State of Ohio and Ohio Civil Service Employee Association Labor Arbitration Proceeding

In the Matter of the Arbitration Between:

The State of Ohio, Ohio Department of Developmental Disabilities

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: Laura Morris
Grievance No.: 24-01-20090722-0007-01-09

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: February 9, 2010

#1054

Appearances

For the Employer

| | |
|---|---|
| Patrick Stephan | Deputy Director |
| Ann Rengert | Deputy Director- Fiscal |
| Jeese Keyes | Second Chair |
| C. Hala | Co-First Chair |
| Laura Frazier | Advocate |

For the Union

| | |
|---|---|
| Laura Morris | Grievant |
| Elbert Ferguson | Chapter President |
| Timothy Smith | Senior Administrator Specialist |
| Deborah J. Hoffine | Medicaid Systems Administrator |
| Lori J. Elmore | Advocate |

RECEIVED / REVIEWED
FEB 11 2010
OCSEA-OFFICE OF GENERAL COUNSEL

Introduction

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation panel between the State of Ohio, Ohio Department of Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11,

AFSCME, hereinafter referred to as the Union, for the period April 15, 2009 to February 29, 2012 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the arbitrator asked the parties if they planned to submit post hearing written closings The parties submitted written closings in compliance with guidelines established at the hearing.

Procedural Arbitrability Issue

Are the disputed grievances properly before the Arbitrator? If not, what shall the remedy be?

Joint Issue

Was the State proper in the job abolishment of the MA position for the reason of efficiency? If not, what shall the remedy be?

Joint Stipulations

Management agrees that the Fiscal Specialists is that the Union would have called, as witnesses did not receive the Management Analyst duties at the time of abolishment of the Management Analyst positions.

Pertinent Contract Provisions

Article 18- Layoffs

18.01- Layoffs

Layoffs of employees covered by this Agreement shall be made pursuant to ORC 124.321-.327 and Administrative Rule 123:1-41-01 through 22, except for the modifications enumerated in this Article.

18.02- Guidelines

Retention points shall not be considered utilized in layoffs. Performance evaluations shall not be a factor in layoffs. Layoffs shall be on the basis of inverse order of State seniority. After the formal notice of layoff has been issued,

an employee may volunteer to accept a layoff up until two weeks prior to the effective date of the layoff or the date of the paper layoff. If employees volunteer to accept a layoff after the date of the paper layoff, the results of the paper layoff will be implemented.

If the affected employee is not qualified to perform the duties of the least senior person, the employee will be able to displace the next least senior person to a position he/she is qualified to perform.

An employee shall not be required to accept a position with a lesser appointment type until the employee has had the opportunity to exercise displacement rights pursuant to 18.04. This does not prevent an employee in a part-time appointment category from bumping an employee in a full-time category.

For purposes of this Article "classification series" is defined as those classifications with the same first four digits of the classification series number.

At any time, an employee can choose to accept a vacancy in lieu of bumping. Employees must exhaust all available bump options in their appointment type including vacancies before they are eligible to displace in the Agency geographic jurisdiction.

18.03- Implementation of Layoff Procedure

The Employer shall conduct a "paper layoff" except where Agencies are funded by multiple funding sources where a reduction in a funding source requires the Agency to reduce positions immediately. In such situations, the Employer may implement the first round of reductions without conducting a "paper layoff." In this instance, where the resulting bumping requires a second round of layoffs, the Employer will then conduct a "paper layoff."

The Agency shall submit notice of a layoff to the Union no later than the time at which the Agency submits its rationale to DAS/Division of Personnel. The Union shall be provided an opportunity to discuss the layoff with the Employer prior to the date of the "paper layoff."

Paper Layoff

The Employer shall execute a layoff by identifying a time period when all potentially affected employees can exercise their order of displacement before implementation of the "paper layoff." All affected employees shall exercise their order of displacement in writing so that once the "paper layoff" is implemented, employees shall assume their new positions or be placed on the recall list.

The parties agree to establish an operations area that can be used to coordinate the layoff and related personnel transactions during the time period when employee assignments will be confirmed. This operations area will include necessary Management and the Union representatives. OCSEA staff representatives may also be in attendance.

This procedure shall provide for the following:

A. The Employer and the Union will share all information about the order of displacement and will make all reasonable efforts to assure that each employee receives this notice and returns the order of displacement form.

B. All potentially affected employees will be given and will complete an Order of Displacement Form that identifies potential options including the appointment type. Employees will be given five (5) working days to return the form. Copies of the form will be s3ent by the Employer to the Union.

C. All operations areas will have a specific schedule that will be made known to all representatives and employees.

D. All employees will be advised that they will receive written notice of their final status when the displacement process is completed.

E. If an employee has not completed the Order of Displacement Form and cannot be reached within fifteen (15) minutes, a Union designee will make a selection on the employee's behalf. The selection shall be based on the criterion set forth in this Article. This choice will be final.

F. At the time the Order of Displacement Form is given to affected employees, the appropriate seniority list in regards to Appendix J shall be made available to the employees for review when completing the Order of Displacement Form.

XXX

(Joint Exhibit 1, pgs. 48-49)

Article 25- Grievance Procedure

25.01- Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances. No employee who has rights to final and binding arbitration of grievances, including disciplinary actions, may file any appeal with the State Personnel board of Review (SPBR) nor may such Board receive any such appeal.

XXX

25.02- Grievance Steps

Layoff, Non-Selection, Discipline and Other Advance-Step Grievances

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement by filed at the appropriate advance step where the action giving rise to the grievance was initiated. A grievance involving a layoff, non-selection or a discipline shall be initiated at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

XXX

(Joint Exhibit 1, Pgs 89-90)

## Case History

The Ohio Department of Developmental Disabilities (ODDD), filed an authorization to abolish three (3) full-time positions with the Department of Administrative Services (DAS) effective August 1, 2008. The rationale justified the abolition for reasons of efficiency. The positions to be abolished included: Account Examiner Supervisor 2; Management Analyst and Clerk 3. Laura Morris, the Grievant served as a Management Analyst at the time of the abolishment. She enjoyed approximately twenty-two (22) years of service and also served as a Union official.

In the past, the Division of Medicaid Development and Administration (MDA) developed Medicaid policy for the ODDD. The Division of Community Services, however, was more field oriented and implemented these policies. In 2005, these two (2) divisions were combined, or reorganized, for reasons of efficiency.

More recently, MDA, has morphed beyond policy development and administration. It presently deals with all other aspects of Medicaid administration. To accomplish these expansive goals, on July 13, 2009 the Employer incorporated two (2) groups into MDA: the Medicaid Payment and Support group, formerly in the Division of Fiscal Administration, and the Provider Certification unit, formerly housed in Community Services.

The rationale (Joint Exhibit 4), identified Fiscal Specialist 1 as the classification identified to fulfill the duties of the Management Analyst position. During the merger of positions and duties, however, the Employer discovered

that OA3 positions within MDA were already generating and compiling patient liability reports. These documents were originally used by MAs prior to the abolishment and merger. The OA3s were not looking up liability accounts and transferring this information into a patient liability database. As such, it was determined that greater efficiency would be realized if OA3s finished tasks they already started rather than assigning these tasks to the Fiscal Specialist classification.

The Grievant acknowledged that the Employer properly followed Article 18 protocols. On July 9, 2009, the Grievant received notice of her displacement options (Joint Exhibit 4). On the same date, the Grievant completed and submitted her displacement options. The parties conducted a jointly supervised paper bump on July 15, 2009. On or about the same date, the Grievant received her notice regarding the results.

The Grievant exercised her displacement options but was unsuccessful in her effort. Her position was effectively abolished on August 1, 2009.

On July 21, 2009 and July 22, 2009, the Grievant filed two grievances, which challenged the abolishment. She maintained the rationale contained "fake" information and that most of the duties were given to managers. The Grievant also maintained her position should be reclassified as a Fiscal Specialist 1. The abolishment, moreover, should have targeted all Fiscal Specialist positions.

## The Procedural Arbitrability Claim

The Employer's Position

The Employer opined the matter is not arbitrable because of a timeliness defect. Since the abolishment only became effective on August 1, 2009, this date became the triggering event. Prior to this date, the Grievant continued to perform her duties causing the premature filing of her grievances on July 21, 2009 and July 22, 2009.

The Union's Position

The Union claimed that the grievances were not procedurally defective. They were filed in accordance with guidelines mutually agreed to by the parties.

The Arbitrator's Opinion and Award on the Procedural Claim

From the evidence and testimony introduced at the hearing and an impartial review of the pertinent contract provisions, it is this Arbitrator's opinion that the grievances were ripe for adjudication purposes. The grievances were timely and the matter is properly before the Arbitrator.

Under normal circumstances the Employer's analysis would be proper but not in this instance. Section 25.02 provides filing exceptions for certain advance-step grievances. One specified and articulated exception deals with layoffs. This section states in pertinent part:

> A grievance involving a layoff... shall be initiated at Step 3 of the grievance procedure within fourteen (14) days of notification of such actions.
>
> (Joint Exhibit 1, Pg. 90)

The parties, therefore have mutually agreed that when layoff grievances are initiated, the triggering date for timeliness purposes becomes the date of notification not necessarily the effective date of the administrative action.

Here the Grievant received the results of the paper bump on July 15, 2009, and shortly thereafter unsuccessfully exercised her displacement options. July 15, 2009 becomes the notification date causing the proper filing of the grievances on July 21, 2009 and July 22, 2009.

## Award

The grievances, which were eventually merged without objection by the Employer, are properly before the Arbitrator.

## The Merits of the Case

### The Union's Position

The Union opined that the Employer's abolishment of the MA position for the reason of efficiency was improper and in violation of Article 18- Layoffs. The Employer, more specifically failed to establish by a preponderance of the evidence that reasons of efficiency warranted the abolishment of the MA position.

The duties in question are being presently performed by a number of individuals. Other bargaining unit members, Customer Service Assistants and Office Assistant 3s are performing some of the abolished duties as well.

These assignments are in direct violation of matters articulated in the rationale (Joint Exhibit 4) presented to the Department of Administrative

Services. The Employer designated Fiscal Specialist as the job classification to perform the contested duties. This particular job classification never received these assignments.

The Employer never supported efficiency gains. The rationale (Joint Exhibit 4) only discussed TABLE of organization changes without any additional anticipated efficiency gains. Pre and post abolishment evidence and testimony documenting abolishment gains were never introduced at the arbitration hearing. Neither statistical data nor other supporting materials were presented as justifications.

The record does, however, indicate that post abolishment responsibilities, those handled by newly enumerated classifications, are not being handled in an efficient manner. After the abolishment, the Employer sent out a letter (Union Exhibit 2) to the Ohio Providers Resource Association and Certified Medicaid HCBS Waiver Providers soliciting recommendations dealing with the patient liability program. These were duties that had been performed by the Management Analyst. An obvious solicitation that should have been sought prior to the abolishment decision if one was truly concerned about efficiency. The automation of provider reports was also enacted after the abolishment. Debbie Hoffine, a Medicaid Health Systems Administrator 2, noted an Executive Secretary now compiles the reports and sends them electronically. Hoffine, moreover, has been assigned the responsibility of receiving overpayment inquiries and responding to these queries; duties that were previously performed by the Grievant.

Under the new format, Providers are to engage in self-monitoring of patient liability functions, duties that were also performed by the Grievant. This approach, however, was attempted before which led to the creation of the Management Analyst position. Timothy Smith, a Senior Administrative Specialist, noted Providers would be unable to self-report and voluntarily submit adjustments when they could benefit from overpayments.

The present system is inefficient which causes dramatic negative consequences. Non-monitored discrepancies impact State and Federal funding. Monitoring, moreover, is mandated by the Federal Government Center for Medicare and Medicaid Services.

The Employer's Position

The Employer maintained it conducted the job abolishment in question pursuant to Article 18 of the Agreement (Joint Exhibit 1). The reorganization was done for efficiency purposes.

The move of the Medicaid Payment and Support Unit and the Provider Certification Unit to the Division of Medicaid Development and Administration was a critical feature of the reorganization for efficiency. Prior to this merger of units, the Employer was experiencing breakdowns in paperwork processing and customer service. Matters of concern were not routed to the proper location with the necessary expertise. Duplicate and conflicting processes also created excessive confusing and inefficient outcomes.

The Grievant's duties were assigned to eleven (11) employees within MDA. Ten (10) of the positions, more specifically, were bargaining unit positions within a lower classification, while the remaining position was an Executive Secretary. The lower classification positions were performing duties, which overlapped those performed by the Grievant. The Executive Secretary sends out an e-mail to the county boards rather than mailing and distributing a massive report which was done by the Grievant. As such, there is no significant change in duties and responsibilities performed by the eleven (11) remaining positions.

The Grievant testified that once these duties and responsibilities were reassigned, there were no remaining duties left to perform. Also, management witnesses were able to rebut the claim that management personnel were engaged in Management Analyst duties after the abolishment. Hoffine and Patirck Stephan, Deputy Director, rebutted the Union's assertion

The Employer was not obligated to reclassify the MA position to a FS1 position. Article 19 or other contractually based grievances should have been filed if the Union felt the Grievant was somehow mistreated or terms and conditions of employment had been somehow breached.

## The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract provisions, the

parties' briefs and relevant statutory requirements cited in the Agreement (Joint Exhibit 1), it is this Arbitrator's opinion that the Management Analyst position was properly abolished. The abolishment was done in accordance with the statutory and contractual requirements contained in Article 18.

It is well-established that if an appointing authority's reorganization can operate more efficiently or economically by either not performing a given service or by legitimately coordinating the services of the abolished position with other position in the organization, then the appointing authority may abolish the position.

Another well-established principle deals with the consolidation or redistribution of duties. Nothing in the abolishment statutes and regulations prohibits these administrative actions. Consolidations take place when job elements are assigned to others within the organization but the consolidated job elements do not represent a substantial percentage of the "new" position. A valid redistribution takes place when various aspects of the abolished position are distributed amongst other existing positions, to the extent that the abolished position becomes permanently deleted or eliminated.[1]

Here, the Employer established by a preponderance of the evidence that the reorganization led to efficiency outcomes. Also, the redistribution of work was not a mere transfer but various aspects of the abolished position were distributed amongst other existing positions (i.e. Executive Secretary and Fiscal Specialist/ OA3) to the extent the MA position became permanently

[1] "Carter, et al., v. Ohio Department of Health (1986), No. 85 AP-752 (10th Dist. Ct. App, 1-9-86), 122; "In re Appeal of Woods (1982), 7 Ohio App 3d 226; "Keyerleber v. Cuyahoga County Mental Health Board, State Personnel Board of Review; 84-LAY-01-0048 (1985).

deleted or eliminated. The Grievant's primary responsibilities dealt with patient liability issues. She entered data into an ACCESS database system, and then mailed and distributed a hard copy report to the county boards. Technological and process changes had reduced this work to forty (40) hours per month. At the time of the abolishment, the eventual duties and responsibilities that were redistributed to the Executive Secretary and Fiscal Specialist and OA3 positions were minimal. This conclusion was never rebutted by the Union. Nothing in the record, moreover, supports the notion that management personnel engaged in MA duties after the abolishment.

Self-reporting by Providers would drastically reduce the Grievant's responsibilities. In my view, this process change would lead to the substantial gains in efficiency. Granted, there exists some controversy surrounding this process change in terms of potential Provider fraud. Yet, the Employer has the right to alter process requirements for perceived efficiency purposes even if this change had not been successful during a prior time period.

Similarly, the minor work performed by the Executive Secretary is viewed as a form of technological change. Once a decision was made to e-mail the document to county boards, a bulk mailing was no longer required.

Clearly, the rationale (Joint Exhibit 4) does identify the position of Fiscal Specialist for the purpose of redistributing work performed by the MA position. It does not, however, identify the OA3 job classification. Once the merger took place, it was determined that OA3 positions were already completing the majority of the patient liability duties engaged in by the MA position. The OA3

position was not looking up liability amounts and entering them into the patient liability database. As such, by adding these duties to the OA3 job classification further gains in efficiency were realized because Fiscal Specialist duties were not duplicated.

The Arbitrator does not view this defect regarding OA3s as a fatal to the rationale's propriety. The Employer substantially complied with statutory requirements.[2] The reason for abolishment of positions was specified as well as the factual basis in support of this determination. Fiscal specialists and OA3s are similarly situated in terms of the redistributed work to be performed. In fact, by assigning MA duties to OA3s the reorganization process became even more efficient. A further duplication of efforts was eliminated.

To remand the dispute back to the parties under there unique circumstances seems unnecessary. The rationale (Joint Exhibit 4) would not be altered nor the underlying justifications. The OA3 position would be substituted for the Fiscal Specialist position. The Arbitrator cannot foresee any reason for an alternative outcome when the record supports such substantial compliance.

## Award

The grievance is denied.

Chagrin Falls, Ohio

Dr. David M. Pincus
Arbitrator

[2] "State ex rel. Potten v. Kuth (1980), 61 Ohio St. 2nd 321."