorically* challenge the Union's contentions. Instead,
15 ODNR produces job descriptions and evidence of non-bargaining-unit employees performing bargaining
16 unit work in order to support its central proposition that the Union lacks an *exclusive right* to complete
17 wildfire reports. Based on these presentations and arguments, ODNR insists that it violated neither
18 Article 7.01 nor Article 7.03 in the instant dispute.

19 **3. ASSESSING ODNR'S EVIDENCE**
20 **A. JOB DESCRIPTIONS OF NON-UNION EMPLOYEES**
21

22 Throughout the arbitral hearing and in its Post-hearing Brief, ODNR references job descriptions of
23 non-union employees, contending that those job descriptions comprehend wildfire reports, FEPP
24 evaluations, and other bargaining-unit work. On their face, the job descriptions manifestly include
25 bargaining-unit work. Nevertheless, the job descriptions do not thereby necessarily trump either Section

³⁶ Based on the foregoing passages, one could reasonably conclude that the wildfire reports non-bargaining-unit employees completed constituted not only less than 20 percent of their overall duties but also 1 percent of the total number of wildfire reports completed.

1 7.01, or 7.03 of Article 7. As discussed below Section 7.03 of Article 7 governs the Parties negotiated
2 responsibilities/under the Collective-bargaining Agreement and may not be lightly jettisoned. Section
3 7.03 reflects the Parties' intent regarding the balancing of bargaining-unit work between union and non-
4 union employees. Thus, the Arbitrator holds that absent some legitimate reason to ignore these Sections,
5 they bind the Parties.

6 **B. NON-UNION EMPLOYEES PERFORMING BARGAINING-UNIT WORK**

7 The issue here is the extent to which non-bargaining-unit employees may legitimately encroach on
8 bargaining-unit work based upon their historical performance of such work. In other words, post 2012,
9 how much bargaining-unit work are non-bargaining-unit employees entitled to perform based upon their
10 historical performance of such work. As noted above, ODNR continually stresses that, prior to 2012,
11 non-bargaining-unit employees completed wildfire reports, thereby precluding bargaining-unit employees
12 from holding exclusive rights to wildfire reports and other bargaining-unit work. ODNR does not
13 explicitly suggest the existence of a binding past practice of non-bargaining-unit employees completing
14 wildfire reports. Yet, ODNR's repeated references to non-bargaining-unit employees' performing
15 bargaining-unit work evoke thoughts of a past practice. Ultimately, however, the arbitral record lacks the
16 prima facie elements of a *well-defined past practice* of non-bargaining-unit employees performing
17 bargaining-unit work. Nevertheless, the arbitral record contains *evidence* of non-bargaining-unit
18 employees performing bargaining-unit work. In addition to ODNR's repeated references to that fact, the
19 Union also concedes non-bargaining-unit employees have historically completed wildfire reports and
20 other bargaining-unit work. Therefore, both parties acknowledge that non-union employees have
21 historically performed such job duties.

22 The issue thus becomes, *how much* post-2012 bargaining-unit work may non-bargaining-unit
23 employees perform without offending Section 7.03 of the Collective-bargaining Agreement. The Union
24 argues that before the 2012 transfer bargaining-unit employees performed 99 to 100 percent of the

1 contested job duties in the instant dispute,³⁷ thereby implying that non-union employees completed
2 approximately 1 percent of pre-2012 bargaining-unit work, including wildfire reports and FEPP
3 inspections. Conversely, ODNR does not address percentages of bargaining-unit work performed by non-
4 union employees, simply stressing, instead, that non-union employees historically performed wildfire
5 reports, FEPP inspections and other bargaining-unit work, thereby denying bargaining-unit employees
6 any basis for claiming exclusive rights or responsibility for such work.

7 Whatever the percentage of pre-2012 bargaining-unit work that non-union employees performed, it
8 was substantially less than what they are performed after the post-2012 transfer. Preponderant evidence
9 in the arbitral record as a whole establishes that, before the 2012 transfer, non-union employees
10 performed some bargaining-unit, but evidence of that fact fails to support a past practice.

11 **C. IMPACT OF SECTION 7.01**

12 Article 7.01 provides in relevant part: “The Employer hereby recognizes the Fraternal Order of
13 Police, Ohio Labor Council, Inc. as the sole and exclusive bargaining agent for the purpose of collective
14 bargaining on all matters pertaining to wages, hours, terms and other conditions of employment for
15 employees in the bargaining unit.”

16 Throughout this dispute, the Union has vigorously alleged that ODNR handled the wildfire in a
17 manner that violated Article 7. In its Post-hearing Brief, the Union cites Section 7.01 as part of the
18 regulatory scheme governing the outcome of this dispute.³⁸ In contrast, ODNR flatly denies having
19 violated any contractual or regulatory provisions. It is to this issue that the Arbitrator presently turns.

20 On its face, Section 7.01 sheds no useful light on the resolution of this bargaining-work issue.
21 Instead, Section 7.01 broadly reflects the basic notion that ODNR must recognize the Union as the sole
22 representative of bargaining-unit employees, regarding all terms and conditions of employment. That
23 Section is wholly silent regarding the inviolability of bargaining-unit work, the issue in the instant
24 dispute. Consequently, the Arbitrator holds that Section 7.01 sheds precious little, if any, light on the

³⁷ Union's Post-hearing Brief, at 7.

³⁸ As discussed below, the Union also alleges that the same conduct that violated Sections 7.01 and 7.03 also offended the Memorandum.

issue in this case.

D. Impact of Section 7.03

Section 7.03 provides in relevant part: “Management shall not attempt to erode the bargaining unit, the rights of bargaining-unit employees, or adversely affect the safety of employees.” Neither the Union nor ODNR specifically interprets Section 7.03. Still, an arbitral interpretation of Section 7.03 is indicated given the Union’s strong invocation of Article 7 regarding the preservation of bargaining-unit work.

For the reasons set forth below, the Arbitrator holds that the extent to which non-union employees have performed bargaining-unit work post violates Section 7.03. First, preponderant evidence in the arbitral record as a whole manifestly establishes that after the 2012 transfer/reclassification, ODNR essentially barred Forest Officers from completing the same wildfire reports and FEPP investigations that constituted a substantial part of pre-2012 bargaining unit work. Usurpation of bargaining-unit work to this degree offends Section 7.03’s language and spirit, thereby undermining the Union’s right to retain responsibility for bargaining-unit work performed pre-2012. And the Arbitrator so *holds*.

E. IMPACT OF THE MEMORANDUM

The Memorandum declares in relevant part:

The parties are seeking to place Park Officers and Forest Officers into a *single new classification* under the division of Parks and Recreation Until . . . the new classification can be utilized, the parties wish to enter into an interim agreement to *integrate Forest Officers* into the Division of Parks and Recreation. . . . 2. Forest Officers *may be assigned* to perform the job duties of a Park Officer. To the extent that a conflict with the Ohio Revised Code is not created, Park Officers *may be assigned* to perform the job duties of a Forest Officer. These assignments or the performance of the duties as described shall not constitute a violation of the FOP Agreement.

As discussed above, Section 7.03 defines the Union’s right/responsibility to perform pre-2012 bargaining-unit work. The issue here is whether the Memorandum explicitly or implicitly modifies the Union’s rights to perform bargaining-unit work under Section 7.03. For the reasons set forth below, the Arbitrator holds that the Memorandum did not modify those rights.

F. MEMORANDUM'S PREAMBLE

The Memorandum's preamble reveals the Party's intent, which betrays no desire to modify the Union's Section 7.03 rights to perform post-2012 bargaining-unit work. First, the preamble clearly identifies the Memorandum's primary purpose of temporarily coalescing Forest Officers and Park Officers into one classification. Second, this purpose informs a reasonable interpretation of the Memorandum's bullet point 2, which is a substantial factor in this dispute. Bullet point 2 provides in relevant part: "Forest Officers may be assigned to perform the job duties of a Park Officer. . . . Park Officers may be assigned to perform the job duties of a Forest Officer." Viewed in light of the purpose of merging the two bargaining units, this reciprocity of job duties makes perfect sense. The preamble reveals no intent to erode Forest Officers' Section 7.03 rights to continue performing pre-2012 bargaining-unit work after their 2012 transfer, and, therefore cannot justify such corrosive conduct.

G. BULLET POINT 2

The issue here is whether bullet point 2 implicitly or explicitly modifies bargaining-unit employees' right to perform post-2012 bargaining-unit work. The Arbitrator holds that bullet point 2 contains no such language and reflects no such intent. First, bullet point 2 specifically addresses performance of Forest Officers' "job duties" and the right to perform them post-2012. Although bullet point 2 does not mention bargaining-unit, wildfire reports, or FEPP evaluations, it is wholly susceptible to such an interpretation. Second, bullet point 2 contemplates Park Officers performing Forest Officers' duties. Third, and perhaps most important to this dispute, bullet point 2 neither explicitly nor implicitly excludes either wildfire reports or FEPP inspections as post-2012 bargaining-unit work. One can reasonably presume that the Memorandum's drafters were fully aware of those two job duties when constructing the Memorandum and would have explicitly excluded those two job duties had they so intended. Fourth, bullet point 2 specifically provides without reservation that Park Officers may perform Forest Officers' job duties. Since Forest Officers became Park Officers who could perform bargaining-unit work, the inescapable conclusion is that Forest Officers (now Park Officers) would continue to perform bargaining-

1 unit work. Fifth, one may reasonably conclude that, after the 2012 transfer/reclassification, wildfire
2 reports and FEPP inspections remained components of bargaining-unit work, unless the Memorandum
3 explicitly excluded. Finally, absent explicit language to the contrary, bullet point 2 does not intend to
4 modify the pre-2012 percentages of bargaining-unit work (approximately 1 percent) that non-bargaining-
5 unit employees performed.

6 **I. IMPACT OF “MAY BE” IN BULLET POINT 2**

7 The final issue regarding the Memorandum is the provision that “Park Rangers *may be* assigned . . .
8 The Union argues that the Parties intended for “may be” to *permit* union employees to maintain their pre-
9 2012 percentage of bargaining-unit work, including wildfire reports and FEPP inspections. ODNR
10 disagrees, contending that “may be” reflects the fact that bargaining-unit employees have no exclusive
11 right to either wildfire reports or FEPP evaluations.

12 The Union prevails on this issue. First, ODNR does not specifically argue that “may be” somehow
13 authorizes the degree to which the Agency has barred union employees from completing wildfire reports
14 and performing FEPP evaluations. Instead, as discussed above, ODNR repeatedly stresses the lack of
15 *exclusivity*, regarding bargaining-unit employees’ right to perform those tasks. In short, ODNR’s
16 argument does not justify its action in this case.

17 Based on the foregoing analysis of both the Memorandum and Section 7.03, the Undersigned holds
18 that non-bargaining-unit employees may perform bargaining-unit work in the same percentages
19 (essentially 1 percent) as they performed that work before the 2012 transfer/reclassification. In other
20 words, ODNR violated at least the spirit of Section 7.03 as well as the Memorandum’s letter/intent by
21 virtually barring Forest Officers from completing wildfire reports. This holding is equally applicable to
22 the performance of FEPP evaluations, which were as much a part of pre-2012 bargaining-unit work as
23 were wildfire reports.

24 **J. LACK OF CONSEQUENCES FOR MR. PFARR**

25 In justifying the allocation of post-2012 bargaining-unit work, ODNR stresses that Mr. Pfarr has

1 suffered no pecuniary or other employment-related consequences due to the assignment of bargaining unit
2 work to non-union employees. Therefore, ODNR reasons that Mr. Pfarr lacked a basis for filing a
3 grievance. The Agency's argument misses the mark. The propriety of infringement on a contractual
4 entitlement (such as bargaining-unit work) is not measured by the existence/nonexistence of adverse
5 consequences upon the beneficiary of that contractual entitlement.

6 This is especially true with respect to bargaining-unit work which is a union's lifeblood.
7 Eliminating a union employee's access to bargaining-unit work is a contractual violation irrespective of
8 what actual damages the employee might have suffered. In this respect, Collective-bargaining
9 Agreements differ from garden-variety commercial contracts. Although damages to the bargaining-unit
10 employee are important, sustained availability of bargaining-unit work is arguably more important
11 because it serves the entire bargaining unit rather than just the needs of individual employees.
12 Consequently, in the instant case, whether Mr. Pfarr has encountered consequences because of the denied
13 access to bargaining-unit does not somehow excuse or justify the underlying contractual violation.
14 Otherwise, the contractual guarantee regarding bargaining-unit work would likely lose much of its luster.
15 In short, the consequential damages lack any talismanic properties regarding the existence of contractual
16 violations.

17 **K. IMPACT OF ODNR'S GOOD FAITH**

18 ODNR cites arbitral precedent to support its contention that since the Agency acted in good faith
19 throughout the transfer/reclassification, there can be no contractual violation. Again, the Arbitrator finds
20 this argument unpersuasive. An employer's good faith is not an affirmative defense contractual
21 violations. To rule otherwise is to premise the integrity of employees' contractual rights on the
22 employer's state of mind. If that were the standard, then arguably the employer holds in its hands the
23 future viability of its employees' negotiated contractual rights. Such a situation would likely prove
24 intolerable in labor-management relations. Consequently, the Arbitrator finds no merit in ODNR's
25 argument on this point.

VII. THE AWARD

For all the reasons set forth in this opinion, the Grievance is hereby **SUSTAINED** in PART and denied in PART. The Forest Officer acted within his discretion when he opted not to investigate the wildfire. On the other hand, ODNR has violated Section 7.03 by aggressively barring bargaining-unit employees from performing pre-2012 bargaining-unit work. ODNR must afford union employees reasonable opportunities to perform bargaining-unit work at pre-2012 levels. Non-bargaining-unit employees may continue to perform bargaining unit work at the pre-2012 levels. Finally, the Arbitrator finds no merit in the Grievants' requests for backpay.



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