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#1077

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME Local 11
AFL-CIO

and

OHIO DEPARTMENT OF
REHABILITATION AND
CORRECTION
Grievant: Mal Corey
Grievance No. 27-23-20100114-0003-03

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

Hearing was held February 16, 2011. The Parties had full opportunity to present evidence and argument.

RECEIVED / REVIEWED

APR - 6 2011

DCSEA-OFFICE OF
GENERAL COUNSEL

APPEARANCES:

On behalf of the Union:

**DAVE JUSTICE, OCSEA Staff Representative, OCSEA,
390 Worthington Road, Westerville, Ohio 43082.**

On behalf of the State:

**CHRIS LAMBERT, ODRC LRO 3, c/o OCB, 100 East
Broad Street, 14th Floor, Columbus, Ohio 43215.**

ISSUES

- 1. Is the grievance substantively arbitrable?**
- 2. If the grievance is arbitrable, did the State violate Article 1.05 when it entered into a pick-a-post agreement with OCSEA at RCI and implemented the terms and conditions of that agreement? If so, what shall the remedy be?**

**RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING
AGREEMENT**

April 15, 2009 – February 29, 2012

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ARTICLE 1 – RECOGNITION

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1.05 – Bargaining Unit Work

Supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification

provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

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

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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....

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- J. The receipt of a grievance form or the numbering of a grievance does not constitute a waiver of a claim or a procedural defect.

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25.02 – Grievance Steps

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25.03 – Arbitration Procedures

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Questions of arbitrability shall be decided by the arbitrator....

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Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

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APPENDIX Q – AGENCY SPECIFIC AGREEMENTS

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DEPARTMENT OF REHABILITATION AND CORRECTION

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B. Pick-A-Post

The Union and the DR&C shall continue Pick-A-Post for Corrections Officers and Corrections Counselors during the term of this Agreement.

1. Effective with the ratification of the Collective Bargaining Agreement, if necessary as determined by the Statewide Oversight PAP Committee, all Pick-A-Post Agreements will be reviewed to:
a) insure that the agreements are within their funded post allocations, b) that the pull and move posts are removed, and c) they are within their relief ratio.
2. The relief ratios will be determined by the Regional Director, after discussion with the Union. If needed this will be reviewed annually.
3. Each local chapter will determine whether a re-canvass is necessary.
4. No agreements shall be considered approved until approved by the Statewide Pick-A-Post Committee. DR&C reserves the right to approve and implement local PAP Agreements, as deemed necessary for good management reason, for situations as described in Section 1 above, or a change in the mission of the institution. The Employer will implement the local PAP Agreement only after a good faith effort has been made to gain approval from the Oversight Committee. If an agreement is implemented in such a manner, the Union reserves the right to file a grievance on the issue directly to Step Three under 25.02 of the grievance process. Management will then agree to arbitrate the grievance through the NTA process, within 30 days of the filing of the grievance.
5. The Pick-A-Post Oversight Committee shall be required to meet monthly during the term of this Agreement unless mutually agreed otherwise.
6. Management retains the right to deny a bid for good management reasons after consultation with the affected employee and the Union.
7. Any immediate threat to the health, safety and security of the institution shall take priority over the Pick-A-Post Agreement.

Correction Officer Pick-A-Post

1. The respective Regional Director shall at least annually supply each warden with a funding letter for each institution indicating the following: a) the number of authorized correction officer positions, b) total weekly posts, and c) a relief factor designated for that prison's staff.
2. All Pick-A-Post Agreements negotiated at the local level shall comply with the limits imposed by the funding letter of the Regional Director.
3. All established posts under the agreements will be filled, barring any unforeseen circumstances that affect the daily operational needs of the institution or a change in the mission of that institution.
4. Each institutional PAP Committee may discuss and come to mutual agreement, on any "utility posts" that may be closed, even at the beginning of the shift. The use of such post closures will be based on operational need, when the need to fill such posts would require the Employer to utilize overtime on the shift.

If any agreements are reached locally on the issue of closing "utility posts," they shall be submitted to the Statewide Oversight Committee for review and approval.

5. The issue of relief officers bidding shift assignments may be included in local proposed Pick-A-Post Agreements, subject to approval from the Pick-A-Post Oversight Committee. No preexisting right to bid for relief officers may be inferred from these discussions.

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PARTIES' POSITIONS ON ARBITRABILITY

State's Position on Arbitrability

The grievance is not substantively arbitrable because a pick-a-post agreement constitutes a contract in and of itself. A pick-a-post agreement is enforceable and cannot be altered unless the Parties agree to alterations or under very narrow circumstances not present here.

The Union can file a grievance alleging the State is not acting in accordance with the terms and conditions of a pick-a-post agreement. However,

once a pick-a-post agreement has been reached, there are no provisions for arbitrating disputes alleging the pick-a-post agreement is in conflict with some other provision of the Agreement.

Union's Position on Arbitrability

The grievance is arbitrable because it alleges a violation of Article 1.05 of the Agreement. The Parties have an affirmative responsibility to not violate the Agreement. The pick-a-post agreement eroded the bargaining unit, and therefore violated Article 1.05. Such a violation is arbitrable pursuant to Article 25 of the Agreement.

OPINION ON ARBITRABILITY

The State has challenged the substantive arbitrability of the grievance on the basis it challenges the binding pick-a-post agreement the Parties negotiated. The Arbitrator finds because the pick-a-post agreement derives from Appendix Q of the Parties' Agreement, a grievance regarding a pick-a-post is substantively arbitrable.

FACTS REGARDING THE MERITS

In August 2009, the State reduced the funded Correction Officer post allocations at 25 of its 27 prisons. RCI was one of the 25 institutions. The State reduced RCI's funded level of 1,227 weekly posts to 1,157 weekly posts. The reduction was equivalent to reducing 12 posts per day.

The RCI Pick-a-Post Committee, consisting of local management employees and local bargaining unit employees, met to determine which posts would be reduced. The Union proposed the Count Office post be one of the reduced posts. The management and Union members of the RCI Pick-a-Post

Committee agreed on which posts would be eliminated. One of the posts the Parties agreed to eliminate in their negotiated pick-a-post agreement was the Count Office post. The Parties' Statewide Oversight Pick-a-Post Committee approved the RCI Pick-a-Post Committee's decisions. The RCI pick-a-post agreement reductions went into effect January 3, 2010.

As part of the Union's written RCI pick-a-post proposal, the Union had stated:

Count Office: To our knowledge R.C.I. is the only institution using a C/O to run the Count Office. SOCF has a SGT, CCI a Lt., and PCI a SGT. The Count Office can be turned over to a supervisor here at R.C.I.

As part of the implementation of the RCI pick-a-post agreement, the State assigned a Lieutenant to the Count Office post.

On January 11, 2010, the Union filed the instant grievance. It states in pertinent part:

Management is currently in violation of the contract by increasing the amount of bargaining work being done by a supervisor. There is currently a Lieutenant (supervisor) doing the bargaining work in the count office. In fact, management has replaced the Corrections Officer with the Lieutenant and instructed the Corrections Officer to train the Lieutenant. The count office has been exclusively bargaining work for more than twenty years.

Remedy sought:

Reinstate the corrections officer post in the count office and remove the lieutenant. Reduce the RCI table of organization of lieutenants by one. Make the contract whole.

PARTIES' POSITIONS ON THE MERITS

Union's Position on the Merits

The language of Article 1.05 is clear and ambiguous; it provides for no increase in bargaining unit work by supervisors, limiting bargaining unit work to what was performed previously, providing bargaining unit employees the first

opportunity for overtime for work normally performed by the bargaining unit, recognition of the integrity of the bargaining unit, and provides no action will be taken to erode the bargaining unit.

The RCI Pick-a-Post Committee identified the Count Office post as a post to be eliminated in order to reach the authorized funding level. The Count Office post is a critical post that has to be staffed. The Count Office post has always been staffed by Correction Officers at RCI. After reaching the pick-a-post agreement, the State assigned a Lieutenant to perform the duties of the Count Office. This assignment violated Article 1.05.

The Parties had an affirmative responsibility to not violate the Agreement. Even though the elimination of the Count Office post was a proposal submitted by the Union members of the RCI Pick-a-Post Committee, the State should have rejected that proposal when the Count Office post was identified as a necessary post that had to be staffed.

State's Position on the Merits

The pick-a-post agreement negotiated by these Parties is a binding agreement. The grievance is moot; the Parties already arrived at a negotiated agreement. Any concerns the Union may have had were, in effect, addressed when the Union agreed to the terms and conditions of the RCI pick-a-post agreement.

The RCI pick-a-post agreement was what the Union bargained for. The Parties both signed the pick-a-post agreement. The Union is seeking in arbitration to get out of something it bargained for. The State could not grant the grievance even if it wanted to. The pick-a-post agreement is as enforceable as the Agreement itself.

OPINION ON THE MERITS

It is unknown to the Arbitrator why this grievance was filed. Perhaps the bargaining unit members on the RCI Pick-a-Post Committee surmised if they proposed eliminating a necessary post, management would reject that proposal and somehow, fewer posts would be reduced.

That is not what happened. Rather, under the auspices of Appendix Q, management agreed to the Union's proposal to eliminate the Count Office post and implemented the Union's suggestion to fill that post with a Lieutenant. The Statewide Oversight Pick-a-Post Committee, consisting of management and union members, approved the agreement the RCI Pick-a-Post Committee had reached.

Once the Parties agreed to the RCI pick-a-post agreement, and the agreement was endorsed by the Parties' Statewide Oversight Pick-a-Post Committee, that is the end of this matter. It is not a meritorious argument for the Union to belatedly lay claim to the Count Office post under Article 1.05. By agreeing in the pick-a-post agreement to eliminate the Count Office post, the Union waived any argument that replacing a Correction Officer with a Lieutenant in the Count Office post violated the Agreement.

AWARD

For the reasons set out above, the grievance is found to be substantively arbitrable.

On its merits, the grievance fails because both Parties negotiated the pick-a-post agreement consistent with Appendix Q of the Parties' Agreement.

Accordingly, the grievance is denied.

Dated: April 4, 2011

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator